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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN MBAWE,

Plaintiff-Appellant,

v.

FARRIS STATE UNIVERSITY, ET AL.,

Defendant-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE WESTERN
DISTRICT OF MICHIGAN

FILED Nov 05, 2018
DEBORAH S. HUNT, Clerk

BEFORE: SILER, GRIFFIN, and STRANCH, Circuit Judges.

SILER, Circuit Judge. When John Mbawe was a pharmacy student at Ferris State University (FSU), he began suffering from paranoid delusions. He believed people were spying on him, following him, and injecting him with foreign substances while he slept. Eventually, a state court granted FSU's petition to have Mbawe involuntarily committed to a psychiatric hospital. Mbawe's commitment rendered him ineligible to maintain his pharmacy-intern license, required for pharmacy students, so FSU withdrew Mbawe from the pharmacy program.

Mbawe filed this suit, claiming that the university and certain administrators (collectively, FSU) unlawfully discriminated against him, in violation of Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act, and deprived him of adequate Fourteenth Amendment procedural due process, in violation of 42 U.S.C. § 1983. The district court granted summary judgment in FSU's favor, holding that the university did not violate Mbawe's statutory or constitutional rights. We AFFIRM.

I.

Mbawe was admitted to FSU's pharmacy program in 2010. He entered the program on a remedial track, which meant that he had four years to complete his coursework instead of the usual three. After his first year, he was academically dismissed for failing to maintain a 2.0 GPA, but he was reinstated after a successful appeal.

As the fall 2013 semester approached, FSU officials grew concerned about Mbawe's mental health. That summer, Mbawe visited FSU's Birkam Health Center (BHC) and told Dr. Susan Davis he was being "targeted" by people who were monitoring his movements. He claimed these people had put a liquid on his car and on his left arm that caused his skin to darken, but lab work revealed no abnormalities. Dr. Davis noted that Mbawe appeared "rational and logical" and said he was "genuinely upset and disturbed about his suspicions."

Mbawe began missing classes soon after the semester began. His professors expressed concern that he was apparently unable to comprehend his schedule and course requirements. Dr. Jeffrey Bates, the pharmacy program's Student Services Coordinator, spoke with Mbawe several times. Mbawe told Dr. Bates that people had been injecting him while he slept, and added that "someone was using cameras to spy on him."

On September 16, an FSU student found three handwritten notes in a university restroom. The first note contained details regarding travel plans that Mbawe had abandoned. The other two notes contained several statements reflecting Mbawe's belief that he was in danger. Specifically, Mbawe wrote that people had placed cameras in his apartment and had injected him while he slept.

The notes also said that "[t]hey are killing me for nothing," and "I know I will die for what they have on my body."

After receiving a photograph of the notes, Dr. Bates called Mbawe, who confirmed that the notes belonged to him. Dr. Bates encouraged Mbawe to visit the BHC counseling center, but he refused and said he did not need counseling. Mbawe did, however, agree to see Dr. Davis again.

Mbawe visited BHC on September 19 and was seen by Nurse Melissa Sprague. He maintained his belief that people were coming into his apartment,

poisoning his food, and injecting things into his body. Nurse Sprague noted that Mbawe had a mental disorder but was "not in any way threatening or bizarre with his behavior." Following his visit, another BHC nurse reported to Dr. Bates that Mbawe was "rational" but "unwilling to see a psychiatrist," and was "not a threat to others or himself."

The next day, Mbawe went to BHC's counseling center and met with Thomas Liszewski, a limited licensed psychologist. Mbawe told Liszewski that he was being bullied by three other pharmacy students who were injecting him with poison while he slept and that the FSU police refused to investigate. Liszewski spoke with FSU Officer Saunders who said that Mbawe "was schizophrenic and needed to be hospitalized but he was not an eminent [sic] threat to himself or anyone else." Liszewski consulted with a colleague and the two "mutually agreed" that they did not have "any right to do anything else." Mbawe rebuffed Liszewski's suggestion that he go to a mental-health center or the emergency room. Liszewski's notes from the meeting describe Mbawe as "quite friendly and rational" and as someone with a low risk for suicide or homicide.

Renee Vander Myde, the BHC director, eventually became aware of Mbawe's difficulties. She and other FSU officials decided to convene a Behavioral Review Team (BRT) to discuss possible courses of action. According to FSU, a BRT is "a forum for faculty, staff, and students to report observed behaviors of any person within the

University community that warrant serious concern."

The BRT met on September 23. Vander Myde and Dr. Bates attended, along with several other FSU officials: Kenneth Plas, an attorney from the general counsel's office; Leroy Wright, Dean of Students; James Cook, Assistant Director of the Department of Public Safety; and Dr. Wendy Samuels, a social work professor. Vander Myde told the BRT she was concerned with Mbawe's mental health and recounted his allegations of people trying to poison him. She also reported that "[b]oth Dr. Davis and Tom Liszewski stated that John was very kind and did not display any aggressive behavior toward them." Dr. Bates similarly stated that "he had not seen any alarming behavior from [Mbawe] until recently when John shared his fear regarding the injections." Dr. Bates also shared that Mbawe was struggling academically because of his absences and was close to being dismissed from the pharmacy program.

The BRT discussed several options, including whether a medical withdrawal would be appropriate. Dr. Bates said he had suggested to Mbawe that he medically withdraw, but Mbawe was not interested. The meeting ended with Vander Myde stating that she would contact Network 180, a mental health facility in Grand Rapids, to see if they had any history with Mbawe.

At 11:00 a.m. on September 24, Vander Myde emailed the BRT. In her opinion, Mbawe needed "intervention for his own well-being and because of

the concerns we discussed yesterday regarding the potential for violence when someone experiences these types of thought processes and who has already exhibited some degree of aggression/anger/frustration related to the pattern of thinking." Vander Myde stated that in order to file a petition for involuntary commitment, someone had to have been in contact with Mbawe within the previous forty-eight hours.

Sometime between 11:00 a.m. and 11:39 a.m., Vander Myde, herself a limited licensed psychologist, spoke with Mbawe on the phone. Following that conversation, Vander Myde told the BRT Mbawe "is still delusional and wants the school to get the police to investigate. He continues to refuse getting help other than getting police to investigate the poisoning he claims to be getting."

That same day, Vander Myde submitted a petition for hospitalization to the Kent County Probate Court. Vander Myde averred that Mbawe's "refusal to get help," as well as his refusal "to eat and his delusions/paranoia [were] putting him at risk of self harm and potentially harm to others." Soon thereafter, Vander Myde informed the BRT that the state judge had considered the petition and ordered Mbawe to be hospitalized for a psychiatric examination.

One week later, on October 1, Grand Rapids police located Mbawe in class at FSU. Officers took him into custody, and he was eventually hospitalized at Pine Rest Christian Mental Health Services. Two physicians concluded that Mbawe had a mental

illness and recommended that he be kept for treatment.

On October 10, the state probate court held a hearing regarding Mbawe's hospitalization. Mbawe was present with counsel. Vander Myde, Mbawe, and Dr. Verle Bell, a staff psychiatrist from Pine Rest, all testified. Following the hearing, the probate court found by clear and convincing evidence that Mbawe was a person requiring treatment under Michigan's mental health code and ordered that he be hospitalized for no longer than sixty days. The probate court's commitment order established that Mbawe had a "mental illness," defined as a "substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." Mich. Comp. Laws §§ 330.1400(g), 1401.

The next day, Vander Myde, Dr. Bates, and Dr. Stephen Durst (Dean of the College of Pharmacy) began to discuss Mbawe's future in the pharmacy program. Of particular concern was their belief that Mbawe's involuntary commitment for a mental illness rendered him ineligible to continue his studies. FSU's "Technical Standards" for pharmacy students require, among other things, that a student "possess the emotional and mental health required for full utilization of their abilities" and also "obtain and maintain a valid Pharmacist Intern license in the State of Michigan." Michigan's Department of Licensing and Regulatory Affairs (LARA), the agency in charge of pharmacist licensure, is obligated by statute to investigate and possibly take disciplinary

action against a licensee who has a "condition that impairs, or may impair, the ability to safely and skillfully engage in the practice of the health profession." *Id.* § 333.16221(a). Such a condition may consist of a "[m]ental . . . inability reasonably related to and adversely affecting the licensee's . . . ability to practice in a safe and competent manner." *Id.* § 333.16221(b)(iii). And FSU was obligated by statute to report Mbawe's involuntary commitment to LARA. *Id.* § 333.16222(1). Thus, Dr. Bates and Dean Durst recognized that Mbawe's mental illness placed his pharmacy-intern license at risk. And without that license, Mbawe could not comply with the pharmacy program's Technical Standards.

Dr. Bates and Dean Durst were also concerned that Mbawe had missed too much coursework to allow him to successfully complete his classes that semester. Because Mbawe was already on a remedial track, he would have been academically dismissed if he had failed any of his classes. This would have made it difficult, if not impossible, for Mbawe to return to the pharmacy program in the future.

Following internal deliberations among Dr. Bates, Dean Durst, Vander Myde, Wright, and the general counsel's office, FSU officials decided to withdraw Mbawe from the university for medical reasons. FSU claims that this route was preferable to outright dismissal because it "would allow Mr. Mbawe the opportunity to apply for readmission," it "would not negatively impact Mr. Mbawe's GPA," and it "would also give Mr. Mbawe the additional time

that he would need to finish his third-year classes that other alternatives would not." But FSU policy required that a student, not the university, initiate a medical withdrawal. Nevertheless, on October 15, Dr. Bates emailed Vander Myde and asked that Mbawe be medically withdrawn from the university.

Mbawe was discharged from Pine Rest on October 16. That same day, he contacted two of his professors asking to make up lost work but was told that he had been withdrawn and that he should contact the dean's office. On October 17, Mbawe met with Dr. Bates and Dean Durst. They informed Mbawe that he had been withdrawn from the pharmacy program because he was no longer in compliance with the program's Technical Standards.

Mbawe appealed his withdrawal to the provost's office on October 21. On October 22, Dean Durst emailed Dr. Paul Blake, the Associate Provost of Academic Affairs. Dean Durst stated that he and Dr. Bates believed that overturning Mbawe's medical withdrawal would place him at risk of academic dismissal, which would make it more difficult for Mbawe to gain readmission to the pharmacy program in the future.

On October 22, Dr. Bates emailed Mbawe's four professors to inquire whether Mbawe could pass his classes if he was given excused absences from October 1 onward. None of the professors answered Dr. Bates' question definitively; they provided answers ranging from "theoretically possible" to "if I was forced to choose pass or fail I would have to say fail."

