IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE DOE NO. 1, JANE DOE NO. 2, AND JANE DOE NO. 3, PLAINTIFFS, v. TEXAS CHRISTIAN UNIVERSITY, DR. DIANE SNOW, DR. ANDREW SCHOOLMASTER, DR. ROB GARNETT, DR. DARRON TURNER, RUSSELL MACK, J.D., LEIGH HOLLAND and AARON CHIMBEL, DEFENDANTS.	§ § § § § § § § § § § § § § §	CIVIL ACTION NO. 3:20-cv-00106-M

DEFENDANT TEXAS CHRISTIAN UNIVERSITY'S MOTION TO DISMISS CLAIMS OF JANE DOE NO. 1 AND BRIEF IN SUPPORT

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Texas Christian University ("TCU") respectfully files this motion to dismiss ("Motion") all of Jane Doe No. 1's ("Doe") claims against TCU in Plaintiffs' First Amended Complaint [Doc. 19] and brief in support.

I. INTRODUCTION

This suit was brought by Doe, a TCU student, after TCU sanctioned her for academic misconduct, i.e., plagiarism, occurring during a four-week summer course in Washington D.C. called about "How Washington D.C. Works." [Compl., ¶ 90-91, 126, 169-173].[1] Conspicuously absent from Doe's Complaint is any denial by Doe of her plagiarism, or any allegation that TCU falsely accused her of plagiarism. The sanction TCU imposed was quite lenient; TCU only declined to award her course credit by giving her a no credit ("NC") grade for the pass-fail course during which she plagiarized. [Compl. ¶ 126, 169-173]. She appealed, and her appeal was unsuccessful. [Compl. ¶ 170]. Unhappy with TCU's academic decision, Doe has sued, alleging race discrimination, as well as a litany of other claims. TCU denies violating her rights.

II. BACKGROUND

This suit is Doe's effort to cloak, under the guise of a civil rights suit, what is essentially a judicial appeal of TCU's academic decision that Doe deserves no credit for the summer course in which she plagiarized. When a court is requested to over-ride an academic decision of a university, the court must "balance the rights of students against the school's 'legitimate interests . . . in preserving the integrity of its programs.'" *Bisong*

[1] References to Compl., __ in the Motion are to paragraphs in Jane Doe No. 1's First Amended Complaint. For example, a reference to [Compl., ¶ 85–86] is to paragraphs 85–86 of her Amended Complaint.

v. Univ. of Houston, 493 F. Supp. 2d 896, 905 (S.D. Tex. 2007) (quoting *Alexander v. Choate*, 469 U.S. 287, 300 (1995). A federal court shows great deference to a university's determination that a student plagiarized an assignment and needed to suffer academic disciplinary consequences. *See id.* at 910–11. Courts show great deference to universities' academic determinations because courts are "particularly ill-equipped to evaluate academic performance." *Id.* (quoting *Bd. of Curators of the Univ. of Missouri v. Horowitz*, 43 5 U.S. 78, 98 (1978)). A good faith determination by TCU that Doe engaged in plagiarism, even if incorrect, would constitute a legitimate non-discriminatory reason for its imposition of an academic sanction. *See id.* at 907. TCU respectfully asks that this Honorable Court refrain from accepting Doe's invitation to conduct a judicial review of TCU's academic decision pertaining to Doe's plagiarism.

III. ARGUMENT AND AUTHORITIES

A. Doe has not pleaded plausible substantive claims against TCU

A plaintiff's complaint must plead sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 698 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* Courts "do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) (citation omitted); *see also Iqbal*, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). Although "a court must accept as true all of the allegations contained in a complaint, that tenet is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory

statements, do not suffice." *Iqbal*, 556 U.S. at 697. "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." *Id*. (citing *Twombly*, 550 U.S. at 557.) If "the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570. TCU moves the Court to dismiss each of Doe's causes of action for failure to state a claim.

1. Doe's Title VI and Title IX claims should be dismissed

Below, TCU combines its arguments about Doe's Title VI and Title IX claims, since the two statutes are similar and are interpreted similarly. "Congress modeled Title IX after Title VI of the Civil Rights Act of 1964 and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009). For Doe to recover under Titles VI and IX, she must establish that the actions about which she complains were motivated by discriminatory intent; these statutes only prohibit intentional discrimination. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 407–08 (5th Cir. 2015). Moreover, Doe cannot recover damages unless an appropriate person—an official authorized to institute corrective measures—had actual knowledge of the discrimination and responded with deliberate indifference. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). A complaint that does not "provide specific allegations of acts that were taken with discriminatory intent" does not state a claim for Title VI discrimination. *Manley v. Tex. S. Univ.*, 107 F. Supp. 3d 712, 724 (S.D. Tex. 2015) (quoting *Subbiah v. Univ. of Tex. at Dall.*, No. 3:10-CV-0115-B, 2010 WL 5287530 at *5 (N.D. Tex. Dec. 27, 2010)). Doe pleads the conclusion that TCU intentionally discriminated, but Doe's factual allegations, if proven, do not support even a

plausible inference of unlawful race or gender discrimination.