Dr. Blake, Dean Durst, and Dr. Bates met with Mbawe on November 5. They informed Mbawe that his appeal had been denied and his withdrawal would stand. At Mbawe's request, Dr. Blake provided Mbawe with a formal letter explaining the three reasons his appeal was denied: he had missed too much class to successfully complete his courses, he was at risk of being academically dismissed if he was not medically withdrawn, and his pharmacy intern licensure had been compromised.

In his letter, Dr. Blake made clear that "[t]he next steps for re-engagement in the Pharmacy Program are to gain clearance from HPRP and reapply to the University and the Pharmacy Program." HPRP, the Michigan Health Professionals Recovery Program, is "a non-disciplinary program designed to assist participants recover from substance abuse or mental health problems." Following their October 17 meeting, Dr. Bates had spoken with HPRP officials, and they advised him that Mbawe likely met the statutory definition of "impaired" and would possibly need to receive a psychiatric evaluation and enter into a monitoring agreement to maintain his pharmacy intern license. Dr. Bates formally referred Mbawe to HPRP on November 4, the day before Mbawe learned his appeal was denied.

At HPRP's urging, Mbawe eventually submitted to a psychiatric examination in January 2014. The HPRP psychiatrist observed that Mbawe suffered from "delusional belief and some paranoid

psychotic behaviors," had not been taking his prescribed medication, and had no "insight into his illness or treatment need." She concluded that Mbawe could not return to practice until his condition was stable and until he entered a monitoring agreement with HPRP and restarted his medication.

HPRP concurred and sent Mbawe a proposed monitoring agreement to sign. Among other things, the proposed agreement required him to participate in regular therapy sessions. Mbawe received the agreement and met with Dean Durst, Dr. Blake, and Dr. Bates on March 11. According to Mbawe, the FSU officials promised that he would be readmitted to the pharmacy program if he signed the monitoring agreement. But Mbawe was dissatisfied with the proposed agreement because it misidentified him as a registered pharmacist, rather than a pharmacy student.

In any event, Mbawe failed to sign the monitoring agreement before the March 11 deadline, so HPRP closed its file and reported Mbawe to LARA. In turn, LARA filed an administrative complaint against Mbawe and summarily suspended his license. Mbawe did not respond to the complaint. Ultimately, LARA issued a final order on October 2, suspending Mbawe's license for a minimum of six months and a day under Mich. Comp. Laws § 333.16221(b)(iii).

Mbawe then filed a complaint with the Department of Education's Office of Civil Rights

(OCR). OCR eventually concluded that FSU unlawfully discriminated against Mbawe because of a mental disability.[1] This suit, against FSU, Vander Myde, and Drs. Durst, Bates, and Blake, followed.

Following discovery, the district court granted summary judgment in FSU's favor. The court held that Mbawe's ADA and § 504 claims failed because he was not "otherwise qualified" to continue his studies in the pharmacy program, with or without a reasonable accommodation. The court also held that, because Mbawe's dismissal was academic rather than disciplinary, FSU did not deprive Mbawe of adequate procedural due process by failing to afford him a formal hearing prior to withdrawing him from the program.[2]

II.

We review a district court's grant of summary judgment de novo, "construing the evidence and drawing all reasonable inferences in favor of the nonmoving party." *Rocheleau v. Elder Living Constr.,*

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[1] Neither party asserts that OCR's findings are entitled to any sort of binding, preclusive, or persuasive effect in this action.

[2] The district court also held that FSU did not violate Mbawe's substantive due process rights because his disability did not make him part of a suspect class and FSU had a rational basis for its decision. Mbawe does not contest that holding on appeal and has therefore waived his substantive due process claim. *See Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998).

LLC, 814 F.3d 398, 400 (6th Cir. 2016) (citation omitted).

III.

A.

Mbawe first claims that FSU discriminated against him in violation of Title II of the ADA and § 504 of the Rehabilitation Act.[3] Those statutes "allow[] disabled individuals to sue certain entities . . . that exclude them from participation in, deny them benefits of, or discriminate against them in a program because of their disability." *Gohl v. Livonia Pub. Schs.*, 836 F.3d 672, 681 (6th Cir. 2016).

Because Mbawe brings forth no direct evidence of discrimination, the familiar *McDonnell Douglas* burden-shifting framework applies. *Id.* at 682; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Mbawe must first establish "that he (1) is disabled under the statutes, (2) is 'otherwise qualified' for participation in the program, [] (3) 'is being excluded from participation in, denied the benefits of, or subjected to discrimination' because of his disability or handicap, and (4) (for the Rehabilitation Act) that the program receives federal financial assistance." *Id.* (quoting *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013)). If Mbawe makes out a prima facie case, "the burden shifts to the school to offer a legitimate,

[3] Since "the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other." *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) (citation omitted). We often analyze ADA and § 504 claims together, *see S.S. v. E. Ky. Univ.*, 532 F.3d 445, 452-53 (6th Cir. 2008), and we do so again today.

nondiscriminatory reason for its actions." *Id.* at 683 (citation and internal quotation marks omitted). "If the school does so, the burden shifts back to [Mbawe] to establish that the school's proffered reason is merely a pretext for unlawful discrimination." *Id.* (citation omitted).

The parties do not dispute that Mbawe's mental illness renders him disabled under the ADA and § 504. On the second element, FSU argues, and the district court concluded, that Mbawe was not "otherwise qualified" to continue his studies because he no longer satisfied the pharmacy program's Technical Standards and because he failed to participate in the HPRP monitoring agreement that would have allowed him to maintain his pharmacy intern license. We agree.

"A handicapped or disabled person is 'otherwise qualified' to participate in a program if she can meet its necessary requirements with reasonable accommodation." *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998) (citation omitted). The plaintiff bears the burden of demonstrating that he is qualified by "proposing an accommodation and proving that it is reasonable, including establishing that he can meet a program's necessary requirements with that accommodation." *Shaikh v. Lincoln Mem'l Univ.*, 608 F. App'x 349, 353 (6th Cir. 2015) (quoting *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010); *Kaltenberger*, 162 F.3d at 435) (internal quotation marks omitted).

Without a reasonable accommodation, Mbawe

was not qualified to continue in the pharmacy program. As noted above, the program's Technical Standards require that a student "obtain and maintain a valid Pharmacist Intern license in the State of Michigan." When FSU officials medically withdrew Mbawe from the university, the state probate court had already determined—after a full adversarial hearing—that he was suffering from a "substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." Mich. Comp. Laws §§ 330.1400(g), 1401. Michigan law required FSU to report Mbawe's condition to LARA, *id.* § 333.16222(a), and LARA was obligated to initiate administrative proceedings once it learned that Mbawe was suffering from a condition that adversely affected his "ability to practice in a safe and competent manner," *id.* § 333.16221(b)(iii). Once the state court found that Mbawe suffered from a mental illness, he was no longer eligible to hold a pharmacy intern license, and he therefore no longer satisfied the Technical Standards.

Further, the Technical Standards required that Mbawe "possess the emotional and mental health required for full utilization of [his] abilities." [*Id.*] Even prior to his hospitalization, FSU officials were aware that Mbawe's mental illness was adversely affecting his ability to function in the program. He was absent from class and seemed confused regarding his schedule. Mbawe's involuntary commitment only served to heighten these concerns. Here too, Mbawe's illness rendered

him unable to meet the Technical Standards.

The question, then, is whether Mbawe could have continued in the pharmacy program *with* a reasonable accommodation. The district court correctly determined that Mbawe failed to "propose[] a reasonable accommodation to account for his disability," as was his duty. *Shaikh*, 608 F. App'x at 354 (quoting *Jakubowski*, 627 F.3d at 202). Mbawe never proposed any accommodation that would have allowed him to continue his studies and remain in compliance with the pharmacy program's Technical Standards. Indeed, in light of the state court's finding that he suffered from a mental illness, it is doubtful that such an accommodation existed, outside of participation in HPRP. This alone proves fatal to Mbawe's statutory claims.

Moreover, Mbawe rejected the accommodation FSU actually proposed—compliance with HPRP's monitoring agreement. In denying Mbawe's appeal, Dr. Blake explained that Mbawe could reapply to the pharmacy program if he was cleared by HPRP. This promise was reaffirmed by Dean Durst, Dr. Blake, and Dr. Bates in March. Nevertheless, Mbawe refused to sign the agreement before the deadline imposed by HPRP.

Mbawe does not contend that HPRP's proposed monitoring agreement or FSU's request that he comply with it were unreasonable. Rather, his only argument is that he rightly refused to sign the agreement because it contained an inconsequential error stating he was a pharmacist, not a pharmacy

student. But this error was attributable to HPRP, not the university; and in any event, Mbawe had a month to seek a correction. He did not. Mbawe cannot now claim that FSU should have provided him another specific accommodation—one that he did not propose—when he refused the reasonable accommodation actually offered to him by the university. *See Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 307 (6th Cir. 2016).

Mbawe's other arguments are similarly unavailing. He claims that FSU officials failed to engage in an "interactive process" to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations," as required by the ADA. *Keith v. Cty. of Oakland*, 703 F.3d 918, 929 (6th Cir. 2013) (citation omitted). This argument fails for two reasons.

First, we have held in the employment context that, to trigger the duty to participate in the interactive process, "[a]n employee has the burden of proposing an initial accommodation." *Jakubowski*, 627 F.3d at 202. Mbawe fails to explain why this rule should be any different in the educational context. As noted above, Mbawe failed to propose any accommodation that would have allowed him to remain qualified to be a pharmacy student, so FSU's duty to engage in the interactive process was never triggered.

Second, we have also held in the employment context that failure to participate in the interactive

process "is actionable only if it prevents identification of an appropriate accommodation for a qualified individual." *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 766 (6th Cir. 2015) (citation and emphasis omitted). Here, the only accommodation that would have allowed Mbawe to remain in compliance with the pharmacy program's Technical Standards— participation in HPRP—was identified by FSU and rejected by Mbawe. Because Mbawe failed to make a prima facie showing that he was qualified to continue his studies with or without accommodations, "we need not consider whether [FSU] failed to engage in the interactive process." *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 395 (6th Cir. 2017).

Mbawe also argues that FSU failed to follow its own policies for dealing with students suffering from a mental illness. True enough. FSU does not deny that the means by which it removed Mbawe from the pharmacy program—an "involuntary medical withdrawal"—was not an authorized university policy. But "the relevant inquiry is whether [FSU] violated the ADA or Section 504 of the Rehabilitation Act, not whether [FSU] followed its internal policies." *Shaikh*, 608 F. App'x at 355. As explained above, FSU violated neither statute. Moreover, Mbawe fails to appreciate that FSU's departure from its own policies worked in his own favor. He does not dispute that, had he failed one or more of his classes, he would have been academically dismissed from the program and that it would have been difficult, if not impossible, for him to ever return. The route chosen by FSU officials, though not

authorized under university policy, left open that possibility.