Although Doe asserts she remained active and excelled academically [Compl., ¶ 124], Doe pleads the legal conclusion she was unlawfully excluded from participation and denied the benefits of TCU's educational programs and activities due to TCU's alleged deliberate indifference to correct and alleged hostile educational environment. [*See generally,* Compl., ¶¶ 181-183, 191-195, 184, 198]. Doe attempts to plead this hostile environment by making allegations about virtually every facet of her TCU experience:

> Inconsiderate Dorm Roommate. In January 2018, Doe's white female dorm roommate moved in first, leaving Doe without the closet, desk and other space Doe desired. When Doe asked TCU to reassign a different roommate, TCU granted her request, and Doe moved to another room to with a new roommate who was a racial minority. [Compl., ¶ 69].
>
> Scholarship. Doe alleges TCU's tuition and costs are exorbitant. [Compl., ¶70]. Doe alleges TCU awarded Doe a scholarship to defray a substantial portion of her "fees and costs" [Compl., ¶70], but not her tuition. Doe, a dependent of parents who are veterans, separately applied for G.I. benefits covering her tuition. [Compl., ¶72].[2] Doe claims she applied for the G.I. benefits because TCU revoked her partial transfer scholarship without explanation, leading to her prematurely exhausting G.I. benefits that she would have used later to pay for post-graduate studies. [Compl., ¶¶ 71-72].[3]
>
> Delay in Admission to Honors College. Honors College policy requires a transfer student, like Doe, to seek admission after 12 graded course hours at TCU. Doe admits she was advised of the policy and waited for admission to the Honors College until after she took the 12 hours. Doe claims an unidentified TCU professor of Doe believes that white transfer students are admitted without the required 12 hours. [Compl., ¶ 73].

[2] A dependent of a veteran who receives full Yellow Ribbon benefits for a semester basically pays no tuition. 38 U.S.C. § 3317; 38 C.F.R. § 21.9700. TCU participates in the Yellow Ribbon program. https://www.benefits.va.gov/gibill/yellow_ribbon/2017/states/tx.asp; https://admissions.tcu.edu/info-for/veterans.php; http://www.reg.tcu.edu/yellowribbon.asp. Under the Yellow Ribbon program, the participating educational institution essentially writes off the amount of tuition which is not paid by the federal government under the G.I. Bill.

[3] Because the $6,000 per semester transfer scholarship would not have covered much of Doe's tuition, Doe's claim is essentially that she desired to pay what she alleges is "exorbitant" tuition [Compl., ¶ 70] to TCU for her undergraduate studies, while saving her G.I. benefits for post-graduate school.

> Moot Court Team. The professor paired Doe with a racial minority teammate, did not give her the individualized attention he gave whites, and did not watch her oral argument during one competition. [Compl., ¶ 75].
>
> Classroom Seating. Doe objects that one teacher did not assign seating for the adult students, so as to require that she and whites sit directly next to each other in class. [Compl., ¶ 84-85]. Doe claims that as a result she was isolated and sat alone in that class, since the white students moved away, and she felt demeaned when the professor did not stop a white student who stated 'all black people are on welfare.' [Compl., ¶ 85].
>
> Group Research Project. Despite TCU's obligations under FERPA[4] to protect the privacy of certain student educational records, Doe alleges that her group members should have been entitled to faster and better access to student data during their school project studying Honors College admissions. [Compl., ¶¶ 87-88].
>
> TCU Summer Program in Washington, D.C. Doe describes a host of complaints ranging from undesirable Washington D.C. roommate assignments, hotel accommodations, bedbugs, Washington D.C. summer heat, excessive walking, accessibility to instructors, inferior birthday celebrations, mishandling of sparklers on her birthday cake, persistent requests by faculty that Doe be more engaged in participating in the program, and being asked to sit next to Dr. Snow. She claims that when her D.C. roommates arrived at the room first, they took the best sleeping arrangements and too much closet space, and were insensitive when she arrived later. She complains her D.C. roommates failed to sleep in the same double bed, which relegated Doe to the room's sofa bed, and they hogged the bathroom. [Compl., ¶¶ 94-111].

Although Doe's complaint is lengthy and verbose, a close examination reveals that she fails to sufficiently state a claim of intentional discrimination or deliberate indifference. In her discrimination allegations, Doe makes conclusory mention that she was treated differently than whites. But her discrimination allegations do not offer sufficient detail to suggest that their circumstances were sufficiently identical to Doe's. "[A] student who is a member of a protected class must show that other students not in the protected class were 'treated differently under circumstances "nearly identical" to [the student's].'"

[4] The Family Educational Rights and Privacy Act is sometimes referred to as FERPA. 20 U.S.C. § 1232g.

Herndon v. Coll. Of Mainland, No. G-06-0286, 2009 WL 367500, *29 (S.D. Tex. Feb. 13, 2009) (citation omitted). Her allegations of alleged racial animus and gender bias are conclusory and hence, under *Twombly*, are legally insufficient. Doe's mere belief that TCU's actions were taken for discriminatory or retaliatory reasons is not enough to establish discrimination under Titles VI and IX. *See Subbiah,* 2011 WL 1771806, at *6 (citing *Richards v. JRK Prop. Holdings*, 405 F. App'x 829, 831 (5th Cir. 2010)). Doe's subjective opinion is not sufficient to create a triable issue. *See Swanson v. General Servs. Admin*, 110 F.3d 1180, 1189 (5th Cir. 1997); *see also Mohamed for A.M. v. Irving Indep. Sch. Dist.*, 252 F. Supp. 3d 602, 627–28 (N.D. Tex. 2017) (holding that a plaintiff's subjective opinion, without more, is insufficient to establish a claim of discrimination). Even assuming that Doe has plead facts showing unfair treatment by fellow students or unfair decisions by TCU faculty, she does not state a claim; Title VI does not protect individuals from unfair decisions but instead ones made with discriminatory intent. *Bisong v. Univ. of Houston*, 493 F. Supp. 2d at 904–05 (S.D. Tex. 2007) (citing *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1997)).