Because Mbawe failed to demonstrate that he was "otherwise qualified" to continue as a student in the pharmacy program, *Gohl*, 836 F.3d at 682, the district court did not err by granting summary judgment in FSU's favor on Mbawe's ADA and Rehabilitation Act claims.

B.

Mbawe also claims FSU deprived him of his Fourteenth Amendment right to procedural due process, in violation of 42 U.S.C. § 1983, by failing to provide him adequate notice and a hearing before withdrawing him from the pharmacy program. To prevail on his procedural due process claim, Mbawe "must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006).

The district court assumed, and FSU does not dispute, that Mbawe had "a property and liberty interest in continued enrollment in the pharmacy program." It is undisputed that Mbawe was removed from the program. His § 1983 claim therefore turns on the last element, whether he was afforded adequate process.

The amount of process Mbawe was due depends on whether Mbawe's dismissal was academic or disciplinary in nature. There is a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978). When a student is dismissed for academic reasons, the procedural requirements are "far less stringent," *id.*, and "a student is entitled only to notice that his or her academic performance was not satisfactory and a 'careful and deliberate' decision regarding [the school's] punishment," *Yoder v. Univ. of Louisville*, 526 F. App'x 537, 549 (6th Cir. 2013) (citing *Horowitz*, 435 U.S. at 85; *Ku v. Tennessee*, 322 F.3d 431, 436 (6th Cir. 2003)). "In contrast, courts reviewing a disciplinary action must conduct a 'more searching inquiry.'" *Id.* (quoting *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005)).

The term "academic" is something of a misnomer. Especially "in the context of medical school, academic evaluations are not limited to consideration of raw grades or other objective criteria." *Ku*, 322 F.3d at 436. For instance, in *Horowitz*, a medical student's dismissal was deemed academic after "the school warned her that significant improvement was needed not only in the area of clinical performance but also in her personal hygiene and in keeping to her clinical schedules," because "[p]ersonal hygiene and timeliness may be [] important factors in a school's determination of whether a student will make a good medical doctor." 435 U.S. at 91 n.6. Similarly, we held in *Ku* that a

medical school did not deprive a student of adequate procedural due process by suspending his studies without first holding a hearing, when the student not only failed an important exam, but also had "continued difficulty interacting with faculty and peers." 322 F.3d at 436; *see also Yoder*, 526 F. App'x at 539-42, 550-51 (university dismissed nursing student for academic reasons when she violated school's Honor Code by revealing confidential patient information on social media).

Here, Mbawe was subjected to an academic dismissal. FSU offered three justifications for withdrawing Mbawe from the pharmacy program: he had missed a significant number of classes, he was in jeopardy of failing his classes, and he was unlikely to maintain his pharmacy-intern license in light of his hospitalization. The district court correctly observed that these justifications plainly related to Mbawe's "ability to succeed in the pharmacy program and [his] fitness to perform as a pharmacist." Mbawe was not, as he claims, removed from school based upon a "violation . . . of valid rules of conduct" or "disruptive or insubordinate behavior." *Horowitz*, 435 U.S. at 86, 90.

Because Mbawe was subjected to an academic dismissal, FSU was not obligated to afford him a formal hearing. *Ku*, 322 F.3d at 436. "[W]hen the student has been fully informed of the faculty's dissatisfaction with the student's academic progress and when the decision to dismiss was careful and deliberate, the Fourteenth Amendment's procedural due process requirement has been met." *Id.* (citing

Horowitz, 435 U.S. at 85-86). Here, Dr. Bates discussed with Mbawe the possibility that he might medically withdraw from the pharmacy program before he was hospitalized. [R. 59-15, PageID 1713.] And after Mbawe was released from the hospital, Dean Durst and Dr. Bates met with him and discussed his academic situation. Mbawe was able to use the information he learned during that meeting in his subsequent appeal, the denial of which resulted in his removal from the pharmacy program. Prior to FSU's final decision, then, Mbawe was "fully informed of the faculty's dissatisfaction with [his] academic progress" and the school's concern regarding his fitness to continue as a pharmacy student. *Id.*

As noted above, the record also reflects that the FSU officials responsible for Mbawe's medical withdrawal were "careful and deliberate" in their decision-making. *Id.* They interacted with Mbawe on several occasions, attended the state court hearing that upheld his hospitalization, and extensively discussed the pharmacy program's Technical Standards and licensure requirement. Mbawe was allowed an appeal, the denial of which was explained to him both in person and in writing. Put differently, Mbawe "was given particularized professional attention by faculty members at all levels in an effort to protect patients while helping [Mbawe] improve his chances of success." *Ku*, 322 F.3d at 437; *see also Shaboon v. Duncan*, 252 F.3d 722, 726-28, 731 (5th Cir. 2001) (upholding academic dismissal of a medical student without a hearing after student refused to seek mental health treatment). Mbawe

received the process to which he was entitle, and the district court rightly granted summary judgment in FSU's favor on his procedural due process claim.

IV.

Through no fault of his own, John Mbawe fell victim to a mental illness that eventually cost him a place in his chosen profession. Once the state court determined that Mbawe met the statutory criteria for involuntary commitment, his pharmacy intern license and, by extension, his ability to satisfy the Technical Standards of the FSU pharmacy program were undeniably compromised. Then, perhaps afflicted by his condition, Mbawe refused to pursue the only course of action that afforded him an opportunity to resume his studies and eventually become a pharmacist. This is not to say that FSU could not do better the next time it is confronted with a student facing a mental health crisis. But, affording FSU the deference it is due in this particularly sensitive setting, the district court correctly concluded that Mbawe could not prevail on his statutory and constitutional claims.

AFFIRMED.

John MBAWE, Plaintiff,
v.

FERRIS STATE UNIVERSITY, et at., Defendant.

Case No. 16-1189

Signed 01/10/2018

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OPINION AND ORDERS

ROBERT J. JONKER, UNITED STATES DISTRICT JUDGE

Plaintiff John Mbawe is a former student of Ferris State University's College of Pharmacy ("pharmacy program"). During his third year, he began making paranoid and delusional statements claiming he was being poisoned. A State probate court ultimately entered an order involuntarily committing Plaintiff for mental health treatment. The order was never appealed or vacated. After Plaintiff's commitment, Defendants withdrew Plaintiff from the pharmacy program. Readmission remained a possibility, but Plaintiff did not complete

the Michigan Health Professionals Recovery Program ("HPRP"), a non-disciplinary program designed to assist participants recover from substance abuse or mental health problems, as a condition of readmission.

Plaintiff brought this disability discrimination action against Defendants on September 30, 2016, alleging statutory violations under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*, as well as constitutional violations under 42 U.S.C. § 1983 for substantive and procedural due process right violations.[1] The matter is before the Court on Defendants' Motion for Summary Judgment. (ECF No. 61). Plaintiff has responded to the motion, and Defendants have replied. (ECF Nos. 69; 77). After careful review of the record, the Court considers oral argument unnecessary to resolve the matter. Plaintiff's claims under the ADA and Rehabilitation Act fail because Plaintiff cannot show he was "otherwise qualified" to continue in the pharmacy program. Plaintiff's Due Process claims fail because his allegations do not amount to a violation of his substantive due process rights and Plaintiff received adequate procedural process. Accordingly, Defendants' Motion for Summary Judgment will be GRANTED.

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[1] Plaintiff also brought a claim of conspiracy under 42 U.S.C. § 1985 but has stipulated to the dismissal of this claim. (ECF No. 69, PageID.2499). Accordingly, the Court need not consider it.

I. Background

I. Plaintiff's Enrollment in the Pharmacy Program

Plaintiff registered as a student in the pharmacy program in 2010. (ECF No. 1, PageID.4). The program ordinarily consists of three years of academic instruction in a classroom setting, followed by a one-year internship. (*Id.*). Plaintiff avers he entered the program on a remedial track that afforded him an additional year within which he could complete his academic instruction. (ECF No. 59, PageID.1417).

When Plaintiff enrolled, he signed a document entitled "Technical Standards for Students Admitted to The Doctor of Pharmacy Degree Program." (ECF Nos. 58-33; 69-1). The document stated that each student in the pharmacy program must be able to demonstrate proficiency in the listed skills, with or without reasonable accommodation, and the pharmacy program reserved the right to dismiss an admitted student who fell out of compliance with the Technical Standards. (*Id.*). Furthermore, because of the internship component, the Technical Standards required all students in the pharmacy program to maintain an educational "Pharmacist Intern license" that is issued by the State of Michigan[2]. (*Id.*). The license is also required

[2] Plaintiff's response brief disputes that the Technical Standards

by Michigan law. *See* MICH. COMP. LAWS § 333.17737(2). Plaintiff received his limited educational license on July 14, 2010. (ECF No. 1, PageID.4). The license was suspended in the wake of Plaintiff's involuntary commitment.

Plaintiff struggled in his coursework from the beginning of his time in the program. In fact, when Plaintiff failed to achieve a GPA of 2.0 after his first year, he was academically dismissed from the pharmacy program. Plaintiff successfully appealed his dismissal, however, and he was reinstated with a number of conditions. (Pl.'s Dep. at 9-13, ECF No. 58-2, PageID.990). Plaintiff managed to stay above the GPA threshold through the 2012-2013 academic year, however during the summer of 2013, if not before, Plaintiff began exhibiting a troubling pattern of behavior that Defendants believed demonstrated delusional and paranoid thinking. A state court agreed, and ordered Plaintiff's involuntary commitment after reviewing the recommendation of two independent physicians, as required by Michigan law. After the involuntary commitment, Plaintiff did not gain readmission to the program.

II. Plaintiff Tells Others He is Being Poisoned and Program Administrators Become Aware of Plaintiff's Mental Health Issues

Over the summer of 2013, Plaintiff treated

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require the license, but the document as submitted by Plaintiff plainly requires the license. (ECF No. 69-1, PageID.2503).

with healthcare professionals at the university's Birkam Health Center ("BHC") for an idiopathic medical condition causing severe abdominal pain. (ECF No. 1, PageID.4). During some of these visits, Plaintiff told BHC health professionals that he believed he was being bullied by a group of people. He thought the group put some sort of liquid on his car and on his left arm, which caused his skin to darken. Plaintiff also thought someone had broken into his apartment and poisoned his food. (ECF No. 1, PageID.5). Plaintiff says he told some of the pharmacy program staff that he was concerned for his own health. (ECF No. 59-26, PageID.1845). Defendants contend this was neither the first time nor the last time Plaintiff demonstrated paranoid behavior[3].

Once the fall 2013 semester began, Plaintiff began missing his classes. Plaintiff's instructors thought Plaintiff was confused about his class schedule and course requirements. Plaintiff also told

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[3] In addition to police records related to Plaintiff's belief his apartment was being broken into, Defendants provide the Declaration of Travis Mitchell, who avers that he was the property manager of a self-storage facility where Plaintiff previously rented a storage unit. Mr. Mitchell states that in July 2013 he required Plaintiff to vacate his unit after Plaintiff accused another tenant of following him. (ECF No. 58-6, PageID.1083). In his deposition, Plaintiff denied harassing anyone, but admitted he was told to vacate the unit. (ECF No. 45-3, PageID.517-518). Defendants also provide an arrest report dated March 5, 2017, from the Hyattsville, Maryland Police Department. The report states Plaintiff was arrested after he allegedly punched a driver whom he believed had been following him. (ECF No. 45-2, PageID.508).

one of his professors he was being injected with drugs while he slept. (ECF No. 58-23, PageID.1195). Reports expressing concern about Plaintiff eventually made their way to the pharmacy program's student services coordinator, Defendant Jeffrey Bates, who says he spoke to Plaintiff about these concerns on several occasions. During these conversations Plaintiff continued to claim he was being injected with needles while he slept. (*Id.*). Troubled by these statements, and by the earlier reports, Defendant Bates sent two e-mails, dated September 16 and 18, 2013, to Plaintiff's professors. Defendant Bates wrote that Plaintiff had "some serious health issues going on" and that Defendant Bates had discussed those issues with Plaintiff's physician. (ECF No. 1, PageID.5-6).

Meanwhile, at the beginning of the fall semester Plaintiff learned his brother had passed away. Plaintiff requested a week long excused absence in order to travel home to Africa to attend his brother's funeral, but Plaintiff ultimately decided not to make the trip. (ECF No. 1, PageID.6). Even though Plaintiff did not make the trip, Defendants argue these plans are important because they link Plaintiff to notes on three scraps of paper found in a university restroom on September 16, 2013. The scraps of paper allegedly contain Plaintiff's hand-written notes and contain remarks about flight plans and statements indicating Plaintiff believed he was in danger and was being injected.[4] Specifically the

[4] During his deposition, Plaintiff implicitly acknowledged writing the statements, but testified he did not know how they

notes state that Plaintiff believed unspecified individuals were sent to "stick" him at night, and that he believed "they are killing me for nothing," and "I know I will die for what they have on my body." The notes also expressed a belief that there were cameras in the Plaintiff's apartment, and that Plaintiff's food was being poisoned. (ECF No. 1, PageID.6; ECF No. 24-1, PageID.257). Plaintiff further pled for someone to rescue him because he knew there were "good people in America." (*Id.*).

On September 19, 2013, Plaintiff missed a scheduled appointment with Dr. Susan Davis, his primary care physician at BHC. Defendants have submitted Dr. Davis' note from the canceled visit. In the note, Dr. Davis wrote that Defendant Bates called the doctor to discuss the notes that had been found in the bathroom and Defendant Bates attributed the notes to Plaintiff. Dr. Davis' note states the clinic was attempting to reach Plaintiff, and that the doctor had diagnosed Plaintiff with an altered mental status. (ECF No. 58-16, PageID.1160). Plaintiff was eventually reached later that day and seen at BHC by Nurse Melissa Sprague. Plaintiff told the nurse he had recently lost his brother and was not feeling well. The nurse's treatment note reports that Plaintiff made comments similar to those contained on the slips of paper. Specifically, Plaintiff "claim[ed] that people [were] coming into his apartment and poisoning his food and injecting

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got to the university's bathroom. (Pl.'s Dep. at 202-204, ECF No. 58-3, PageID.1029).

thinks [sic] into his body." (ECF No. 59-11, PageID.1648). Nurse Sprague's assessment was that Plaintiff had a mental disorder, though she did not find Plaintiff's behavior threatening or bizarre. (*Id.*) Plaintiff gave permission for BHC staff to talk to Defendant Bates, and Nurse Cande Price made the call. Despite the statements Plaintiff had made, Ms. Price reported Plaintiff was "rational and is unwilling to see a psychiatrist" and that Plaintiff was not a threat either to himself or to others. (ECF No. 59-11, PageID.1649).

Dr. Davis testified during her deposition that she agreed with Nurse Price that Plaintiff did not pose a threat. (ECF No. 59-14, PageID.1695). Plaintiff argues, however, that his professors were pressuring the doctor and demanding that Plaintiff see the school psychologist. Dr. Davis thus encouraged Plaintiff to see a psychiatrist to prove his professors wrong and take the pressure off her. (ECF No. 59-26, PageID.1845). Plaintiff agreed, and on September 20, 2013, Plaintiff met with Mr. Thomas Liszewski, MA, LLP, LPC, for an assessment.

Plaintiff's presenting problem was described as being "[d]elusional," though the initial intake found Plaintiff was oriented to all spheres. Plaintiff's risk assessment was also "low" and Mr. Liszewski wrote Plaintiff seemed "quite friendly and rational." (ECF No. 59-11, PageID.1650). But during the examination, Plaintiff made statements consistent with what he had told Nurse Sprague, as well as what was on the slips of paper found in the university restroom. Plaintiff told Mr. Liszewski that he had been bullied by three other pharmacy

students. They broke into Plaintiff's apartment every night and injected him with poison. Plaintiff moved to a different apartment but the group of students found where he had moved and continued injecting him. (*Id.*). Plaintiff had his blood tested at BHC because he did not trust the results from another lab. Plaintiff also showed Mr. Liszewski where on his body he believed he had been injected, but the psychologist did not see any skin puncture or discoloration. (*Id.*).

The psychologist told Plaintiff his beliefs were not rational, and Plaintiff's accusations seemed delusional and paranoid. (*Id.*). When Plaintiff asked why the police would not help him, the psychologist called the university's chief security officer and allowed Plaintiff to listen in. The officer told Mr. Liszewski that he believed Plaintiff "was schizophrenic and needed to be hospitalized" although he did not think Plaintiff was an "eminent [sic] threat to himself or anyone else." (*Id.*). Mr. Liszewski recommended that Plaintiff go to a mental health agency or the ER, but Plaintiff refused. (ECF No. 59-11, PageID.1650). After conferring with a physician, Mr. Liszewski did not believe he had the right to do anything besides what he had recommended. (*Id.*).

III. Pharmacy Program Administrators Decide to Petition for Plaintiff's Hospitalization.

Pharmacy program administrators remained concerned and decided to take action. Events moved

quickly on September 24, 2013. On that date, a Behavior Review Team ("BRT") meeting was convened to discuss Plaintiff's mental health.[5] (ECF No. 1, PageID.7). The team was composed of several individuals, including Defendant Bates and Defendant Renee Vander Myde.[6] According to minutes taken during the meeting, the BRT discussed Plaintiff's poor attendance, his visits to BHC, the statements he had made to his physicians and professors, and the slips of paper that had been found. (ECF No. 59-15, PageID.1712-1713). Defendant Bates told the team that Plaintiff had admitted to writing the notes on the slips of paper, and that Plaintiff was "on his 'last strike'" and "very close to being dismissed[.]" (ECF No. 59-15, PageID.1713). Defendant Bates stated he had spoken with Plaintiff about a medical withdrawal from the pharmacy program, but Plaintiff was not interested in withdrawing.

Ultimately, Defendant Vander Myde decided Plaintiff needed to be hospitalized. Following a short talk with Plaintiff, Defendant Vander Myde completed a "Petition/Application for Hospitalization." (ECF No. 1-4, PageID.70). On the form, Defendant Vander Myde stated Plaintiff had a mental illness requiring treatment and checked three boxes reflecting her belief that that:

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[5] The BRT is a forum for faculty, staff, and students to report observed behaviors of any person within the college community that warrant serious concern. (ECF No. 1-1, PageID.40).

[6] Defendant Vander Myde was the director of the BHC, and herself a limited licensed psychologist.

as a result of this mental illness, [Plaintiff] can be reasonably expected within the near future to intentionally or unintentionally seriously physically injure [him]self or others, and has engaged in an act or acts or made significant threats that are substantially supportive of this expectation.

[Plaintiff] is unable to attend to those basic physical needs that must be attended to in order to avoid serious harm in the near future, and has demonstrated that inability by failing to attend to those basic physical needs.

[Plaintiff's] judgment is so impaired []he is unable to understand the need for treatment. Continued behavior as the result of this mental illness can be reasonably expected, on the basis of competent clinical opinion, to result in significant physical harm to self or others.

(ECF No. 1-4, PageID.70). Defendant Vander Myde also wrote that:

The health center physician, a staff counselor, and at least two members of the faculty have expressed concerns to me and shared detailed information regarding John Mbawe and his mental status. I spoke with John Mbawe today and he made several delusional and paranoid statements regarding his belief others are trying to kill him by coming into his apartment at night and injecting him with poison and drugs. He is refusing to eat because he believes his food is being poisoned as well.

(ECF No. 1-4, PageID.70). Defendant Vander Myde then faxed the completed form to the Kent County Probate Court.[7] After reviewing the petition, the State court entered an order dated the same day that required Plaintiff be taken into custody and examined by mental health professionals. (ECF No. 1-4, PageID.71).

IV. The State Court Orders Plaintiff Hospitalized

On October 1, 2013, Grand Rapids police located Plaintiff at the university's campus and took Plaintiff into protective custody for a 48 hour hold. (ECF No. 1-5, PageID.73-74). Plaintiff was first taken to Network 180, a mental health facility, then to St. Mary's Hospital, and ultimately to Pine Rest Christian Mental Health Services. (ECF No. 1-5, PageID.73). Plaintiff subsequently was examined by two physicians. Both physicians concluded that Plaintiff had a mental illness requiring treatment,

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[7] Plaintiff contends that Defendant Vander Myde made a number of misrepresentations on the petition. Plaintiff does not contest, however, that Plaintiff made the statements Defendant Vander Myde attributed to him or that other school officials were concerned about Plaintiff's behavior. The issue boils down to possible disagreement among school officials about whether Plaintiff's behavior warranted involuntary hospitalization. That disagreement became immaterial when a state probate court judge made the call after considering the recommendation of two independent physicians.

and recommended hospitalization. (ECF No. 24-2, PageID.259-262). Plaintiff was hospitalized at Pine Rest through October 16, 2013.

On October 2, 2013, the day after Plaintiff was hospitalized, Defendant Vander Myde notified the university that Plaintiff had been placed on medical leave, and that the BHC would let the university know if Plaintiff withdrew from the program. (ECF No. 1, PageID.10). On October 10, 2013, a hearing regarding Plaintiff's hospitalization was held in the Kent County Probate Court. At the hearing Defendant Vander Myde, Dr. Verle Bell (a staff psychiatrist from Pine Rest), and Plaintiff all testified. Following the hearing, Judge Mark Feyen found Plaintiff was a person requiring treatment under the mental health code and ordered Plaintiff's continued treatment for up to ninety days – sixty of which could consist of hospitalization. (ECF No. 59-18, PageID.1756-1777).