With respect to her complaints about housing, alleged loss of scholarship, delay in admission to the Honors College, the moot court team and tournament, classroom seating, the group project, and the D.C. summer program, she does not allege any specific facts that would show the acts were taken with intent to discriminate based on her race or gender. She admits that when she demanded to be moved within her dorm, TCU granted her request. Doe was never denied any housing. She fails to allege any facts that another room she preferred was available during the middle of the semester but was refused due to her race or gender, nor does she explain why being assigned a racial

minority roommate is discriminatory.

Doe admits TCU encouraged minority enrollment, initially provided her with a limited scholarship, admitted her to the Honors College, and subsidized her attendance at the summer Washington D.C. course. Those actions certainly do not indicate discriminatory intent on the part of TCU. Doe agrees TCU followed its Honors College admission policy for transfer students in her case, yet she complains (based on what unidentified persons told her) that unidentified white students were treated better. But she does not identify any specifics on 'nearly identical' white students who did not meet the 12-hour requirement who were admitted into the Honors College, or whether this occurred during the period the policy was in effect. *See Herndon,* at *29. Her insufficient allegations are based on information that "she learned from classmates and faculty" and she fails to identify the classmates or the faculty who provided the information. [Compl., ¶ 73, p. 35].

Her grievances about her participation in moot court do not support an inference of intentional race or gender discrimination. Her Amended Complaint conveniently fails to mention that her original moot court partner was a white male but that due to the team participants' busy schedules, the participants themselves changed partners or that the partners were paired based on the subjects they desired to debate. Her complaint that the instructor would not meet with her but regularly met with others is too unspecific and generalized to support a claim of intentional discrimination. She does not allege dates and times of any requested meeting with the instructor, the identities of other team members allegedly preferred by the instructor, or facts suggesting the reason for the instructor's actions were due to race or gender. Nor does Doe explain how, during a competition when the team members are competing at the same time, the instructor could

simultaneously watch all the multiple teams. Her assertion that the instructor's actions "brought it home" [Compl., ¶ 76] that these actions are the result of institutional racism in pure conjecture. Doe's assertions that the complained of actions were motivated by racial or gender bias "are exactly the type of 'labels and conclusions,' and 'the-defendant-unlawfully-harmed-me-accusations', which are insufficient to state a claim for relief or survive a motion to dismiss." *See Easley v. Univ. of Tex. at Arlington*, 984 F. Supp. 2d 631, 636 (N.D. Tex. 2013) (quoting *Iqbal*, 556 U.S. at 678).[5]

As it relates to her classroom seating complaint, Doe does not allege that the instructor engaged in any affirmative conduct in seating the students in a discriminatory fashion or creating a discriminatory seating chart, and she fails to allege TCU has a legal duty to over-ride adult students' choices about where they choose to sit in class.[6] Doe appears to have issues with the instructor's teaching method, and one controversial classroom comment by one student, which she found subjectively offensive. But those allegations, even if true, do not state a claim for intentional discrimination by TCU.

Doe makes general allegations of racism and gender bias in TCU's programs without sufficient facts. Nowhere in the Complaint does Doe plead any particularized facts of derogatory or racial epitaphs, or any negative comment about her race or gender, by any TCU faculty member, staff member or official that would support intentional

[5] Doe does not sufficiently allege disparate treatment claims by pleading facts showing students in nearly identical circumstances to Doe were treated more favorably. *See Herndon*, 2009 WL 367500, at *29; *Mawle v. Texas A&M Univ./Kingsville*, 2010 WL 1782214, *13 (S.D. Tex. April 30, 2010)(Title XI claimant must show he was treated differently from similarly situated students who are not members of the protected class to raise an inference of intentional discrimination). Her generalized disparate treatment allegations [Compl., ¶¶ 20, 75, 88 (p. 43), 187, 201] and about whites on the moot court team are not sufficient to prove intentional discrimination. Moreover, to the extent Doe is claiming liability under a disparate impact theory, her case still fails. More recent cases have held that disparate impact claims are not viable under Title IX. *Doe No. 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 657 n. 3 (W.D. Tex. 2017). To the extent Doe pleads disparate treatment and or disparate impact claims, TCU moves these claims be dismissed.

[6] Nor does Doe mention that she actually preferred to sit alone in the back, for this particular class.

discrimination. She fails to sufficiently plead facts indicating that her race or gender was a substantial motivating factor in any alleged adverse education action, and she fails to sufficiently plead any TCU official had actual knowledge of any alleged discrimination much less that they responded with deliberate indifference. To the contrary, when she made complaints about the summer program to the Title IX officer, an investigation was undertaken. [Compl., ¶¶ 122, 123, 129-130]. Doe's contention that Dr. Turner and TCU's Title IX Office did not investigate and ignored Doe's complaints are belied by her inconsistent allegations. They range from Dr. Turner doing nothing, to interviewing Doe and her mother within a couple of weeks of the ending of the summer course, and again a month later.[Compl., ¶¶ 122, 130]. Doe admits Leigh Holland actually reached out to Doe and was actively investigating and interviewing witnesses. [Id., ¶ 131]. Doe makes no allegations that the Title IX Office deviated from any of its policies or guidelines in conducting its investigation of Doe's complaints or that it conducts complaints of males or non-minority females differently. Deliberate indifference requires a showing that TCU's response was clearly unreasonable under the known circumstances. *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204, 210 (5th Cir. 2019). "Deliberate indifference to constitutional rights is a very high standard of misconduct." *Plummer v. Univ. of Houston*, 860 F.3d 767, 778 (5th Cir. 2017). Doe may not be satisfied with how the investigation was handled, but TCU clearly has not acted unreasonably.[7]

2. Doe has not been deprived of any of the benefits of any education program or activity at TCU

[7] TCU also moves to dismiss Doe's theory that TCU maintains an official policy of deliberate indifference of investigating race discrimination complaints made by African-American females that constitutes intentional discrimination. [Compl., ¶¶ 57 (pp. 25-26), XX (p. 66, 131-133]. This theory is not cognizable. Courts that have allowed the claim to go forward under Title IX have limited it to sexual assault cases and not discrimination based on race. This issue is briefed in Doe 2 and Doe 3's briefs. TCU seeks dismissal of any such claims.