V. Program Administrators Decide to Withdraw Plaintiff from the Pharmacy Program and University.

The day after the State court ordered Plaintiff's continued hospitalization, the BRT met to discuss Plaintiff's status in the pharmacy program. During the conversation, the team discussed the university's student handbook, the program's technical standards, and the university's dismissal policy. (ECF No. 59-19, PageID.1779). It was noted that Plaintiff's "licensure issues may trump all of

this," however a team member recommended staying on the "academic side of things." (*Id.*). Given the State court's commitment order, Plaintiff was obviously in a tenuous position academically and on his licensure. The only question remained how to manage that reality.

Following further discussion, it was decided that Plaintiff should be withdrawn from the university for medical reasons, and Defendant Bates e-mailed Defendant Vander Myde on October 15, 2013, to "formally request[] that a Medical Withdrawal be processed" for Plaintiff. (ECF No. 59-19, PageID.1780). Defendant Bates expanded on this by stating that the request was made "[d]ue to [Plaintiff's] inability to attend classes related to a medical condition and in an effort to help [Plaintiff] avoid failing his classes this semester[.]" (*Id.*). The same day, Defendant Durst, the Dean of the College of Pharmacy, e-mailed the BRT to state that the university had decided to medically withdraw Plaintiff from the pharmacy program. Defendant Durst also informed Plaintiff's professors. (ECF No. 1, PageID.10).

Plaintiff contends the procedures used to arrive at the withdrawal decision were contrary to the university's established policy for handling students that school officials believed had mental health problems and also ran against the university's policy that medical withdrawals could only be initiated by a student. Plaintiff further argues the withdrawal compromised his license because he was

no longer enrolled as a student in the program.[8] Of course, the University had no general policy for dealing with students who were the subject of an involuntary commitment order. By choosing to use a medical basis for withdrawal, rather than the normal academic basis, Defendants believed they were preserving an easier pathway for Plaintiff's return. (ECF No. 59-16, PageID.1724). In either case, the State court's commitment order ensured that the Michigan licensing authority would be involved in any such return.

VI. Plaintiff Finds Out He was Withdrawn and Appeals

After he was discharged from Pine Rest on October 16, 2013, Plaintiff contacted two of his professors asking to make up lost work. One of Plaintiff's professors told him about Defendant Durst's e-mail and advised Plaintiff to contact Defendant Durst. (ECF No. 59-16, PageID.1720-

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[8] A pharmacy intern must notify the pharmacy board if he is no longer actively enrolled in a pharmacy degree program. MICH. ADMIN. CODE R. 338.473a. (ECF No. 59, PageID.1418). It was the State court's commitment order, itself, however, that was the first action ensuring that Plaintiff's license would be at risk. This is because the school itself was obligated to report the commitment order, which at a minimum established Plaintiff was a person requiring treatment. *See* MICH. COMP. LAWS §§ 333.16221-22 (identifying grounds for investigation and eventual action by the Department of Licensing and Regulatory Affairs, and requiring reporting); MICH. COMP. LAWS §§ 330.1400(g), 1401 (describing findings necessary for a commitment order).

1721). Plaintiff did so, and on October 17, Plaintiff met with Defendants Durst and Bates. Plaintiff's cousin, a professor based in Chicago, also participated via telephone. (Pl.'s Dep. at 245, ECF No. 58-3, PageID.1039). During the meeting, the Defendants confirmed to Plaintiff that he had been withdrawn from the program and explained Plaintiff's academic situation to him. (ECF No. 59-16, PageID.1724). Plaintiff requested information on how to appeal, and the day after the meeting Plaintiff was told to submit an appeal to Defendant Paul Blake (the Associate Provost for Academic Affairs at Ferris State). (ECF No. 1, PageID.13). Following the October 17th meeting, Defendant Bates referred Plaintiff to HPRP. (ECF No. 58-23, PageID.1207). This appears to have been informal at first, with a formal referral received by HPRP on November 4, 2013. (ECF No. 45-7, PageID.560).

Plaintiff submitted an appeal on October 21, 2013. In it, Plaintiff claimed to have been discriminated against because he was African American.[9] (ECF No. 59-26, PageID.1845-1847). During the pendency of Plaintiff's appeal, Defendant Durst wrote to Defendant Blake. Defendant Durst stated that he and Defendant Bates felt that "overturning [Plaintiff's] medical withdrawal may place [Plaintiff] in greater peril for an academic dismissal, which will likely make the task of gaining

[9] Plaintiff is actually from Cameroon, Africa and was admitted to the United States on asylum. (ECF No. 59-2, PageID.1439). He is currently a resident of Maryland. Plaintiff is not pursuing a race or alienage claim.

readmission even more difficult at some point down the road." (ECF No. 59-16, PageID.1724). Defendant Durst added that Defendant Bates was gathering Plaintiff's current grades to assess Plaintiff's current standing, and that the program had "yet to approach the issue related to licensure and [Plaintiff's] ability to obtain and maintain either an intern license or a pharmacist license." (*Id.*).

On October 22, 2013, Defendant Bates e-mailed Plaintiff's professors to ask whether Plaintiff would be able to pass his classes if he were given excused absences from October 1, 2013, onward. (ECF No. 59-16, PageID.1735). Plaintiff's professors responded with various degrees of uncertainty. One stated that it was "theoretically possible" for Plaintiff to pass. (ECF No. 59-16, PageID.1726). Another said Plaintiff's current grade was a C, but it was impossible to predict where Plaintiff would end up at the close of the semester. (ECF No. 59-16, PageID.1728). Another responded that if she were forced to choose, Plaintiff would fail. (ECF No. 59-16, PageID.1733). Finally another professor responded that if Plaintiff could make up a missed midterm, Plaintiff could theoretically pass the class. (ECF No. 59-16, PageID.1731). No professor was willing to provide an unqualified prediction of success.

Defendants Durst, Bates, and Blake met with Plaintiff on November 5, 2013, to discuss his appeal. Plaintiff was told his appeal had been denied, and the withdrawal would stand, for three reasons: (1) he had missed too many classes; (2) Plaintiff was

already on the remedial track of the pharmacy program; and (3) Plaintiff had been reported to the HPRP and would need to reconcile his licensure issue before returning to the internship. (ECF No. 1-9, PageID.86).

Plaintiff requested a formal letter regarding his appeal from Defendants. On November 18, 2013, Defendant Blake wrote Plaintiff and restated the appeal was being denied for three reasons:

1. The time you had missed from class was significant and the unanimous assessment of your professors was that you could not successfully complete your courses.

2. Since you were already on a remediation track within the Pharmacy Program and were at risk of academic dismissal, upholding the medical withdrawal would reduce your risk of dismissal from the Program.

3. Most importantly, your licensure to complete your internship had been compromised and until that issue was/is resolved you would not be able to complete your internship.

(ECF No. 59-26, PageID.1848-1849). Plaintiff was told that the "next steps for re-engagement in the Pharmacy Program are to gain clearance from HPRP and reapply to the University and the Pharmacy Program. This is University policy." (ECF No. 59-26, PageID.1849). A month later, when it appeared to Defendant Durst that Plaintiff was not interested in

reapplying, Defendant Durst wrote that the pharmacy program should contact the state licensing board and inform them that Plaintiff had been dismissed from the program. Defendant Durst further noted Plaintiff's license had been suspended since he was no longer enrolled in the pharmacy program and Plaintiff's failure to comply with HPRP made it doubtful that Plaintiff would be re-licensed. (ECF No. 59-16, PageID.1745).

VII. Administrative Action

Plaintiff initially did not respond to HPRP's communications, and Plaintiff's case was closed as non-compliant on December 12, 2013. (ECF No. 45-6, PageID.555). Thereafter, it appears Plaintiff petitioned to reopen the case and his request was granted. Once his case was reopened, HPRP required Plaintiff to undergo a psychiatric evaluation with Dr. Bela Shah, M.D. (ECF No. 45-6, PageID.554-557). Dr. Shah's evaluation was conducted on January 29, 2014. The doctor found Plaintiff to be cooperative, but evasive at times. Plaintiff had spontaneous speech, with an euthymic mood and appropriate affect. Plaintiff also appeared alert and oriented, but he had limited insight. (ECF No. 45-6, PageID.556). Dr. Shah's impression was that Plaintiff had delusional beliefs with some paranoid psychotic behaviors. She noted Plaintiff had stopped taking his medications after his hospitalization at Pine Rest, and the doctor diagnosed Plaintiff with a delusional disorder and assigned him a GAF score of 54.[10] The

[10] The GAF score is a subjective determination that represents

doctor recommended that Plaintiff be monitored by HPRP for his mental health disorder, that he receive therapy, and that he meet with a psychiatrist to restart his medication regimen. Dr. Shah further concluded that Plaintiff could not safely practice with his educational license until Plaintiff's condition had stabilized, he had restarted his medications, and signed a monitoring agreement with HPRP. (ECF No. 45-6, PageID.557).

The HPRP concurred with Dr. Shah that Plaintiff should be placed under a monitoring agreement. It further agreed that Plaintiff could not safely practice under his educational license. Thereafter, Plaintiff was sent a monitoring agreement that required, *inter alia*, Plaintiff attend therapy. (ECF No. 58-43). Plaintiff received the

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"the clinician's judgment of the individual's overall level of functioning" on a hypothetical continuum of mental health-illness. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM- IV-TR)*, (4th ed., text rev., 2000), pp. 32, 34. The GAF score is taken from the GAF scale, which rates individuals' "psychological, social, and occupational functioning," and "may be particularly useful in tracking the clinical progress of individuals in global terms." *Id.* at 32. The GAF scale ranges from 100 to 1. *Id.* at 34. At the high end of the scale, a person with a GAF score of 100 to 91 has "no symptoms." *Id.* At the low end of the GAF scale, a person with a GAF score of 10 to 1 indicates "[p]ersistent danger of hurting self or others (e.g., recurrent violence) OR persistent inability to maintain minimal personal hygiene OR serious suicidal act with clear expectation of death." *Id.* A GAF score of 54 reflects the clinician's judgment that the individual suffers from moderate symptoms or moderate difficulty in social, occupational, or school functioning. *Id.*

monitoring agreement, but did not sign it. After Plaintiff refused to sign the monitoring agreement, HPRP closed the case and forwarded it to the Michigan Department of Licensing and Regulatory Affairs ("LARA") for further action.[11] (ECF No. 45-7, PageID.561).

Thereafter, LARA brought an administrative complaint against Plaintiff. (ECF No. 45-7, PageID.559). The complaint alleged that Plaintiff's conduct "indicates that [Plaintiff] suffers from a mental or physical inability reasonably related to and adversely affecting [Plaintiff's] ability to practice in a safe and competent manner[.]" (ECF No. 45-7, PageID.562). LARA recommended that a hearing be held, and that Plaintiff's limited educational license ultimately be suspended. (*Id.*). When Plaintiff did not respond to the complaint, however, LARA issued a Final Order dated October 2, 2014, that summarily suspended Plaintiff's educational license for a minimum of six months and one day for violation of MICH. COMP. LAWS § 333.16221(b)(iii).[12] (ECF No. 45-8, PageID.565-568). Plaintiff was also fined, and

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[11] See *Lucas v. Ulliance, Inc.*, No.15-10337, 2016 WL 1259108, at *2 (E.D. Mich. Mar. 31, 2016) for a discussion of the interplay between LARA and HPRP.

[12] This statute allows LARA to take disciplinary action against a licensee who has a "[m]ental or physical inability reasonably related to and adversely affecting the licensee's or registrant's ability to practice in a safe and competent manner." MICH. COMP. LAWS.
§ 333.16221(b)(iii).

LARA ordered that if Plaintiff sought relicensure or reinstatement, he would first be required to seek permission. (ECF No. 45-8, PageID.566). Plaintiff filed a request for reconsideration, however his request was rejected as being untimely. (ECF No. 58-25, PageID.1242). It does not appear Plaintiff has applied for relicensure since the suspension and expiration of his educational license.

On July 29, 2016, the Department of Education's Office for Civil Rights concluded its investigation. (ECF No. 1-1, PageID.63-64). Plaintiff brought this action on September 30, 2016. Defendants filed the instant motion on September 26, 2017, and move for summary judgment on all counts.

LEGAL STANDARD

Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003) (citing FED. R. CIV. P. 56(c)). A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, the Court views the evidence and draws all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). But that does not mean that any amount of evidence, no matter how small, will save a nonmoving party from losing on a motion for summary judgment. *Scott v.*

Harris, 550 U.S. 372, 380 (2007).

DISCUSSION

I. Initial Matters

On August 25, 2017, the Court ordered the parties to submit supplemental briefing on the state processes and whether subject matter jurisdiction existed to bring suit in this Court. (ECF No. 55). The parties have each filed briefs, and responses to those briefs. Based on further development of the factual record, the Court is satisfied it has jurisdiction over the matter, and can address the merits of the case.

There are also a number of other pending substantive motions. These include Defendant Vander Myde's Motion for Judgment on the Pleadings (ECF No. 23), Defendant Ferris State's Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim (ECF No. 29), Defendants' Motion to Compel Psychiatric Examination (ECF No. 44), Defendants' Motion in Limine regarding records of Plaintiff's arrest in Maryland (ECF No. 52), and Defendants' Second Motion to Compel Plaintiff to Respond to Defendants' Requests for Admissions (ECF No. 71). The Motion for Judgment on the Pleadings will be denied as moot because Defendant Vander Myde is the prevailing party here. The Motion to Dismiss for Lack of Jurisdiction will be denied since the Court concludes it has jurisdiction over the matter. The remaining substantive motions will also be denied. Neither a psychiatric evaluation, nor the alleged events in Maryland, records from the

Grand Rapids police, or communication records from the HPRP were necessary to reach the conclusion that Defendants are entitled to summary judgment on all counts.

II. Plaintiff's Claims

Since Plaintiff has stipulated to the dismissal of the conspiracy claim, there are four remaining claims in Plaintiff's Complaint: the two statutory claims for violations of Title II of the ADA and Section 504 of the Rehabilitation Act, and the two constitutional claims for violations of Plaintiff's substantive and procedural due process rights. For reasons discussed below, Defendants are entitled to summary judgment on all the remaining claims.

A. Statutory Claims

1. Requirements of a Title II and Section 504 Case

In the first two claims of his Complaint, Plaintiff argues Defendant Ferris State University discriminated against him in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et. seq*., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[13] Each

[13] In both counts, Plaintiff contends the university discriminated against him by: (1) subjecting him to a process that did not exist under the university's policies and procedures; (2) allowing students, but not Plaintiff, to continue their education regardless of their medical condition or situation; (3) choosing not to follow the university's written policy and procedures for handling students with mental health crises; (4) failing to provide due process protections to Plaintiff that were afforded to other students; (5) denying Plaintiff access to

act allows qualified individuals with a disability "to sue certain entities . . . that exclude them from participation in, deny them benefits of, or discriminate against them in a program because of their disability." *Gohl v. Livonia Public Schs. Sch. Dist.*, 836 F.3d 672, 681 (6th Cir. 2016). In circumstances where, as here, the differences between the two statutes are immaterial to resolving the claims of the case, courts in the Sixth Circuit analyze the two claims together. *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445, 452-453 (6th Cir. 2008).

A plaintiff can "defeat a summary judgment motion through an indirect or direct showing of discrimination." *Gohl*, 836 F.3d at 682. To proceed with an indirect case, the familiar *McDonnell Douglas* test applies, and a plaintiff is required to show "that he (1) is disabled under the statutes, (2) is 'otherwise qualified' for participation in the program, and (3) 'is being excluded from participation in, denied the benefits of, or subjected to discrimination' because of his disability or handicap, and (4) (for the Rehabilitation Act) that the program receives federal financial assistance." *Id.* (quoting *G.C. v. Owensboro Public Schs.*, 711 F.3d 623, 635 (6th Cir. 2013)). Where the claim is based on direct evidence of discrimination, a plaintiff "must simply produce

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campus; (6) requiring Plaintiff be escorted to a meeting with the Dean of the pharmacy program; (7) reporting Plaintiff to HPRP; and (8) providing greater due process protections to students who represented an actual threat. (ECF No. 1, PageID.20-21, 23-24).

enough evidence of discrimination to persuade a reasonable jury that animus was a but- for cause of the challenged act." *Id.* (quoting *Morgan v. SVT, LLC*, 724 F.3d 990, 995 (7th Cir. 2013)). However, under either test, Plaintiff bears the burden of showing that he is "otherwise qualified." *Hardenburg v. Dunham's Athleisure Corp.*, 963 F. Supp. 2d 693, 701 (E.D. Mich. 2013).

2. Whether Plaintiff was "Otherwise Qualified" to Continue in the Pharmacy Program.

For the purposes of the instant motion, Defendants concede that Plaintiff has a disability as defined by the statutes. (ECF No. 62, PageID.1866). However, Defendants argue that at the time Plaintiff was withdrawn he was not "otherwise qualified" to participate in the pharmacy program. The Court agrees.

"A handicapped or disabled person is 'otherwise qualified' to participate in a program if []he can meet its necessary requirements with reasonable accommodation." *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998) (citing *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1034 (6th Cir. 1995)). "'A plaintiff asserting a violation of the ADA or Rehabilitation Act bears the burden to establish that he is qualified.'" *Shaikh v. Lincoln Mem'l Univ.*, 608 F. App'x 349, 353 (6th Cir. 2015) (quoting *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 462 (4th Cir. 2012)). Specifically, "Plaintiff must present

sufficient evidence to show he could satisfy the program's necessary requirements, or that any reasonable accommodation by the school would enable him to meet these requirements." *Yaldo v. Wayne State Univ.*, No. 15-cv-13388, 2017 WL 2507213, at *17 (E.D. Mich. June 8, 2017) (citing *Shaikh*, 608 F. App'x at 353). When reviewing "the substance of a genuinely academic decision" courts "should show great respect for the faculty's professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 255 (1985). This is especially true "'regarding degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession.'" *Kaltenberger*, 162 F.3d at 437 (quoting *Doherty v. Southern Coll. of Optometry*, 862 F.2d 570, 576 (6th Cir. 1988)).

a. The Pharmacy Program's Technical Standards and Licensure Requirement

The Technical Standards for admitted students in the pharmacy program required students to "meet required aptitude, abilities and skills" in several skill areas. Two of those skills appear as follows:

45 Behavioral and Social Attributes: An applicant or student must possess the emotional and mental health required for full utilization of their abilities, exercise good judgment and prompt completion of responsibilities. Empathy, integrity, honesty, concern for others, patience, good interpersonal skills, strong work ethic and motivation

are required. Applicants and students must be capable of developing the maturity to maintain a professional demeanor and organization in the face of long hours, personal fatigue, and dissatisfied patients and colleagues under varying degrees of stress. Students will, at times, be required to work for extended periods of time outside of the 8am-5pm "work day". Students must be able to maintain a level of behavior, demeanor, personal hygiene, communication and dress that is expected of patient and caregivers in acute, sub-acute and community practice settings, as well as the classroom and laboratory setting.

46 **Ethical Values:** An applicant and student must demonstrate a professional demeanor, conduct and behavior that are appropriate to his/her standing in the professional degree program. This includes compliance with the administrative rules applicable to the profession of pharmacy; and honor codes of the College of Pharmacy and Ferris State University. Under all circumstances, students must protect the confidentiality of any and all patient information in their professional and personal communications. Students must meet the ethical standards set forth in the profession of pharmacy. In addition, students must be able to obtain and maintain a valid Pharmacist Intern license in the State of Michigan and pass requisite criminal background check, drug tests/screens, immunization/tests, and training required by the Michigan Board of Pharmacy rules, Michigan law and/or Ferris State University College of Pharmacy affiliated experiential sites and their accrediting

and/or regulatory agencies.

(ECF No. 69-1, PageID.2503-2504). There is no dispute that these were necessary requirements for participation in the pharmacy program. And no reasonable jury could find that Plaintiff was able to meet these necessary skills without accommodation when he was withdrawn. When the State court ordered Plaintiff's treatment for a period up to ninety days, the court had the opinions of two examining physicians who both found Plaintiff met Michigan's statutory definition of a mental illness,[14] that is, a "substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." (ECF No. 24-2, PageID.259, 261). The State court also heard from Dr. Verle Bell, who testified that even though Plaintiff might be discharged soon after the hearing, Plaintiff represented a danger because "if you think someone is trying to kill you and you're a highly intelligent, otherwise logical, capable person, you might do something to defend yourself when there's no need of defense. There's at least one indication that that was tried." (ECF No. 59-18, PageID.1765). Dr. Bell further testified that Plaintiff represented a threat to himself or others "because of the belief that people might be trying to kill him, and he would take what seems to him as a rational, appropriate response to

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[14] *Compare* ECF No. 24-2, PageID.259, 261 *with* MICH. COMP. LAWS § 330.1400(g).

when there is no threat. Then there is . . . calling the police constantly. That certainly harasses the system and puts a—you know, they—they could respond thinking he's in danger and endanger themselves in the process." (ECF No. 59-18, PageID.1766). Based on this testimony, the State court determined that Plaintiff was a "person requiring treatment" under MICH. COMP. LAWS § 330.1401, a determination Plaintiff did not further challenge. All this occurred only days before Plaintiff was withdrawn from the pharmacy program and university. In short, Plaintiff's submissions here show that he could not demonstrate good judgment or exercise professional behavior, both necessary requirements of the pharmacy program as contained in the Technical Standards.