Doe's discrimination claims should also be dismissed because she cannot show any alleged discrimination resulted in the denial any educational opportunities, programs or that she was otherwise excluded from a program or benefit. As previously noted, she alleges TCU intentionally solicited minority students to apply for admission to TCU. She does not allege she has ceased being a TCU student, and in fact she is at present a TCU student; she does not allege she was suspended, placed on probation, or that TCU took an action which reduced her grade point average. She was never denied housing. In what she describes as her worst experience at TCU, the D.C. summer course, she alleges she "remained active and excelled academically." [Compl., ¶ 124]. There is no allegation that she was unable to secure a specific class or was unable to take a required course or class at TCU. She makes no allegation that the alleged loss of a scholarship and the substitution of veteran G.I. Bill benefits has in any way prevented her from continuing her education at TCU, or she has sustained a current financial loss[8] as a result of not being eligible for the scholarship.

She admits that she was admitted into TCU's Honors College and does not allege that she is no longer an Honor College student. She admits that she participated in the moot court program, and she does not allege she failed to successfully complete the tournament. There is no allegation that anyone at TCU refused, barred her entry, or otherwise prevented her from entering into any classroom, attending lectures, or receiving an education. Doe raises no allegation that she was ever disciplined, suspended or dismissed from TCU.[9]

[8] To the contrary, Yellow Ribbon G.I. benefits defray tuition, and hence leave her currently in a much better position financially that the transfer scholarship, which her pleadings state only covered fees and costs.
[9] The only educational benefit of which Doe could reasonably argue of which she was deprived is receiving no credit for the Honors College 2019 D.C. summer program. But any such denial was a result of Doe

Doe makes no allegation that the group research project in the course "Engaging Difference and Diversity" was not completed, that she received a poor grade, or that she did not receive course credit in that course. [Compl., ¶ 87]. Doe admits TCU encouraged her to participate in the summer D.C. program and offered her money to enable her to attend. [Compl., ¶ 97]. Despite Doe's current expression of disappointment about the D.C. program[10] and her complaints about the activities, programs and events of the D.C. program, she does not allege that she was intentionally excluded or refused participation or involvement in any of its activities or events. In fact, Doe concedes "she pressed on" [Compl., ¶ 113, p. 55] and "remained active and excelled academically throughout." [Compl., ¶ 124, p. 62].

3. Doe's allegations of a hostile educational environment are not actionable as they do not show a negative impact upon her receipt of education benefits and participating in educational programs

To maintain a Title VI and Title IX claim for a racially hostile environment, Doe must show (1) that racial harassment was so severe, pervasive,[11] and objectively offensive that it deprived her of access to an educational opportunity; and (2) that TCU acted with deliberate indifference to the harassment. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648–52 (1999). These elements are judged by a "totality of the circumstances" analysis, including the frequency and severity of the conduct, whether it is physically

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having plagiarized at least two written assignments. Doe essentially admits having plagiarized the assignments.

[10] To the extent the Court can consider assertions in the separate motion to dismiss filed by defendant Aaron Chimbel, it is noted that on July 28, 2019, Doe advised Professor Chimbel she enjoyed the week he led the program.

[11] To be pervasive, the alleged harassment must be more than episodic, regardless of the effect the harassment may have on a plaintiff's mental state, since pervasive "means that the challenged incidents are 'more than episodic; they must be sufficiently continuous and concerted.'" *Lopez v. Webster Cent. Sch. Dist.*, 682 F. Supp. 2d 274, 285 (W.D.N.Y. 2010) (quoting *Hayut v. St. Univ. of N.Y.*, 352 F.3d 733, 745 (2d Cir. 2003).

threatening or humiliating, and whether it unreasonably interferes with the student's educational opportunities. *Hendrichsen v. Ball St. Univ.*, 107 F. App'x 680, 684 (7th Cir. 2004). "The harassment must have 'concrete negative effect' on the victim's education" *Fennell,* 804 F.3d at 410, (quoting *Davis,* 526 U.S. at 654). The severe, pervasive and objectively offensive harassment must be "more than the sort of teasing and bullying that generally takes place in school." *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 167 (5th Cir. 2011) (citation omitted). For the educational harassment to rise to the level of actionable conduct, courts have required a showing of significant negative impact on the student's education. *See Herndon*, 2009 WL 367500, at *26. Here, Doe's pleadings do not sufficiently allege that she was denied the benefits of an education at TCU.

4. Doe's admission of plagiarism is not the product of race or gender discrimination and is the sole reason for any alleged loss of an educational benefit

Doe received no credit for the D.C. summer program. [Compl., ¶ 169]. Doe essentially admits she did plagiarize. Nowhere does she allege that TCU deviated from its plagiarism policy. Doe does not allege the NC grade reduced Doe's overall GPA or that it is a permanent mark on her transcript. Doe does not plead that she received a more severe sanction, such as being placed on probation, suspension, or expulsion; in fact, a NC is an extremely lenient sanction.

Nothing in the Amended Complaint indicates TCU addressed her plagiarism in a more adverse way than it handled that of a white student under 'nearly identical' circumstances. *See Herndon*, *supra,* at *29.[12] The only inference that flows from Doe's

[12] If Doe is alleging that TCU's academic disciplinary proceeding upholding Doe's plagiarism was the product of an erroneous outcome or selective enforcement standard due to her race or gender under *Yusuf*

allegations was that she was disciplined for plagiarism, not from any racial animus or gender discrimination. While Doe in a conclusory fashion contends that TCU did not follow published academic appeal procedure protocols [Compl., ¶ 170] she fails to plead facts showing how the procedure was not followed. There is no reasonable basis to conclude that the report of her plagiarism by Professor Chimbel and the imposition of NC for the summer course is a result of discrimination based on Doe's race or gender.[13] Doe is essentially asking for a judicial appeal of TCU's academic decision pertaining to her plagiarism, and TCU urges the court to refrain from revisiting its academic decision.

5. Doe's claims of retaliation under Title VI and Title IX fail

Doe's retaliation claim is based on the following timeline:

- On or about July 29, 2019, Doe informed Dr. Turner, TCU's Title IX officer, that she intended in the future to make some sort of unspecified complaint about the summer program. [Compl., ¶ 122].
- On August 3, 2019, Dr. Snow advised Doe that Snow knew of her plagiarism. [Compl., ¶ 126].
- On August 16, 2019, Doe gave a video statement to Turner, and on August 26, 2019, she spoke with Ms. Holland in his office. [Compl., ¶ 130].
- On August 27, 2019, Dr. Mack provided her notice that he had recommended an NC grade for the summer course due to her plagiarism. [Compl., ¶ 169].
- On September 4, 2019, Associate Dean Garnett denied her appeal and notified her she would receive an NC, mentioning her plagiarism. [Compl., ¶ 169].

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v. Vassar Coll., 45 F.3d 709, 715 (2d Cir. 1994), her allegations are too conclusory to survive a Rule 12(b)(6) motion. She alleges no facts casting doubt on the accuracy of the outcome of the lenient academic disciplinary sanction of NC Doe received for the summer program. Notably, Doe does not plead that she did not plagiarize. Nor is there any allegation that the decision to uphold the NC and plagiarism sanction was motivated by gender or race bias. Moreover, Doe's scant and factually deficient allegation that an unidentified student turned in "incomprehensible doodles" and received course credit [Compl., 172] is wholly insufficient and generalized to consider as a similarly situated comparator.

[13] To the extent the Court can consider the declaration of Aaron Chimbel, a co-defendant, Professor Chimbel discovered Doe's plagiarism without knowledge of any of Doe's complaints. It does not appear Doe pleads any allegations otherwise.

To establish a prima facie case of Title IX retaliation, plaintiff must show that (1) she engaged in protected activity, (2) the decision-maker knew of the protected activity, (3) plaintiff suffered an adverse school-related action, and (4) a causal connection exists between the protected activity and the adverse action. *Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 320 (6th Cir. 2017); *see generally Lowry v. Tex. A&M Univ. Sys.*, 11 F. Supp. 2d 845, 911 (S.D. Tex. 1998). If a plaintiff succeeds, the school may rebut that presumption by "articulating some legitimate, nondiscriminatory reason for its action." *Id.* Should the school do so, the burden shifts back to plaintiff to undermine its proffered reason as pretextual. *Id.* Ultimately, a plaintiff must show that the retaliatory adverse action would not have occurred but for plaintiff's legally protected complaint. *Univ. of Tex. SW. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013).

Doe's retaliation pleadings are insufficient to plead a "but-for" retaliation under the *Twombly* standards. Under the timeline in her pleadings, Dr. Snow told Doe she was aware of her plagiarism on August 3, 2019; assuming, for the sake of argument after that date Doe made a formal protected complaint and then on August 16, 2019, Doe gave a video interview with Dr. Turner, this occurred after Doe's plagiarism and after Dr. Snow advised Doe she was aware of it.[14] But what is critical is that Doe does not allege that Chimbel, who discovered Doe's plagiarized paper that was turned in the day before, on July 28, 2019, was aware of Doe's July 29, 2019 complaint of discriminatory treatment when Chimbel notified Dr. Snow of the plagiarism. The plagiarism is what set in motion

[14] In an attempt to salvage her retaliation claim, Doe now alleges vaguely in her Amended Complaint that she informed TCU of her mental state to Turner on July 29, 2019. But she fails to foreclose if the complaint was actually made by Doe or another person, how it was communicated to Turner (in writing, by email or indirectly,) or if Doe welcomed that no action be taken by Turner at that time. [Compl., ¶ 122]. Doe admits she did not begin "working to formalize her complaints" until August 16, 2019. [Compl., ¶ 130]. She has not sufficiently plead that she initially made a protected complaint to Turner; advising someone you intend to file a complaint (of some sort) later is not itself a legally protected complaint.

the need for Doe to receive the lenient NC sanction. It was not the product of unlawful discriminatory action toward Doe. Then, in a situation where Doe's pleadings support the inference she in fact engaged in plagiarism (and obviously deserved some discipline), TCU issued an extremely lenient sanction, i.e., the NC grade. TCU did not expel, suspend, place on probation, or take an action which lowered Doe's GPA as a result of her misconduct. To qualify as "adverse," an educational action must be sufficiently severe to dissuade a "reasonable person" from engaging in the protected activity. *See Burlington North. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Gordon v. Traverse City Area Pub. Sch.*, 686 F. App'x 315, 320 (6th Cir. 2017); *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 728–29 (7th Cir. 2009). For instance, placing a plaintiff on academic probation and noting the same on an education record that affects licensure and ability to practice medicine has been held to be a materially adverse action. *Sadeghian v. Univ. of S. Alabama*, No. 18-00009-JB-B, 2018 WL 7106981, at *12 (S.D. Ala. Dec. 4, 2018); *see also Emeldi v Univ. of Or.*, 698 F.3d 715, 725–26 (9th Cir. 2012) (holding that a professor resigning as a graduate student's advisor, effectively prevented the student from obtaining a degree, was deemed to be materially adverse); *see also Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 92 (2d Cir. 2011) (expulsion of a student following a report of cheating held to be materially adverse). TCU's NC for the course was not, under these authorities, sufficiently severe to constitute an adverse action.

Doe also fails to plead facts indicating that Dr. Garnett, who was not on the D.C. trip, and who she alleges made the ultimate decision on her plagiarism appeal, had knowledge she had made a legally protected complaint. Doe does not allege Garnett was involved in the alleged conspiracy plot hatched by Snow, Mack and Chimbel on August

3, 2019. [Compl., ¶ 125]. Doe merely leaps from this allegation to another conclusory allegation that Garnett was aware of Doe's D.C. trip complaints. [Compl., ¶ 169]. Nowhere does Doe ever allege if, how or when Garnett became aware of Doe's complaints while considering her NC and academic misconduct appeal. Knowledge by the decision-maker is essential, to show retaliatory motive. *See Gordon*, 686 F. App'x 315 (6th Cir. 2017). The mere fact that she had a complaint about her treatment in D.C. pending at the time she requested a review of the plagiarism decision does not lead to a reasonable inference that the denial of her appeal was in retaliation for her complaint. *See Doe v. Princeton Univ.*, 790 F. App'x 379, 385 (2d Cir. 2019).

6. Doe's claim of employment discrimination and retaliation should be dismissed

Doe alleges the TCU Honors College offered her a part-time job as a desk assistant for which she never applied. She apparently thought it was good idea to take the job, but she now makes a myriad of complaints about the job, her duties, her pay, and her scheduled hours. [Compl., ¶¶ 77-83]. Doe alleges the legal conclusion that TCU's employment actions toward her were motivated by her race, and alleges only generally that unidentified white "counterparts" were treated better. [Compl., ¶ 79].

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*., is the federal civil rights act which addresses employment discrimination. Doe's complaint does not mention Title VII. Title VII has an administrative exhaustion requirement. 42 U.S.C. § 2000e-5(c)(e). Title VII requires employees to exhaust their administrative remedies before seeking judicial relief. *Id.* "Private sector employees must satisfy this requirement by [,among other things,] filing an administrative charge with the EEOC." *McClain v. Lufkin Indus.,*

Inc., 519 F.3d 264, 273 (5th Cir. 2008) (citation omitted). In the Fifth Circuit,[15] a plaintiff cannot sidestep Title VII's administrative exhaustion requirements by pleading an employment discrimination case under Title IX. *See Lekoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995). Nowhere does Doe assert she exhausted Title VII's administrative requirements.

Even if Doe had exhausted administrative requirements, her pleadings are still insufficient. To state a discrimination claim for disparate treatment, she has to plead sufficient facts showing she was treated differently from a white employee under 'nearly identical' circumstances. *See Herndon*, *supra*, at *29. Her conclusory pleadings comparing her employment situation to unidentified white "counterparts" and her conclusory claim she was "supposedly hired to perform identical duties to her white counterparts" [Compl., ¶¶ 79, 82] are insufficient. She fails to plead facts showing the job titles, duties, responsibilities, seniority, of her white "counterparts" were nearly identical to hers. The facts she has pleaded negate that she suffered retaliation related to her employment based on her complaint. She pleads that she made a formal complaint of discrimination on August 16, 2019 to Dr. Turner at TCU, and that she received a $2 an hour raise seven days later. [Compl., ¶¶ 82, 130]. Retaliation claims are based on "adverse" employment actions, which for example, which might involve a substantial pay *cut*, but not a pay *raise*. In addition, Doe fails to plead any facts about who made any allegedly retaliatory employment decisions she asserts, or facts showing any decision-maker pertaining to her employment had knowledge of a complaint at the time of a decision about her. The Fifth Circuit has determined that, in order to establish the

[15] Some other circuits interpret the interplay between Title IX and Title VII differently.

causation prong of a retaliation claim, the employee should demonstrate that the employer knew about the employee's protected activity. *See Medina v. Ramsey Steel Co., Inc.,* 238 F.3d 674, 684 (5th Cir. 2001); *see also Chaney v. New Orleans Pub. Facility Mgmt., Inc.,* 179 F.3d 164, 168 (5th Cir. 1999) ("If an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct."); *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 883 (5th Cir. 2003).[16] Any retaliation claim relating to employment should be dismissed.

7. Doe's Section 504 Rehabilitation Act and ADA claims are not plausible

For Doe to maintain a claim under either statute, her burden is to show she: (1) has a qualifying disability; (2) is "otherwise qualified" to participate in the educational program; and (3) was excluded on the basis of her disability. *Shaikh v. Texas A & M Univ. Coll. of Med.*, 739 F. App'x 215, 219, 224 (5th Cir. 2018). Under Section 504, she must allege she was discriminated against solely on the basis of her disability. 29 U.S.C. § 794(a). Under the ADA, she must show her alleged disability was a motivating factor in the exclusion. *Pinkerton v. Spellings*, 529 F.3d 513, 516–10 (5th Cir. 2009).

Doe alleges her disability was asthma. [Compl., ¶ 205].[17] Assuming for the sake of argument that Doe's asthma is a disability, Doe fails to allege how respiratory issues associated with asthma resulted in her being "excluded," i.e., that she was prevented from participating in the Washington D.C. summer session. Doe's pleading conclusively

[16] Nor has Doe plead that anybody who was aware of her complaints influenced any decision-maker who made employment decisions about her.

[17] A disability is an impairment which substantially limits one or more major life activities, 42 U.S.C. § 12102(1), such as learning, thinking, communicating, or working, among other activities. *Id.,* § 12102(2)(A).

demonstrate she was not excluded; she pleads that, although her asthmatic condition made it challenging to walk in the summer heat in Washington D.C., "miraculously" she "remained active and excelled academically throughout." [Compl., ¶ 124]. Indeed, she must have been able to perform a great deal of walking, despite her asthmatic condition, since she pleads she developed numerous blisters on her feet from all of her walking. Other than pleading a conclusion that she "sacrificed receiving academic information and course participation" [Compl., ¶ 113], she identifies no building she failed to see, or program or event which she missed in D.C., due to her asthma. In short, she fails to sufficiently plead she was "excluded" from a program based upon disability.

To the extent she alleges TCU's NC decision was an "exclusion", she pleads no causal connection between her asthma, on the one hand, and TCU's NC decision, on the other. In addition, she alleges Dr. Garnett made the final NC decision, and she pleads no facts suggesting Garnett had any knowledge of her disability or that he had any motive to mistreat a student because of asthma. Where a decision-maker has no knowledge of a person's disability, it is impossible for that decision-maker to be motivated to intentionally discriminate based on disability. *Scott v. Shoe Show, Inc.*, 38 F. Supp. 3d 1343, 1360–61 (N.D. Ga. 2014).

Simply put, Doe was not able to meet TCU's academic policy prohibiting plagiarism. Courts show deference to an educational institution's judgment regarding a student's qualification when examining disability discrimination claims. *McGregor v. La. St. Univ. Bd. of Supervisors*, 3 F.3d 850, 858–59 (5th Cir. 1993). TCU respectfully asks that the Court reject Doe's attempt to obtain a judicial reconsideration of TCU's academic

standards and decisions concerning her plagiarism, under the guise of Doe's disability discrimination suit.

Doe's failure to accommodate claim should be dismissed. She pleads in a conclusory fashion that, when her asthma made her walking in Washington D.C. difficult for her, TCU failed to accommodate her. [Compl., ¶ 217]. She must establish: (1) she was a qualified individual with a disability; (2) the disability and limitations were known; and (3) the covered institution failed to make reasonable accommodations for such known limitations. *Neely v. Pseg Tex. Ltd. P'ship*, 735 F.3d 242, 247 (5th Cir. 2013). In considering an accommodation request, an educational institution is not required to make fundamental modifications in program requirements, provide services of a personal nature, or provide aids or services which will result in undue financial hardship or lowering program standards. *Tips v. Regents of Texas Tech Univ.*, 921 F. Supp. 1515, 1518 (N.D. Tex. 1996).

Doe's disability accommodation pleadings are deficient, because she fails to plead the accommodation she sought, which TCU supposedly denied.[18] *See Mesa v. City of San Antonio*, No. CV-SA-17-CA-654-XR, 2017 WL 5924263, at *4 (W.D. Tex. Nov. 29, 2017)(granting defendant's motion to dismiss where plaintiff's failed to allege he requested a specific accommodation or that a reasonable accommodation was denied). The plaintiff has the burden of identifying "the existence of some accommodation" necessary for the plaintiff to meet the essential requirements of the program at issue. *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 190 (2d Cir.

[18] Doe alleges she informed Dr. Gooding of her "worsening condition," and she sought "some guidance and/or relief from Dr. Gooding" [Compl., ¶¶ 101-102]; Doe alleges she sought "sympathy and reasonable accommodations" from Dr. Snow, but identifies no specific accommodations she needed and her complaint identifies none. [Compl., ¶¶ 109-110].

2015) (citation omitted). TCU had no control over the heat Washington D.C. was experiencing or distance between the buildings the group was to visit in D.C. Doe admits she had access to D.C.'s extensive public transportation [Compl., ¶ 100] and was allowed the accommodation of receiving a ride through Lyft instead of walking, when she desired, although she alleges that her teacher scowled about her taking Lyft and reminded her that walking can be healthy. [Compl., ¶¶ 107, 113]. In this case, the only conceivable "accommodation" would be TCU completely excusing her plagiarism, and as a matter of law that type of "accommodation" would not be reasonable.

8. Doe's ADA Title III claim for monetary damages and Rehabilitation Act claim for money damages for mental anguish should be dismissed

Doe appears to plead for the recovery of emotional distress damages ("psychological and physiological harm") under ADA Title III and the Rehabilitation Act. [Compl., ¶ 210, 218]. The Fifth Circuit has held there is no claim for money damages by a private individual under Title III of the ADA. *Perez v. Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180, 183 (5th Cir. 2015). Mental anguish damages are not available under the Rehabilitation Act. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 680 (5th Cir. 2020).[19]

9. All of Doe's negligence theories fail to state a claim

Doe asserts claims of negligence, gross negligence, negligent hiring, negligent retention, negligent supervision, negligent training and negligent misrepresentation. [Counts VI–VIII]. Liability for negligence requires a showing that a defendant owes a duty of care, the breach of which proximately causes damages to a plaintiff. *Thapar v. Zezulka*,

[19] TCU also seeks dismissal of all claims for punitive damages Doe seeks. *Doe 1 v. Baylor Univ.*, No. 16-cv-173-RP, 2020 WL 1557742, *6 (W.D. Tex., April 1, 2020).

994 S.W.2d 635, 637 (Tex. 1999). TCU challenges the sufficiency of Doe's pleading on duty, breach, causation and damages.

Doe makes conclusory assertions that TCU "owed a legal duty" to "possess and apply the knowledge and to use the skill and care that is used by a reasonable and prudent educational institution." [Compl., ¶¶ 233, 241]. But Doe does not plead specific facts establishing the existence of or the scope of duty of care owed to Doe. Doe complains of unspecified conduct of other TCU students and TCU faculty. But Doe fails to state any specific conduct that would give rise to a legal duty. When considering whether a legal duty exists, courts consider the risk, foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the burden of guarding against the injury and the consequences of placing the burden on the defendant. *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). None of her factual allegations address these necessary legal considerations for determining whether a legal duty exists. No special relationship exists between a private university and its adult students. *Boyd v. Tex. Christ. Univ., Inc.*, 8 S.W.3d. 758, 760 (Tex. App.—Fort Worth 1999, no pet.). Nor does TCU have a duty to control the conduct of third person students or TCU agents. *Phillips*, 801 S.W.2d at 525. Doe does not allege any prior acts of the individual defendants or other TCU agents that might have put TCU on notice of a foreseeable risk of harm to Doe. Doe's allegations fail to identify specifically how any alleged duty was breached under any negligence theory. [Compl., ¶¶ 234-236]. There is no allegation of how a similarly situated university would have acted differently under the same or similar circumstances. Nor has Doe specifically alleged how any act or omission of a TCU student, faculty or staff was a substantial factor in bringing about any alleged

psychological and physiological injury. [Compl., ¶¶ 234-236]. *See Texas Pattern Jury Charges: General Negligence*, PJC 2.4 (2016). Because TCU owes no duty to Doe based on the allegations in the Amended Complaint, and the allegations fail to state a plausible claim on breach of duty or proximate cause, her negligence and gross negligence claims should be dismissed.

TCU also challenges that Doe has adequately pleads a viable negligent hiring and supervision claim. Doe does not plead sufficient facts to state a claim that TCU breached either of these duties. Doe fails to allege facts showing TCU negligently hired or retained faculty or staff. Doe fails to allege any credentials or qualifications that were lacking on the part of any TCU actors. Doe does not allege that TCU failed to investigate any qualifications, credentials or prior actions in a manner that would have put TCU on notice that hiring, or continuing to employ, would pose an unreasonable risk of harm to Doe, or otherwise breach of a legal duty owed to Doe. Doe fails to allege any different or additional actions TCU should have taken in connection with hiring, retaining, supervising, or training such individuals. Doe also fails to plead sufficient facts concerning causation. Doe generically alleges TCU was aware of some conduct and failed to act, but Doe's pleadings do not connect any specific conduct toward her to any factually specific act of negligent hiring or retention. Although she complains about certain conduct of individual defendants, she fails to plead facts connecting the dots to identify how this conduct was causally related to any actor's retention or supervision. Doe simply has not provided sufficient allegations that TCU failed to meet the standard of care for a similar situated university in hiring, retaining, supervising and training these particular employees nor how a breach of that standard proximately caused any harm to Doe.

10. Doe's fraud, negligent misrepresentation and DTPA allegations are insufficient and should be dismissed

Claims alleging fraud, negligent misrepresentation, and violations of the DTPA are subject to the requirements of Federal Rules of Civil Procedure 9(b). See *Patel v. Holiday Hosp. Franchising, Inc.,* 172 F. Supp. 2d 821, 825 (N.D. Tex. 2001). Doe has not satisfied Rule 9(b). *Shushany v. Allwaste, Inc.,* 992 F.2d 517, 521 (5th Cir.1993). Doe's factual allegations are insufficient. Likewise, Doe's allegations of deceptive trade practices are insufficient under Rule 9(b)'s heightened pleading requirements for the same reasons that her allegations of fraud and negligent misrepresentation are insufficient under Rule 9(b).

11. Doe's assault claim against TCU should be dismissed

Doe's conclusory allegations that Snow walked "menacingly" behind Doe and another African American student and "aggressively shoved herself between the two African Americans to break them up," aggressively placed her hand on Doe's back, "driving her to the front of her peers," [Compl., 103], pushed Doe's back causing her to stumble and driving her to the front of the group so Doe could see better, and took off her jacket, folded her arms, and walked toward Doe, who has acknowledged she is 6 feet, 180 lbs, are not sufficient to plausibly state a claim of assault. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n.4 (Tex. 2010). Likewise, Doe's claims that Snow assaulted Doe repeatedly throughout the trip, without Doe's consent and causing injury to Doe, and that Snow was aware her contact was unwelcome and offensive to Doe are mere conclusions with no factual support.

B. TCU requests that the Court decline to exercise supplemental jurisdiction over Doe's state law claims

In the event the Court dismisses Doe's federal claims over which it had original jurisdiction, TCU requests that the Court decline to exercise supplemental jurisdiction

over or dismiss Doe's remaining state law claims. 28 U.S.C. § 1367(c)(3). District courts are given "wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed." *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993).

IV. CONCLUSION

TCU requests that Doe 1's case be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the above and foregoing Defendant Texas Christian University's Motion to Dismiss Claims of Jane Doe No. 1 and Brief in Support was served on all counsel of record receiving electronic notice from the court's ECF notification system.

/s/ George Haratsis
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