Moreover, at the time the decision was made to withdraw Plaintiff from the program, Plaintiff plainly could not maintain his limited educational license. The State court's order meant Plaintiff was significantly impaired in his judgment and behavior. *See* MICH. COMP. LAWS § 330.1400(g) and § 330.1401. Under MICH. COMP. LAWS § 333.16221, LARA is required to, *inter alia*, investigate an allegation that a health professional licensee has a mental inability that adversely affects that licensee's ability to practice in a safe and competent manner. *Id.* Other licensees have an obligation to report an individual they have knowledge of or reasonable cause to believe is impaired or in violation of Section 16221. *See* MICH. COMP. LAWS §§ 333.16222(1); 333.16223(1). Members of the BRT appeared well aware of this obligation, as the October 11, 2013,

meeting minutes document the team's concern that Plaintiff's "licensure issues may trump all of this." (ECF No. 59-19, PageID.1779). And by the time Plaintiff's appeal was formally denied, Defendants had acted on this obligation by reporting Plaintiff to HPRP. (ECF No. 1-9, PageID.86). In sum, the administrative process leading to the suspension of Plaintiff's limited educational license began prior to the time when the final denial of Plaintiff's appeal was made. Without cooperating with this process to a successful conclusion—which Plaintiff did not—Plaintiff could not maintain his educational license and was not an "otherwise qualified" individual.

This conclusion is consistent with a line of cases discussing ADA claims brought by commercial truck drivers. *See Williams v. J.B. Hunt Transp., Inc.*, 826 F.3d 806, 811 (5th Cir. 2016); *Harris v. P.A.M. Transp., Inc.,*, 339 F.3d 635, 636-37 (8th Cir. 2003); *Bay v. Cassens Transportation Co.*, 212 F.3d 969, 973-76 (7th Cir. 2000); *King v. Mrs. Grissom's Salads, Inc.*, No. 98-5258, 1999 WL 552512, at *1-*3 (6th Cir. 1999). In these cases, the commercial truck drivers were found not qualified after either (1) failing to obtain a medical examiner's certificate of DOT qualification or, (2) failing to resolve a conflict of medical opinions under agency procedures. In *King*, for example, two physicians disagreed over whether an ADA plaintiff was qualified under the DOT regulations. When the plaintiff did not seek resolution of the disagreement with the Department of Transportation, the Sixth Circuit affirmed the district court's conclusion that the plaintiff was not a

qualified individual because the plaintiff lacked the requisite certification and failed to exhaust the administrative procedures. *King*, 1999 WL 552512, at *2-*3. Likewise in *Williams*, the Fifth Circuit held that an employer's administrative termination of the commercial driver plaintiff did not violate the ADA because the employee was not qualified. The court based the decision on the fact that the employee lacked DOT certification that he was physically qualified to drive and never sought review. *Williams*, 826 F.3d at 811-12.

While the occupations may be different than that of the instant case, the analysis is the same. After his involuntary hospitalization, Plaintiff's license was in jeopardy: the commitment order gave LARA grounds to investigate, and the pharmacy program was obligated to report Plaintiff. Administrative action was inevitable, and when it came, Plaintiff failed to see the process through to a successful completion. Accordingly, no reasonable jury could find that without an accommodation, Plaintiff was qualified to participate in the pharmacy program.

b. "With . . . Reasonable Accommodation"

The remaining question in the "otherwise qualified" analysis is whether Plaintiff could perform the necessary requirements of the pharmacy program *with* reasonable accommodation. Here, Plaintiff has the burden of showing "he proposed a reasonable accommodation to account

for his disability." *Shaikh*, 608 F. App'x at 354

(quoting *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 202 (6th Cir. 2010)). No reasonable jury could find that Plaintiff did. The only accommodation that Plaintiff possibly requested on this record was the decelerated schedule allowing him an extra year within which he could complete his academic instruction. Plaintiff avers he received this accommodation when he enrolled in the pharmacy program, and thus was on the schedule during the events in question. Plainly, for reasons discussed above, Plaintiff was not performing the pharmacy program's necessary requirements with this accommodation when he was withdrawn. Plaintiff never proposed any additional accommodations to the pharmacy program. Because of this, Plaintiff has failed to satisfy his burden. *See Jakubowski*, 627 F.3d at 202 (stating "[i]f a disabled employee requires an accommodation, the employee is saddled with the burden of proposing an accommodation and proving that it is reasonable.").

None of Plaintiff's arguments to the contrary are persuasive. Plaintiff argues that the pharmacy program failed to follow the university's policies for students with mental illness. Even assuming for purposes of argument that is true, it does not amount to a violation of Title II or Section 504. "[T]he relevant inquiry is whether [the pharmacy program] violated the ADA or Section 504 of the Rehabilitation Act, not whether [the pharmacy program] followed its internal policies." *Shaikh*, 608 F. App'x at 355. Second, Plaintiff contends that Defendants needed to engage in an interactive process with Plaintiff before it could be determined if Plaintiff was otherwise

qualified.[15] (ECF No. 69, PageID.2486). Plaintiff's argument is contrary to the "general rule [that] the [plaintiff] must request a reasonable accommodation to trigger the [defendant's] duty to engage in the interactive process." *Arredondo v. Howard Miller Clock Co.*, No.

1:08-cv-103, 2009 WL 2871171, at *9 (W.D. Mich. Sept. 2, 2009); *see also Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 165 (5th Cir. 1996). Indeed, a plain reading of the relevant regulation makes clear that whether a plaintiff is a qualified individual is distinct from a defendant's obligation to engage in the interactive process. *See Arredondo*, 2009 WL 2871171, at *8 (noting that "[o]n a facial reading of the statutory text and the . . . regulation, the Court's ruling that [Plaintiff] was not a 'qualified individual' should be dispositive of the interactive process requirement").

For a related reason, Plaintiff's third argument that he should have been allowed other accommodations such as a transfer to a different program at the university fails. "In order to establish a prima facie case of disability discrimination under the statute, [Plaintiff] must show that he requested, and was denied, reassignment to a position for which he was otherwise qualified." *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247, 258 (6th Cir. 2000);

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[15] ADA regulations state that "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3).

see also Jakubowski, 627 F.3d at 201-202. Plaintiff's identification of possible accommodations appear for the first time in the instant litigation, and do not appear to have been proposed to the pharmacy program.

Even if Plaintiff could show he requested these accommodations, his claim would fail because Defendants offered a reasonable accommodation: successfully complete the HPRP program. Plaintiff failed to pursue the program to completion. Though he contends he should have been offered different accommodations, Plaintiff cannot force the pharmacy program to provide a specific accommodation if the program offered an alternative reasonable accommodation. *Tennial v. United Parcel Service, Inc.*, 840 F.3d 292, 307 (6th Cir. 2016). Given the State court's commitment order, the pharmacy program's offer that Plaintiff cooperate with the HPRP as a condition of re-admittance was eminently reasonable, and Plaintiff fails to persuasively demonstrate otherwise.

For all the above reasons, and drawing all inferences in favor of Plaintiff, the Court concludes Plaintiff was not "otherwise qualified" because he could not perform the necessary requirements of the pharmacy program, with or without reasonable accommodations. Because Plaintiff has not met his burden under either an indirect or direct evidence theory, the Court need not address the other elements of a *prima facie* case or the pharmacy program's sovereign immunity defense.

B. Constitutional Claims

Plaintiff's remaining claims allege violations of both his substantive and procedural due process rights under 42 U.S.C. § 1983. For the reasons discussed below, no reasonable jury could find in Plaintiff's favor on either claim.

1. Substantive Due Process

Plaintiff first claims Defendants violated his substantive due process rights by terminating Plaintiff's enrollment in the pharmacy program.

"The substantive component of the Due Process Clause protects 'fundamental rights' that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Michigan Dept. of State Police*, 490 F.3d 491, 499 (6th Cir. 2007) (quoting *Palko v. Conn.*, 302 U.S. 319, 325 (1937)). "Such rights include 'the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). "The Supreme Court has cautioned, however, that it has 'always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" *Id.* (quoting *Glucksberg,* 521 U.S. at 720).

Indeed, the Supreme Court has generally refrained from determining whether continued

enrollment in a school free from arbitrary state action is protected by substantive due process, and in cases discussing the issue, the Court has only assumed, *arguendo*, that such a fundamental right exists. *See, e.g., Regents of Univ. of Mich.*, 474 U.S. at 222-23; *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978). The Sixth Circuit Court of Appeals has gone further, however, and has concluded that absent an equal protection violation there is no substantive due process right to continued enrollment at a state university. *See Reyes v. Bauer,* No. 11-15267, 2013 WL 3778938, at *12 (E.D. Mich. July 18, 2013) (collecting cases); *Bell v. Ohio State Univ.*, 351 F.3d 240, 251 (6th Cir. 2003) ("Where . . . there is no equal protection violation, we can see no basis for finding that a medical student's interest in continuing [his] medical school education is protected by substantive due process."); *see also Hill v. Bd. of Trs. of Michigan State Univ.,* 182
F. Supp. 2d 621, 626-27 (W.D. Mich. 2001) ("The Sixth Circuit has recognized that the right to attend public high school is not a fundamental right for purposes of substantive due process analysis. The right to a public college education and the right to receive notice prior to suspension are even less fundamental.") (citations omitted).

Plaintiff argues he has shown a violation of equal protection to distinguish the above line of cases. (ECF No. 69, PageID.2496). He points the Court to his Complaint, in which he avers he had a right to continue in his studies if his dismissal "was based on generalization or stereotypes about a protected class of persons." (ECF No. 1, PageID.28).

Assuming, without deciding, this is sufficient to state a claim for an equal protection violation, Plaintiff cannot succeed. "Disabled persons are not a suspect class for purposes of an equal protection challenge." *S.S.*, 532 F.3d at 457 (citing *Tennessee v. Lane*, 541 U.S. 509, 522 (2004)). To show an equal protection violation, therefore, Plaintiff must show: (1) Defendants "intentionally treated him differently—because he is disabled—than similarly situated students who were like him in all relevant respects, and (2) the defendants' actions bore no rational relationship to a legitimate governmental purpose." *Id.* at 458. Plaintiff avers he was intentionally treated differently than similarly situated students (*see* ECF No. 59, PageID.1418-1419) but he has not shown that Defendants' actions bore no rational relationship to a legitimate governmental purpose. Dr. Bell testified in front of the State court that Plaintiff was a threat to himself and to others. (ECF No. 59-18, PageID.1766). The State court agreed Plaintiff required treatment. Schools have a legitimate educational purpose in maintaining order and safety for its students and its school. *S.S.*, 532 F.3d at 458. Moreover, Plaintiff has no convincing comparator because no one other than Plaintiff was involuntarily committed by a State court.

Plaintiff has not shown an equal protection violation that would preclude application of the above Sixth Circuit authority. Therefore, read in the light most favorable to Plaintiff, Plaintiff's allegations do not amount to a violation of his substantive due process rights and Defendants are entitled to summary judgment on the substantive due process

claim. *See Bell*, 351 F.3d at 251.

2. Procedural Due Process

Plaintiff finally contends that Defendants violated his procedural due process rights when he was withdrawn from the university. The elements of a procedural due process claim are: (1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process. *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). Analysis of a procedural due process claim involves two steps: "First, the Court must determine whether the interest at stake is a protected liberty or property interest under the Fourteenth Amendment. Only after identifying such a right do [courts] continue to consider whether the deprivation of that interest contravened the notions of due process under the Fourteenth Amendment" *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 604- 605 (6th Cir. 2016) (internal quotation marks omitted). "The amount of process due will vary according to the facts of each case and is evaluated largely within the framework laid out by the Supreme Court in *Mathews v. Eldridge*[.]" *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 634 (6th Cir. 2005) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).[16]

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[16] The *Mathews* Court articulated the test as follows:
[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

For purposes of this discussion, the Court will assume that a pharmacy student like Plaintiff has a property and liberty interest in continued enrollment in the pharmacy program and has satisfied the first element of a procedural due process claim. Turning, then, to the second element, the parties disagree on what process Plaintiff was due, and whether he received that process. Plaintiff contends he was entitled to notice and a hearing prior to the October 15, 2013, decision to withdraw Plaintiff from the pharmacy program. (ECF No. 68, PageID.2171-2176). Defendants contend a hearing was not required in order to satisfy procedural due process. (ECF No. 62, PageID.1879). Defendants have the better argument.

The difference in the parties' positions comes down to whether Plaintiff's withdrawal from the program is considered an academic or disciplinary decision. Disciplinary decisions require a "more searching inquiry" than academic decisions. *Flaim*, 418 F.3d at 634; *see also Horowitz*, 435 U.S. at 86 (noting that academic decisions "call[] for far less stringent procedural requirements[.]"). "The term 'academic' in his context is somewhat misleading." *Yoder v. Univ. of Louisville*, 526 F. App'x 537, 550 (6th Cir. 2013). Generally, "academic evaluations are not limited to consideration of raw grades or other

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additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Mathews, 424 U.S. at 335.

objective criteria." *Ku v. State of Tennessee*, 322 F.3d 431, 436 (6th Cir. 2003). Rather, reviewing courts usually find an academic dismissal "where a student's scholarship or conduct reflects on the personal qualities necessary to succeed in the field in which he or she is studying and is based on an at least partially subjective appraisal of those qualities." *Allahverdi v. Regents of Univ. of New Mexico*, No. 05-277, 2006 WL 1313807, at 20 (D.N.M. Apr. 25, 2006) (citing cases); *see also Horowitz*, 435 U.S. 78, 89-90 (1978) (noting that a decision to dismiss a medical student was academic if it "rested on the academic judgment of school officials that [the student] did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal").

In a case with facts close to those of the instant case, the Fifth Circuit Court of Appeals found that a decision to dismiss a medical student from a residency program for failure to tend to her mental health was an academic decision. *Shaboon v. Duncan*, 252 F.3d 722 (5th Cir. 2001). As in the instant case, the student in *Shaboon* was hospitalized for mental health treatment. The student's decision had been voluntary, and she subsequently left treatment against advice. When the student did not cooperate with treatment and exhibited no improvement, the student was dismissed from the residency program. *Id.* at 725-28. In finding that the decision to dismiss the student was academic, the Fifth Circuit reasoned that "[a]lthough [the student's] intransigence might suggest that her dismissal was disciplinary, her

refusal to acknowledge and deal with her problems furnished a sound academic basis for her dismissal." *Id*. at 731. This analysis is similar to that used in the Sixth Circuit, where "dismissing a medical student for lack of professionalism is academic evaluation." *Yaldo*, 2017 WL 2507213, at *11 (citing *Al-Dabagh v. Case W. Reserve Univ.*, 777 F.3d 344, 360 (6th Cir. 2015)). The Court finds this authority to be persuasive.

The Defendants in the instant case offered three justifications for denying Plaintiff's appeal. Two are clearly academic: Plaintiff missed a significant amount of class and was in jeopardy of failing his classes. The third reason, also, is academic: Plaintiff could not maintain his professional educational license. (ECF No. 59-26, PageID.1848-1849). It is plain that in offering these reasons, the pharmacy program dismissed Plaintiff not for disciplinary reason, but for reasons related to Plaintiff's ability to succeed in the pharmacy program and Plaintiff's fitness to perform as a pharmacist. Accordingly, the Court holds that the decision to withdraw Plaintiff from the university was an academic decision.

The due process required for academic decisions is "minimal." *Yoder*, 526 F. App'x at 549. "In the case of an academic dismissal or suspension from a state educational institution, when the student has been fully informed of the faculty's dissatisfaction with the student's academic progress and when the decision to dismiss was careful and deliberate, the Fourteenth Amendment's procedural

due process requirement has been met." *Ku*, 322 F.3d at 436 (citing *Horowitz*, 435 U.S. at 85-86). No formal hearing is required. *Id.* The Court finds the requisite process for an academic decision has been met here.

Viewed in the light most favorable to the non-moving party, Plaintiff was fully informed of the pharmacy program's dissatisfaction with his progress. The documents submitted by Plaintiff show Defendant Bates discussed a medical withdrawal from the program with Plaintiff before

Plaintiff was hospitalized. (ECF No. 59-15, PageID.1713). Plaintiff's supplemental brief acknowledges that Defendant Bates requested that Plaintiff withdraw. (ECF No. 59, PageID.1420). Though Plaintiff may have disagreed with the request, clearly Plaintiff was on notice the pharmacy program was dissatisfied with his performance to that point and that, in fact, his dismissal from the program was a very real possibility. Moreover, the documents submitted by Plaintiff show that Defendants explained Plaintiff's academic situation during their initial meeting with Plaintiff. (ECF No. 59-16, PageID.1724). And, as noted above, these reasons were expanded upon in subsequent meetings and communications between Plaintiff and program administrators into three primary academic justifications. This was enough to fully inform Plaintiff. *See Yoder*, 526 F. App'x at 550-551.

The record also establishes that the decision to withdraw Plaintiff from the pharmacy program was careful and deliberate. The decision was reached only after several interactions with Plaintiff,

including a State court hearing resulting in Plaintiff's hospitalization. Thereafter several meetings between BRT members and other university officials was held. The minutes show the defendants discussed the university's handbook and dismissal policies, as well as the program's Technical Standards and licensure requirement. (ECF No. 59-19, PageID.1779). Thereafter, Plaintiff was permitted to appeal and the denial of the appeal was twice explained, first in person and then in paper. These actions reflect the careful and deliberate processes called for by *Horowitz* and its progeny.

In sum, viewing the facts in the light most favorable to Plaintiff, the Court holds no reasonable jury could find Plaintiff was not afforded the requisite process for an academic decision to withdraw him from the pharmacy program.[17] Defendant's motion for summary judgment on this count will be granted.

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[17] Even if the Court were to conclude the decision to withdraw Plaintiff from the pharmacy program was a disciplinary decision, it would still survive scrutiny. The majority in *Horowitz* stated that a disciplinary decision to expel a student only "required an informal give-and-take between the student and the administrative body dismissing him that would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context." *Horowitz*, 435 U.S. at 85-86 (internal quotation marks omitted) (citing *Goss v. Lopez*, 419 U.S. 565 (1975)). Plaintiff clearly had that opportunity via a meeting at which his cousin was present, and the opportunity to file an appeal in which he explained his conduct.

CONCLUSION

Plaintiff was endeavoring to complete the academic and state regulatory requirements for becoming a pharmacist, a position of trust and responsibility with access to controlled substances. Obviously a successful candidate needs mental stability himself or herself, as Michigan licensure law requires, and as the University's Technical Standards ensure. Once the state court ordered Plaintiff's involuntary commitment—an order that Plaintiff never appealed or had set aside—it is hard to see how any responsible administrator or licensing official could blithely allow Plaintiff to continue in the program as though nothing had happened. And it is equally hard to see how a federal court looking in reflective retrospect could lightly second guess the particular steps these defendants took in an effort to honor their responsibilities to the Plaintiff, the University, and the public.

Like any responsible licensing authority, Michigan has developed a detailed statutory and regulatory process for balancing the competing interests. The process ensures that licensees—including those licensed in a training program—have the technical and personal qualifications and competence to practice safely. And they also ensure that when a licensee is found to lack a competency, he or she has the ability to contest the finding in the first place; and even if ultimately found lacking in some way, to structure a supervised pathway back to full licensure through the HPRP
process.

Here, Plaintiff failed to take advantage of the process. He chose not to contest the State court's original order of commitment. He chose not to participate in the licensing authority process that gave him an opportunity to contest the licensing suspension. And he refused to participate in the HPRP process that provided a possible pathway for him towards successful completion of training and eventual practice. Plaintiff cannot spurn these established State law procedures and potential for accommodation, and convincingly argue that these Defendants denied him due process and reasonable accommodation for a mental health condition sufficiently serious to warrant involuntarily hospitalization under a State court order that has never been challenged.

ACCORDINGLY, IT IS ORDERED THAT:

1. Defendants' Motion for Summary Judgment (ECF No. 61) is **GRANTED.**

2. Defendant Vander Myde's Motion for Judgment on the Pleadings (ECF No. 23) is

DISMISSED AS MOOT.

3. Defendant Ferris State University's Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim (ECF No. 29) is **DENIED.**

4. Defendants' Motion to Compel Psychiatric Examination (ECF No. 44) is **DENIED AS MOOT.**

5. Plaintiff's Corrected Motion for Leave to File Excess Pages (ECF No. 49) is

GRANTED.

6. Defendant's Motion in Limine (ECF No. 52) is **DENIED AS MOOT.**

7. Defendant's Second Motion to Compel (ECF No. 71) is **DENIED AS MOOT.**

This case is **DISMISSED.**

IT IS SO ORDERED.

Dated: January 10, 2018

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHM MBAWE,

Plaintiff-Appellant,

v.

FERRIS STATE UNIVERSITY, ET AL.,

Defendant-Appellees.

ORDER

FILED Dec 7, 2018

DEBORAH S. HUNT, Clerk

BEFORE: SILVER, GRIFFIN, and STARANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk