

No. 18-1179

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In the  
**Supreme Court of the United States**

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JOHN MBAWE,  
*Petitioner,*  
v.

FERRIS STATE UNIVERSITY, ET AL.,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit**

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**BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED**

1. A person is not a qualified individual under either Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, where the person fails to meet the eligibility requirements for participation in the program, with or without accommodation. In the case at bar, Petitioner John Mbawe failed to meet the essential eligibility requirements for continued enrollment in the Ferris State University (“FSU”) Doctor of Pharmacy program because his involuntary hospitalization rendered his intern-pharmacy license subject to investigation and revocation by the state and because maintaining a valid inter-pharmacy license was an indispensable requirement of continued enrollment. Following Mbawe’s release from his involuntary hospitalization, FSU officials met with Mbawe, discussed his situation with him, and offered him the reasonable accommodation of allowing him to continue with the pharmacy program after he resolved his licensing deficiency by addressing his mental health issues to the satisfaction of the state regulatory authorities. However, Mbawe refused this reasonable accommodation.

The question presented is:

Did the lower courts properly conclude that Mbawe failed to establish a prima facie claim under either the ADA or §504 because he was not a qualified individual until he resolved his licensing issue,

which Mbawe refused to do following the interactive process?

2. Because academic evaluations of a student, in contrast to disciplinary decisions, bear little resemblance to the judicial and administrative factfinding process, no hearing is required for non-disciplinary dismissals. Rather, procedural due process is satisfied when the student is informed of the nature of the dissatisfaction and the final decision is careful and deliberate. In the case at bar, the FSU officials made an academic decision when they decided that Mbawe failed to meet the essential eligibility requirements for continued enrollment in FSU's pharmacy program due to his compromised intern-pharmacy license, Mbawe was fully informed of the decision, and the decision was careful and deliberate.

The question presented is:

Did the lower courts properly conclude that Mbawe was afforded adequate procedural due process?

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## **RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

Respondents Ferris State University, Renee Vander Myde, Stephen Durst, Jeffery Bates, and Paul Blake respectfully request that the Court deny the Petition for Writ of Certiorari.

### **OPINIONS BELOW**

Petitioner has accurately cited the opinions below.

### **STATEMENT OF JURISDICTION**

Respondents do not contest Petitioner's Statement of Jurisdiction.

### **STATUTORY PROVISIONS INVOLVED**

Petitioner has raised claims under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, or Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Neither statutory provision was violated.

## STATEMENT OF THE CASE

### A. Overview.

This case involves the academic decisions made by administrators and faculty members at Ferris State University (“FSU”) with regard to the continued enrollment of John Mbawe in FSU’s Doctor of Pharmacy Program. Mbawe’s enrollment ended after his untreated delusional disorder caused him to become involuntarily hospitalized in a psychiatric facility for more than two weeks.<sup>1</sup> At that point, Mbawe was not a “qualified individual” because after his hospitalization, he no longer met the essential eligibility requirements to remain in the pharmacy program.

More specifically, following his involuntary commitment, Mbawe’s pharmacy intern license – an indispensable requirement under the program’s Technical Standards and under state law – was severely compromised (*i.e.*, the license was subject to immediate investigation and revocation by the state’s regulatory agency). The one and only accommodation that would have permitted Mbawe to continue with the program would have been for Mbawe to address his mental health problems and to resolve his licensing

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<sup>1</sup> According to the Diagnostic and Statistical Manual of Mental Disorders (5th Edition) (“DSM-V”), the essential feature of a delusional disorder is the presence of one or more delusions that persist for at least one month. (L.R.58-5, PgID#1078). The DSM-V is “one of the basic texts used by psychiatrists and other experts,” and has been relied upon by this Court. *Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014).

issue. Although FSU offered that accommodation to Mbawe, he refused to accept it. Therefore, FSU did not violate the ADA or §504.

Furthermore, because FSU's academic decisions were careful and deliberate, and because Mbawe was fully informed of those decisions, Mbawe received all the due process that was required. As such, the district court properly granted summary judgment with regard to Mbawe's claims and the Sixth Circuit properly affirmed. Accordingly, there is no reason for this Court to grant Mbawe's petition.

**B. Mbawe struggled with delusions throughout his enrollment at FSU.**

Mbawe began taking classes in FSU's pharmacy program in the fall of 2010. (L.R.1, PgID#4). In late 2012, Mbawe began to complain that other students were using "code words" during class to make veiled references about him. (L.R.58-2, PgID#991-993 and 995-998; L.R.58-4, PgID#1062-1063). Mbawe described his fellow students' actions as "bullying," and even expressed his belief that some of his professors were conspiring with them. (*Id.*)

In January, 2013, Mbawe spoke to Leroy Wright, the Dean of Student Life, about his "bullying" complaints. (L.R.58-4, PgID#1062-1063). Although Mr. Wright was skeptical of the allegations, he explained how Mbawe could make a report with the Office of Student Conduct. Mr. Wright also invited Mbawe to contact him if he continued to have concerns. (*Id.*). When Mbawe did not follow-up, Mr. Wright assumed that the matter had either resolved or that

the bullying had not occurred in the first place. (*Id.*) Consequently, despite the unusual nature of Mbawe's accusations, there was no intervention to assess his mental health at that time.

Thereafter, as 2013 progressed, Mbawe's paranoid delusions became more problematic. More particularly, on one occasion, in the early spring of 2013, Mbawe confronted another tenant at a self-storage facility in an aggressive manner and accused the tenant of following him. (L.R.58-6, PgID#1081-1083; L.R.58-2, PgID#1004-1005). Mbawe engaged in a similar confrontation with a different tenant several weeks later. (L.R.58-6, PgID#1082).

Mbawe also began to have frequent interactions with the Grand Rapids Police Department ("GRPD"). (L.R.58-7 through #58-12, PgID#1085-1119). For example, on April 5, 2013, Mbawe called GRPD to report that he was being followed. (L.R.58-7, PgID#1085-1088; L.R.58-2, PgID#1011-1012). When the officer responded, Mbawe claimed that his neighbors were "stalking" him. (L.R.58-7, PgID#1085-1088). The officer noted that Mbawe "appears to be 10-96" (indicating mental illness). (*Id.*) Mbawe had another similar interaction with GRPD in June, 2013. (L.R.45-3, PgID#527 and L.R.58-8, PgID#1090-93).

Still another interaction occurred on July 3, 2013 when Mbawe again reported that he was being followed. (L.R.45-3, PgID#527-528 and L.R.58-9, PgID#1095-1099). In making that report, Mbawe connected the inception of people following him to a class that he had taken at FSU. (L.R.58-9, PgID#1095-99). The report is one of the many examples of Mbawe

focusing his delusions on particular individuals – an indication that he was becoming a risk of lashing out.<sup>2</sup>

Also in July, 2013, Mbawe began renting an apartment from Grace Suchowian. (L.R.58-13, PgID#1121-1123). Shortly thereafter, Mbawe told Ms. Suchowian that he believed that people were breaking into his apartment so he paid her to install additional locks and motion sensors. (*Id.*, ¶3; L.R.58-2, PgID#1006-1008). Mbawe also placed strings on his bedroom door so he would know if someone had entered the room while he was away. (L.R.58-13, PgID#1122).

However, none of this allayed Mbawe’s paranoia. Rather, he soon began to claim that people were coming into his apartment through the ceiling and walls and injecting him with needles while he slept. (L.R.58-13, PgID#1122; L.R.45-4, PgID#546). Later, Mbawe insisted that his female neighbors were breaking into his apartment (again projecting his delusions onto particular individuals). (*Id.*) Mbawe even called GRPD at the end of August. (L.R.58-11, PgID#1107-1110). He told the officer that his neighbors were “using something on him” to make him move around and that at night they would sneak into his bedroom and inject him. (*Id.*).

The officer, like nearly every police officer who had contact with Mbawe in 2013, determined that Mbawe was suffering from “10-96 issues.” (*Id.*). When the officer suggested that Mbawe connect to mental health

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<sup>2</sup> “Individuals with persecutory delusions are often resentful and angry and may resort to violence against those they believe are hurting them.” (L.R.58-5, PgID#1078).

resources in the community, Mbawe complained that “the last officers thought I was crazy too.” (*Id.*) Demonstrating a complete lack of awareness of his own mental illness, Mbawe insisted that he was perfectly sane. (*Id.*)

However, Mbawe’s delusions were only worsening. On various occasions throughout the spring/summer of 2013, he presented to local hospitals requesting blood work and other medical testing. (L.R.58-14 through 58-16, PgID#1124-1167).<sup>3</sup> Mbawe made similar requests with Dr. Susan Davis, a physician at FSU’s Birkam Health Center, and also repeated his irrational belief that people were poisoning his food and injecting him while he slept. (L.R.58-16, PgID#1160-61). Not surprisingly, repeated medical testing confirmed that Mbawe had not been poisoned and that his health was fine. (L.R.58-14 through 58-16, PgID#1124-1167). Despite these assurances, however, Mbawe maintained the unshakeable belief that his delusions were real.<sup>4</sup>

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<sup>3</sup> During his June 26, 2013 visit to Mercy Health (St. Mary’s Campus), a social worker referred Mbawe to Network 180, a mental health facility, but Mbawe declined treatment. (L.R.58-15, PgID#1158).

<sup>4</sup> Mbawe’s irrational beliefs meet the very definition of delusion: “fixed beliefs that are not amenable to change in light of conflicting evidence.” (L.R.58-5, PgID#1073). See also the report of Defendants’ expert psychiatrist, Frank Ochberg, M.D. (L.R.45-1, PgID#498-502).

**C. Mbawe's delusions continued as the 2013 Fall Semester began.**

Mbawe's difficulties increased as the Fall Semester began in August, 2013. Even before then, Mbawe had been struggling academically. His GPA for his first semester (the 2010 Fall Semester) was 1.29, which was well below the 2.0 required minimum. (L.R.58-17, PgID#1169). Mbawe was unable to do much better his second semester so he was academically dismissed. (L.R.58-18, PgID#1172; L.R.58-2, PgID#989-990). Following an appeal, his grades were adjusted slightly and he was reinstated. (L.R.58-19, PgID#1174-75). The reinstatement, however, was probationary: Mbawe was afforded an additional year to complete the first three years of the curriculum (L.R.58-19, PgID#1175), but he was advised that if he failed one more course he would be dismissed with no right to appeal. (*Id.*; L.R.58-2, PgID#990-991).

Thereafter, Mbawe had done just enough to get by, and as he entered the 2013 Fall Semester, his GPA was hovering slightly above the 2.0 minimum. (L.R.58-20, PgID#1177-1181). Nevertheless, despite his tenuous academic standing, Mbawe missed numerous classes in the first weeks of the semester. (L.R.58-21 and 58-22, PgID#1183-1192). In doing so, he expressed considerable confusion regarding his schedule, which raised concern among the faculty. (*Id.*) In short, as the 2013 Fall Semester began, Mbawe was in desperate need of help.

**D. Mbawe's condition deteriorated throughout the semester.**

When Dr. Jeffrey Bates, the Student Services Coordinator for the Doctor of Pharmacy program, learned that Mbawe was struggling, he reached out, and the two had a number of conversations in late August and early September, 2013. (L.R.58-23, PgID#1195). Even without knowing the full extent of Mbawe's delusions, these conversations soon led Dr. Bates to develop deep concerns regarding Mbawe's mental health.<sup>5</sup> (*Id*).

Perhaps exacerbating Mbawe's instability was the fact that he was attempting to travel to Cameroon to attend his brother's funeral. (L.R. 58-23, PgID#1196 and 1203). Given Mbawe's tenuous academic standing, his professors expressed concern that if Mbawe traveled, he would miss too much coursework and fail. (L.R.58-23, PgID#1216-1218). Some of his instructors even suggested that Mbawe withdraw rather than miss two weeks of class. (L.R.58-23, PgID#1217). Ultimately, Mbawe did not make the trip. (L.R.1, PgID#6).

Nonetheless, the fact that Mbawe was planning the trip is significant for a different reason. On September 16, 2013, Mbawe left three scraps of paper containing hand-written notes in a restroom at the

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<sup>5</sup> Mbawe's interactions with the GRPD also continued. (L.R.58-12, PgID#1112-1119; L.R.58-2, PgID#1023-1025).

Grand Rapids campus building.<sup>6</sup> (L.R.24-1, PgID#257; L.R.58-2, PgID#1025-26 and 1029). One of the scraps of paper related to Mbawe's travel plans so it helped establish that he had written the notes. (L.R.58-23, PgID#1196).

The other two scraps of paper contained a number of alarming statements. (L.R.24-1, PgID#257; L.R.58-2, PgID#1029-1031). In particular, the notes stated, among other things: "They shade me on the streets, its not FBI," "They send people to inject me at night while I sleep," "I have been to the police millions! Of time;" "They stick me at night"; "Poison my food"; "I know that I will die for what they have on my body." (L.R.24-1, PgID#257) (original capitalization and punctuation).

An image of the notes found their way to Dr. Bates. (L.R.58-23, PgID#1197). After Mbawe admitted that he had written the notes, Dr. Bates became even more concerned for Mbawe's welfare. (*Id.*) Dr. Bates recommended that Mbawe take a medical leave from the pharmacy program to address his mental health issues, but Mbawe declined. (L.R.82, PgID#2755-2756; L.R.58-28, PgID#1251).

#### **E. Mbawe's interactions with Dr. Davis and Mr. Liszewski.**

On September 19, 2013, Mbawe returned to Dr. Davis (his physician at the Birkam Health Center) and was seen by Nurse Melissa Sprague. (L.R.58-16, PgID#1160-61). The medical record from that visit

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<sup>6</sup> A student used his cell phone to take a photograph of the notes as they were found next to the bathroom sink.

reveals that Mbawe “appear[ed]” rational, but that he continued to report his delusional belief that people were coming into his apartment, poisoning his food, and injecting things into his body. (L.R.58-16, PgID#1161).

The next day, Mbawe met briefly with a limited license psychologist, Thomas Liszewski, LLP, LPC., who worked in the adjoining counseling center. (L.R.58-26, PgID#1244). Mr. Liszewski saw Mbawe over the lunch hour when the counseling center was closed, and the meeting was not a clinical experience. (*Id.*, PgID#2691-2693 and PgID#2709-2716). Rather, Mr. Liszewski saw Mbawe only briefly in a clerical role to try to determine whether Mbawe wanted to make an appointment for some other time. (*Id.*, PgID#2709-2711). Mbawe, however, told Mr. Liszewski that he did not want counseling and that he had agreed to meet only because Dr. Davis had requested it. (L.R.58-26, PgID#1244).

As such, Mr. Liszewski did not conduct a formal assessment of Mbawe. (*Id.*) Nonetheless, he still recognized that Mbawe was suffering from delusions. Mr. Liszewski recommended that Mbawe go to the Kent County Community Mental Health or the emergency room for a psychiatric evaluation, however, Mbawe refused stating that “nothing was wrong” with him and that the problem was with “the people who were attempting to poison him.” (L.R.58-26, PgID#1244). Mr. Liszewski eventually concluded that he could not petition Mbawe for involuntary treatment at that time. (*Id.*)

#### **F. The Behavioral Review Team was convened.**

Around this same timeframe, Renee Vander Myde, the Director of Birkam Health Center, began to work with Dr. Bates to get Mbawe help. (L.R.58-27, PgID#1247-1248). On September 23, 2013, Ms. Vander Myde spoke with Leroy Wright regarding the possibility of convening a Behavioral Review Team (“BRT”) to discuss possible interventions for Mbawe. (L.R.58-4, PgID#1063-64). The meeting was scheduled for that same day. (L.R.58-27, PgID#1247).

Ms. Vander Myde and Mr. Wright both attended the meeting along with Dr. Bates. Also present were Kenneth Plas (an attorney from FSU’s General Counsel’s Office), James Cook (Assistant Director of FSU Department of Public Safety), and Dr. Wendy Samuels, Ph.D., (Professor of Social Work). (L.R.58-23, PgID#1197-1198). As reflected in the meeting notes, the participants discussed, among other things, their concerns regarding Mbawe’s ongoing delusions.<sup>7</sup> (L.R.58-28, PgID#1250-1251). Dr. Bates also explained that Mbawe was on his “last strike” and very close to being academically dismissed. (L.R.58-28, PgID#1251). Another concern that was raised immediately after the meeting was the fact that in 2011, Mbawe had threatened someone with a stapler that he had hidden in his coat pocket to make it appear as if it were a gun. (L.R.58-23, PgID#1198 and 1211).

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<sup>7</sup> Due to a typographical error, the notes indicated that the BRT meeting was held on September 24, 2013.

On September 24, 2013, the day after the BRT meeting, Ms. Vander Myde e-mailed the BRT members confirming that Mbawe's "pattern of delusion and persecution" appeared to be increasing in severity. (L.R.58-29, PgID#1254). She opined that Mbawe needed intervention for his own well-being and explained that a "potential for violence" exists when someone experiences delusions and exhibits "aggression/anger/frustration" related to his thinking. (*Id.*)

Ms. Vander Myde then spoke to Mbawe by telephone. (L.R.58-30, PgID#1256). During the call, Mbawe continued to insist that people were breaking into his apartment and injecting him. (*Id.*) He also continued to refuse to submit to a psychiatric assessment or to engage in treatment. (*Id.*) When Ms. Vander Myde challenged Mbawe's delusions, he became agitated and expressed his anger that the police were not investigating. At the end of the call, Ms. Vander Myde was convinced that Mbawe was mentally ill and a significant risk of harming himself or others. (*Id.*) Ms. Vander Myde then began the necessary steps to submit a petition to have Mbawe evaluated for a possible involuntarily commitment. (L.R.58-30, PgID#1257; L.R.58-31, PgID#1259-1263). She completed and signed a pre-printed form petition for Mbawe and submitted the form to the Kent County Probate Court. (L.R.58-31, PgID#1260).

#### **G. Mbawe was involuntary committed.**

The Kent County Probate Court reviewed the petition and determined that Mbawe required a psychiatric evaluation. Accordingly, on September 24,

2013, the probate court entered a “pick-up order” that directed peace officers to take Mbawe into protective custody and transport him to a local facility so that he could be assessed for hospitalization. (L.R.1-4, PgID#71).

One week later, on October 1, 2013, Mbawe was picked up, evaluated and involuntarily committed. Before Mbawe was committed, two psychiatrists independently evaluated him and both concluded that he required treatment. (L.R.24-2, PgID#259-262). Mbawe was determined by both psychiatrists to be a “person requiring treatment,” – *i.e.*, he was both mentally ill **and** he presented a substantial risk of harm to himself or others. M.C.L. §330.1401(1).<sup>8</sup>

Thereafter, Mbawe challenged his commitment, and on October 10, 2013, he was given a formal evidentiary hearing. (L.R.24-3, PgID#264-284).<sup>9</sup> At the hearing, Dr. Verle Bell, one of the psychiatrists at the facility to which Mbawe had been committed, confirmed that Mbawe was suffering from a delusional disorder.

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<sup>8</sup> On the morning of October 1, 2013 (before he was taken into protective custody), Mbawe had a court hearing with his landlord, Grace Suchowian, due to Mbawe’s failure to pay rent. (L.R.58-13, PgID#1122). During that hearing, Mbawe made statements on the record reflecting his delusional beliefs that people were living in the ceiling of his apartment. (L.R.45-4, PgID#546). The matter was then set for a bench trial on October 4, 2013, which Mbawe did not attend because he had been committed.

<sup>9</sup> Mbawe was represented by an attorney at the hearing and afforded other due process guarantees, such as the right to cross-examine witnesses and the right to present evidence. *See* M.C.L. §330.1452(1), 330.1454(1) and 330.1459.

(L.R.59-18, PgID#1763). Dr. Bell testified that Mbawe was 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.” (L.R.59-18, PgID#1765). Based on this testimony and other evidence, the probate court continued Mbawe’s hospitalization. (L.R.24-4, PgID#287-88). The probate court’s order was entered just a few days before Mbawe was medically withdrawn from the pharmacy program.

**H. Mbawe did not take his anti-psychotic medication.**

Notably, Mbawe did not take his anti-psychotic medication during his involuntary hospitalization. When asked during discovery about his medication use while hospitalized, Mbawe admitted that he flushed all his medication down the toilet. (L.R. 58-3, PgID#1041; L.R.58-42, PgID#1340). Mbawe’s admission that he was not medication compliant is consistent with the observations of the hospital’s medical staff. (L.R.58-48, PgID#1370).<sup>10</sup>

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<sup>10</sup> An entry on the Charting Flowsheet for October 11, 2013 at 9:00 a.m. (the day after Dr. Bell testified at the hearing) states that Mbawe “went to the bathroom shortly after receiving meds and ran water,” an indication that he was not medication compliant. (L.R.58-48, Pine Rest Medical Records, PgID#1370).

**I. Mbawe was withdrawn from the Doctor of Pharmacy Program.**

On October 15, 2013, Mbawe was withdrawn from the pharmacy program. (L.R.58-23, PgID#1194-1224). To briefly summarize that process, after Mbawe was involuntarily committed, Dr. Bates had a number of conversations with Dr. Stephen Durst, the Dean of the College of Pharmacy, regarding Mbawe's status in the program. The two were concerned that the hospitalization had rendered Mbawe ineligible to continue. (*Id.*, PgID#1199-1200).

In particular, by October 11, 2013 (if not before), Dean Durst and Dr. Bates realized that Mbawe's delusional disorder and involuntary hospitalization had compromised his intern-pharmacy license with the State of Michigan (also known as a "Pharmacist Educational Limited License"). (*Id.*, PgID#1200-1201). The Technical Standards required students enrolled in the pharmacy program to maintain a valid intern-pharmacy license. (L.R.58-33, PgID#1277-1280). Further, the Doctor of Pharmacy Student Policy Handbook provided in relevant part that "[a] student's progression within an academic year may be stopped" for failure to maintain up-to-date documents including the intern-pharmacy license, "irrespective of whether experiential training is underway that semester." (L.R.58-34, PgID#1296-1297). The requirement to maintain the license was also imposed by state law. M.C.L. §333.17737(2); Mich. Admin. Code R. 338.473a(1), (3), and (6).

Calling Mbawe's license into doubt was the fact that the Michigan Department of Licensing and Regulatory Affairs ("LARA") is obligated to proceed against a licensee for, among other things, a "condition that impairs, or may impair, the ability to safely and skillfully engage in the practice of the health profession." M.C.L. §333.16221(a). LARA is also obligated to proceed against a licensee who because of a mental condition lacks "the ability to practice in a safe and competent manner." M.C.L. §333.16221(b)(iii).

Both Dean Durst and Dr. Bates realized that Mbawe's mental illness could prevent him from practicing in a safe and competent manner. (L.R.58-23, PgID#1201-1202). In particular, they believed that Mbawe's involuntary hospitalization demonstrated he was "impaired," which is defined by statute as the inability to conform to "the minimum standards" of acceptable practice due to, among other things, "mental illness." M.C.L. §333.16106a.<sup>11</sup> To the extent Mbawe was impaired, he was ineligible to remain in the program because his license was subject to immediate disciplinary action.

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<sup>11</sup> Mbawe's delusional disorder met the statutory definition of "mental illness" because it constituted a "substantial disorder" that was significantly impairing his "capacity to recognize reality . . ." See M.C.L. §330.1400(g). Defendants also reasonably believed that Mbawe's mental illness left him unable to meet the minimum acceptable standards for the profession. (L.R.58-23, Bates Dec., PgID#1200-1202).

Moreover, as licensed pharmacists themselves, Dean Durst and Dr. Bates had a statutory obligation to report Mbawe's suspected impairment. *See* M.C.L. §333.16222(1) and M.C.L. §333.16223(1). As a result, Dean Durst and Dr. Bates recognized that Mbawe's impairment would "trump" (*i.e.* take precedence over) their other concerns. (L.R.59-19, PgID#1779; L.R.1, PgID#10 and L.R.50, PgID#839, n. 5). Accordingly, while Dean Durst and Dr. Bates remained concerned about Mbawe's academic issues, they concluded that Mbawe needed to resolve his impairment to the satisfaction of LARA and the Michigan Board of Pharmacy before he could be allowed to continue with the program. (L.R.58-23, PgID#1201-1202).

However, despite the determination that Mbawe was ineligible to remain in the pharmacy program, neither Dean Durst nor Dr. Bates wanted to dismiss Mbawe. Although the Technical Standards expressly provided that a student who falls out of compliance is subject to dismissal (L.R.58-32, PgID#1274-1275; Doc 58-33, PgID#1277), Dean Durst and Dr. Bates wanted to give Mbawe the chance to finish the program. (L.R.58-23, PgID#1203-1204). As such, they discussed whether Mbawe could be removed from the program in a way that would leave open the possibility that he might return at some point, if and when his mental illness was adequately addressed, and the issues surrounding his license were resolved. (*Id.*)

In looking for a way to accomplish that goal, Dean Durst and Dr. Bates sought guidance from, among others, Ms. Vander Myde, Mr. Wright, and FSU's General Counsel's Office. (L.R.58-23, Bates Dec., ¶30,

PgID#1204). After receiving that guidance, and after careful consideration, it was eventually decided that the best way to help Mbawe was to withdraw him from FSU for medical reasons. (*Id.*). Unfortunately, effectuating the withdrawal was complicated by Mbawe's inaccessibility due to his hospitalization. Accordingly, on October 15, 2013, it was decided that FSU would initiate the medical withdrawal on Mbawe's behalf. (L.R.58-23, Bates Dec., ¶32, PgID#1204-1205).<sup>12</sup>

**J. The medical withdrawal saved Mbawe from permanent dismissal.**

Mbawe's withdrawal from the pharmacy program was not only necessary because his license was jeopardized, the withdrawal also provided Mbawe the benefit of avoiding a permanent academic dismissal. At the time the decision to withdraw Mbawe was initially made, he had already missed more than two weeks of critical coursework and the exact date that he would be released from the hospital was still unknown. (L.R.58-23, PgID#1204-1205). Further, even before his hospitalization, when Mbawe was contemplating a trip to Cameroon, his professors expressed concern. (*Id.*, PgID#1203, 1216-1217). His professors expressed a

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<sup>12</sup> The withdrawal was then processed by the Birkam Health Center. (L.R.58-35, PgID#1309-1310; L.R.58-36, PgID#1313).

similar concern when Mbawe was first hospitalized.<sup>13</sup> (L.R.58-23, PgID#1199, 1213-1214).

Mbawe was already on his “last strike” academically. (L.R.58-28, PgID#1251). If he had failed even one class, he would have been dismissed with no further appeal. (L.R.59-19, PgID#1175; L.R. 58-23, PgID#1203). Given his extended absences, and given his professors’ concerns, it seemed extremely unlikely that Mbawe could possibly pass all of his classes. (*Id.*)

Further, Mbawe had already been placed on the remedial track and was butting up against the “three-in-four” rule – *i.e.*, he needed to complete the third-year of the curriculum by the end of his fourth calendar year (which for Mbawe ended in August, 2014). (L.R.58-19, PgID#1175). Yet, on October 15, 2013, (the day FSU initiated the medical withdrawal on Mbawe’s behalf) Mbawe was still hospitalized, and his exact release date was still uncertain. As a result, any resolution other than the medical withdrawal would have almost certainly extinguished Mbawe’s chances of ever becoming a pharmacist.

#### **K. Mbawe was fully informed of the decision.**

On October 16, 2013, Mbawe was released from the hospital and learned that he had been withdrawn. (L.R.1, Complaint, ¶¶90-91, PgID#11). Dean Durst and

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<sup>13</sup> When Mbawe was first hospitalized he was placed on medical leave. (L.R.82, Opinion and Order, PgID#2733). Due to privacy concerns, Dr. Bates could not advise Mbawe’s professors that Mbawe had been involuntarily committed; accordingly, he merely advised them that Mbawe’s return date was unknown. (L.R.58-23, Bates Dec., ¶17, PgID#1198-1199).

Dr. Bates then arranged a meeting with Mbawe to discuss the withdrawal (L.R.58-23, Bates Dec., ¶33, PgID#1205), and the three met the following day (October 17). (L.R.58-3, Mbawe Dep., pp.242-245, PgID#1039).

During the meeting, Dean Durst and Dr. Bates explained that Mbawe had been withdrawn because he was not in compliance with the Technical Standards due to the licensing issue. (L.R.58-23, PgID#1205-1206). He was further advised that his withdrawal was appropriate for academic reasons. (*Id.*) Mbawe was told that he could appeal to the Provost's Office, however, he was encouraged to work on his mental health and seek readmission in the future. (*Id.*)

Notably, Mbawe did not offer to provide a written recommendation from a psychiatrist or psychologist clearing him to immediately return to the program or to resume the practice of pharmacy. (*Id.*, ¶36, PgID#1206). Mbawe also did not acknowledge that he had been suffering from delusions, nor did he concede that his delusions were not real; rather, Mbawe described his involuntary commitment as an "overreaction." (*Id.*)

Moreover, although Mbawe may have been unhappy that he had been withdrawn from the program, the decision did not come as a surprise. At the time, Mbawe was aware of the following facts and circumstances:

- That even before his hospitalization, Dr. Bates recommended that Mbawe take a medical leave

to address his mental health. (L.R.58-28, PgID#1251).

- That he had been involuntarily committed, and that as a result, LARA had a statutory obligation under M.C.L. §333.16221(a) to investigate how his mental illness impacted his ability to practice pharmacy and, thereby, to maintain his intern-pharmacy license.
- That the Technical Standards (which Mbawe accepted with his signature at the beginning of his enrollment) required him to maintain a valid intern-license at all times, and that his failure to do so could result in dismissal. (L.R.58-33, PgID#1277, 1280).
- That he was refusing to take his anti-psychotic medication and that he had not taken medication during his hospitalization. (L.R.58-42, PgID#1340).
- That he still failed to realize and/or understand that his delusions were not real – delusions that Dr. Bell had concluded just a few days prior made Mbawe a threat to himself or others. (L.R.59-18, PgID#1765-1766).

Simply put, whether or not Mbawe chose to acknowledge his own mental illness, he was made fully aware that he was not satisfying the program's requirements for continued enrollment.

**L. Mbawe sought further review of the decision.**

Unfortunately, the most debilitating impact of Mbawe's delusional disorder is his total lack of insight. A lack of insight or awareness regarding mental illness

is common among those suffering from delusional disorders so they often fail to perceive their need for treatment. (L.R.59-18, PgID#1767; L.R.45-1, PgID#498-502). Consequently, rather than address his mental health issues, Mbawe instead chose to appeal the decision to withdraw him from the program.

On October 21 2013, Mbawe submitted his written appeal to the Provost's Office. (L.R.58-37, PgID#1315-1317). With his appeal, Mbawe showed a continued unwillingness to engage in treatment, to take medication, or to resolve his licensing issues. (*Id.*) Instead, Mbawe resorted to conspiratorial thinking suggesting that some of his professors were “planning behind the scene” to get rid of him. (*Id.*, PgID#1317; L.R.58-3, PgID#1040).

At the time, the reality of the situation was that Mbawe had been only recently released from the hospital following a 16-day involuntary commitment. The probate court had conclusively determined that Mbawe’s hospitalization was necessary because his persecutory delusions made him a threat to himself and others. (L.R.24-4, PgID#287-88). In light of this, it was assured that LARA would conclude under M.C.L. §333.16221(a) that Mbawe, at least without treatment and monitoring, lacked the ability to practice in a safe and competent manner, and thus, he was unable to maintain his license. (L.R.58-23, PgID#1200). Furthermore, Dean Durst and Dr. Bates had a statutory obligation to report Mbawe’s suspected impairment to LARA, or alternatively, to refer Mbawe to the Health Professionals Recovery Program

(“HPRP”).<sup>14</sup> See M.C.L. §333.16222(1) and M.C.L. §333.16223(1).

In other words, the administrative process to determine Mbawe’s ability to maintain his intern-pharmacy license (an indispensable requirement for continued enrollment in the program) was inevitable. (L.R.58-23, Bates Dec., ¶¶22-24, PgID#1200). Further, the administrative process needed to be completed before Mbawe could return to the program. *See M.C.L. §333.16170(1).*<sup>15</sup> Yet, Mbawe requested that he be allowed to immediately return to class without addressing his licensing issues in any manner at all. (L.R.58-37, Letter 10/21/2013, PgID#1315-1317). Granting Mbawe’s request was not possible.

To assist Dr. Blake in his review of Mbawe’s appeal, Dr. Bates made an informal inquiry with HPRP during the last week of October, 2013 regarding Mbawe’s ability to maintain his license in light of his untreated mental illness. (L.R.58-47, PgID#1364). That inquiry

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<sup>14</sup> The HPRP is a program established through legislation and administered through a contract with the Michigan Department of Licensing and Regulatory Affairs, Bureau of Professional Licensing. *See M.C.L. §§333.16165-16170.* The HPRP is generally responsible for establishing a mechanism for monitoring health professionals who may be “impaired.” *See M.C.L. §333.16165; see also L.R.58-38, Brochure, PgID#1319-1320.*

<sup>15</sup> In relevant part, M.C.L. §333.16170(1) provides that a health professional may be accepted into HPRP only if the professional “acknowledges his or her impairment” and “withdraws from or limits the scope of his or her practice . . . .” *Id.* Mbawe refused to do either of these things.

eventually led Dr. Bates to formally refer Mbawe to HPRP soon thereafter. (L.R.45-7, PgID#560).<sup>16</sup>

On November 5, 2013, Dr. Blake, Dean Durst and Dr. Bates met with Mbawe and informed him that the medical withdrawal would stand. (L.R.1-9, PgID#86-91). In particular, Dr. Bates explained to Mbawe that he had been withdrawn from FSU and would have to apply to gain readmission to the pharmacy program. (*Id.*, PgID#87-89). However, he also told Mbawe that if HPRP determined that he was no longer impaired (through monitoring, counseling, medication, or otherwise) that he would be supported in the reapplication process. (PgID#87-88). Dr. Blake likewise assured Mbawe that if he cooperated with HPRP that the Provost's Office would help Mbawe reapply. (*Id.*).

Further, on more than one occasion following the meeting, Mbawe was advised that working with HPRP was his pathway to readmission. (L.R.58-23, PgID#1208, 1222-1224; L.R. 1-10, PgID#94). In particular, Dr. Blake guaranteed that he would help Mbawe with the readmission process after the HPRP

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<sup>16</sup> It is immaterial that Dr. Bates did not contact HPRP immediately upon recognizing Mbawe's licensing issue. Had Mbawe heeded their advice by accepting the withdrawal from the program and worked on his mental health issues, their statutory obligation to report Mbawe would have been moot. Mbawe could have self-reported to HPRP at any time thereafter, satisfied its requirements, and then sought readmission with his license secured. It was only after Mbawe demonstrated that he would not self-report that Dr. Bates determined that he had to refer Mbawe to HPRP in order to satisfy his statutory obligation. (L.R.58, PgID#976-978).

proceedings were underway and Mbawe had clearance to return to the program. (PgID#94). On November 18, 2013, at Mbawe's request, Dr. Blake provided Mbawe with a formal letter explaining the final decision to withdraw Mbawe from the pharmacy program. (L.R.1-12, PgID#99).

**M. Mbawe failed to comply with the requirements imposed by HPRP.**

In mid-November, 2013, HPRP directed Mbawe to submit to a psychiatric evaluation, which he eventually did by presenting to Dr. Bela Shah on January 29, 2014.<sup>17</sup> (L.R.67-2, HPRP Letter 11/18/2013, PgID#2086; Doc 45-6, Psychiatric Evaluation, PgID#554-557). Dr. Shah diagnosed Mbawe with a delusional disorder (the same diagnosis reached by Dr. Bell). (cf. L.R.59-18, Transcript, PgID#1763-1765 and L.R.45-6, Psychiatric Evaluation, PgID#557). Specifically, she concluded that he was suffering from a "Delusional Disorder, persecutory type." (DSM-V 297.1). (L.R.45-6, Psychiatric Evaluation, PgID#557). Dr. Shah observed that Mbawe had "no understanding that his thoughts could be delusional." (L.R.45-6, Psychiatric Evaluation, PgID#556). She recommended that Mbawe be monitored for two years while receiving treatment in a structured setting. (L.R.45-6, Psychiatric Evaluation, PgID#557). She also recommended that Mbawe receive therapy "to get more insight" and that he treat with a psychiatrist to

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<sup>17</sup> Initially, Mbawe neglected to cooperate with HPRP, and his file was closed, however, his file was later reopened. (L.R.67, Defendants' Response Brief, PgID#2053-2057).

“restart the antipsychotic regimen.”<sup>18</sup> (*Id.*) Under the heading “Safety to practice,” Dr. Shah concluded that Mbawe could not return to FSU’s pharmacy program until he agreed to monitoring, restarted medication, and his condition stabilized. (*Id.*)

Dr. Shah then submitted her findings to HPRP. Based on those findings, HPRP required Mbawe to enter into a monitoring agreement by which he would agree to engage in treatment. (Doc 58-43, PgID#1345-1348). Had Mbawe entered into the monitoring agreement, HPRP would have cleared him to return to the program. (*Id.*) HPRP determined that as long as Mbawe was abiding by the terms of the proposed monitoring agreement, he could have safely practiced pharmacy and returned to the program. However, Mbawe refused to sign the agreement. (L.R.45-7, Administrative Complaint, ¶¶9-14, PgID#561; Doc 58-3, Mbawe Dep., p.278, PgID#1048). Accordingly, on March 12, 2014, HPRP reported Mbawe’s non-compliance to LARA. (Doc 58-44, HPRP Letter 3/24/2014, PgID#1351; L.R.45-7, Administrative Complaint, ¶14, PgID#561).

**N. Mbawe’s intern pharmacy license was suspended.**

On April 24, 2014, after receiving notice from HPRP that Mbawe had refused to sign the monitoring agreement, LARA (Bureau of Health Care Services) filed an administrative complaint against Mbawe.

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<sup>18</sup> As noted above, Mbawe never actually took any medication.

(L.R.45-7, PgID#559-563).<sup>19</sup> In relevant part, the complaint asserted that Mbawe suffered from a “mental or physical inability reasonably related to and adversely affecting [his] ability to practice in a safe and competent manner, in violation of section 16221(b)(iii) of the Public Health Code, supra.” (*Id.*, PgID#562). LARA requested a hearing before the Board of Pharmacy Disciplinary Subcommittee to determine whether action should be taken against Mbawe. (*Id.*)

At the same time, LARA summarily suspended Mbawe’s license, because “the public health, safety, and welfare require[d] emergency action . . . .” (*Id.*; L.R.58-45, PgID#1353-1354). Mbawe was advised that he had 30 days to submit a written response to the administrative complaint and that pursuant to M.C.L. §333.16231(7) (now subsection (9)) failure to do so would be treated as an admission of the allegations contained in the complaint. (L.R.45-7, PgID#563).

Mbawe did not respond to the administrative complaint. As a result, the complaint was transmitted to the Board of Pharmacy Disciplinary Subcommittee for imposition of an appropriate sanction. (L.R.45-8, PgID#565-568). Mbawe’s failure to respond was an admission that he suffered from mental health problems that adversely affected his ability to practice in a safe and competent manner. M.C.L. §333.16231(9).

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<sup>19</sup> In his petition, Mbawe makes the untrue assertion that FSU reported him to the “Michigan Board of Pharmacy” when he refused to sign HPRP’s monitoring agreement. (App. 13). In actuality, HPRP reported Mbawe to LARA. (L.R.45-7, PgID#559-563).

At its September 8, 2014 meeting, the Disciplinary Subcommittee then suspended Mbawe's license for violation of M.C.L. §333.16221(b)(iii). (L.R. 45-8, PgID#566). The Final Order implementing the suspension was entered on October 2, 2014.<sup>20</sup> (PgID#565-568).

**O. Mbawe's untreated mental illness continues to cause him difficulty.**

Given Mbawe's refusal to engage in treatment, he unfortunately continued to struggle after he was withdrawn from FSU. In February, 2014, Mbawe was arrested by the Mecosta County Sheriff's Department for failure to pay child support. At the time he was arrested, he told the deputies that he was being "assaulted and stabbed." (Doc.#62-5, PgID#1912).

Then, in April, 2014, Mbawe reported to GRPD that he had been attacked by someone while he was sleeping in his car. (L.R.45, Brief, PgID#492).<sup>21</sup> Mbawe believed that his supposed assailant then fled in his own car so Mbawe chased him through the city

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<sup>20</sup> Although Mbawe lost his Michigan intern-pharmacy license, in January, 2016, he falsely stated on an application for a Maryland Pharmacy Technician license that no disciplinary action had been taken against him. (L.R.58-3, Mbawe Dep., pp.309-311, PgID#1055-1056; L.R.58-46, Maryland Pharmacy Application, p."3564," PgID#1360).

<sup>21</sup> At the time, Mbawe was living in an apartment in Kentwood, Michigan. (L.R.58-42, Mbawe's Interrogatory Answers, ¶1(h), PgID#1333). However, he apparently felt threatened sleeping there so he was spending nights in his car. (L.R.62-3, Medical Records, PgID#1901).

streets in the middle of the night. (L.R.45-3, PgID#541-543). Mbawe even believed that the police dispatcher encouraged him to continue the automobile chase. (*Id.*, PgID#542). However, when GRPD later reviewed the security video of the parking lot where Mbawe's car had been parked, the officers concluded that there was no assailant. (L.R.45-5, PgID#548-552). Mbawe had been chasing a figment of his delusionary imagination.<sup>22</sup> (*Id.*)

Then, in July, 2014, Mbawe was arrested for causing a disturbance at the police station after he refused to leave because the police were not investigating his delusionary complaints. (L.R.62-11, PgID#1944-1947). Also during this same timeframe, Mbawe began to express the belief that other cars on the road were "stalk[ing]" him. (L.R.45-3, PgID#520-529). He said that on one occasion "they" put "white sticky stuff" on his windshield while he was driving, which made it feel "like his car was burning." (*Id.*, PgID#520). He also said that many other times three or more cars stalk him in traffic with one car in front, one to the side, and one behind to box him in. (*Id.*, PgID#522-527). He insists that the stalking has occurred in the various places that he has lived and that the stalking was still occurring in 2017 at the time of his deposition. (*Id.*)

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<sup>22</sup> Yet, even during his deposition, Mbawe maintained that GRPD was wrong and that the attack had really occurred. (L.R.45-3, PgID#541-543).

Notably, Mbawe's delusions have continued to occasionally cause him to react violently as demonstrated by his arrest in March, 2017 for assault. (L.R.58-3, PgID#1032-1035). The arrest occurred in Maryland, where Mbawe currently lives. On the evening of March 5, 2017, the victim of Mbawe's assault was returning from church with his pregnant wife. (L.R.45-2, PgID#504-513; L.R.53-1, PgID#863-866). After the victim parked, Mbawe "walked up to the parked car, opened the driver door and threw multiple punches at [the victim's] head region, while [his] wife was still seated in the passenger seat of the car." (L.R.45-2, PgID#505). Mbawe eventually stopped punching the victim, and the police were called.

Mbawe attacked his victim because Mbawe irrationally believed that the man had been following him. The fact that Mbawe would act so violently shows how unstable his untreated delusional order makes him. (L.R.45-1, PgID#498-502; L.R.53, PgID#854-861).<sup>23</sup> Quite simply, Mbawe's refusal to engage in treatment continues to render him unsafe.

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<sup>23</sup> Mbawe had yet another negative interaction with a different driver sometime in 2016. (L.R.45-3, Mbawe Dep., pp.122-127, PgID#525-526).

**P. Mbawe's complaints with OCR.**

After leaving FSU, Mbawe wrote several letters to the United States Department of Education, Office of Civil Rights (“OCR”). One such letter that is particularly insightful is dated June 18, 2014. (L.R.62-10, PgID#1928-1942). The letter is a rambling diatribe in which Mbawe recites his version of the facts of this case as filtered through his delusionary beliefs, paranoid thoughts, and conspiracy theories. (*Id.*) Mbawe wrote another similar letter on December 29, 2014. (L.R.62-14, 12/29/2014, PgID#1956-1976; L.R.58-3, PgID#1057). When these letters are juxtaposed to the medical documents, police reports, and other objective evidence in the record, they paint a vivid picture of the severity of Mbawe's mental illness.

However, despite the jarring nature of Mbawe's correspondences, OCR began an investigation. Thereafter, FSU's General Counsel responded to OCR's request for documents and explained how FSU had appropriately addressed Mbawe's situation. (L.R.62-12, PgID#1949-1950). Nevertheless, without giving FSU the opportunity to defend its position, OCR concluded in a letter dated July 29, 2016 that FSU had somehow violated Mbawe's rights. (L.R.1-1, PgID#34-63). The OCR letter is obviously not binding and Mbawe has not argued otherwise. (App. 12a, n. 1). In fact, OCR's analysis is deeply flawed. (L.R.58, PgID#981-983).

**Q. Proceedings below.**

On September 30, 2016, Mbawe filed suit in the United States District Court for the Western District of Michigan against FSU and the individual Defendants, Dr. Bates, Dean Durst, Dr. Blake and Ms. Vander Myde. Mbawe asserted claims against FSU under the ADA and §504, and asserted claims against the individual Defendants under 42 U.S.C. § 1983 for an alleged violation of procedural due process with regard to his withdrawal from the pharmacy program. The district court entered its order granting summary judgment in favor of the Defendants on January 10, 2018. The Sixth Circuit affirmed on November 19, 2018 (R. 35), and Mbawe’s Petition for Rehearing *En Banc* was denied on December 7, 2018. (R. 37-1).

**THE REASONS FOR DENYING THE PETITION****I. THERE IS NO CONFLICT REGARDING AN ENTITY’S OBLIGATION TO ENGAGE IN THE INTERACTIVE PROCESS THAT COULD BE SOLVED BY GRANTING THE PETITION BECAUSE FSU OFFERED MBAWE THE ONLY REASONABLE ACCOMMODATION AVAILABLE.**

The Sixth Circuit properly held that after Mbawe was released from the hospital, he was not qualified to continue in the pharmacy program. (App. 16a). That holding was correct because the program’s Technical Standards unambiguously required Mbawe to “obtain and maintain a valid Pharmacist Intern license in the State of Michigan.” (*Id.*). As the Sixth Circuit correctly held “[w]hen FSU officials medically withdrew Mbawe

from the university, the state probate court had already determined – by 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.’” (*Id.*) (quoting Mich. Comp. Laws §§ 330.1400(g), 1401).

As licensed pharmacists, Dean Durst and Dr. Bates undisputedly had a statutory obligation to report Mbawe’s impairment to LARA, or alternatively, to refer Mbawe to HPRP. See Mich. Comp. Laws §§333.16222(1) and 16223(1). Dean Durst and Dr. Bates were not free to ignore Mbawe’s impairment as Mbawe had urged them to do. Instead, once the Kent County Probate Court found that Mbawe suffered from a mental illness, he was no longer a “qualified person” because “he was no longer eligible to hold a pharmacy intern license, and he therefore no longer satisfied the Technical Standards.” (App. 16a). With regard to post-secondary education, the eligibility requirements for participation include both academic and technical standards. 34 C.F.R. §104.3(l)(3); 45 C.F.R. §84.3(l)(3).<sup>24</sup>

Given the foregoing, Mbawe’s dubious contention that a conflict exists between the circuits regarding an entity’s obligation to engage in the interactive process is entirely irrelevant to the Sixth Circuit’s disposition

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<sup>24</sup> Technical standards are all “nonacademic admissions criteria that are essential to participation in the program in question.” *Southeastern Comm. College v. Davis*, 442 U.S. 397, 406; 99 S.Ct. 2361 (1979) (quoting 45 C.F.R. Pt. 84, App. A).

in this case. FSU engaged in the interactive process and that process led FSU to offer a reasonable accommodation for Mbawe – *i.e.*, Mbawe was repeatedly advised that if he addressed his mental health issue and resolved his licensing issue to the satisfaction of HPRP, he could continue with the pharmacy program. (L.R. 1-9, PgID#87-88; L.R.58-23, PgID#1208, 1222-1224; L.R. 1-10, PgID#94).

Although FSU initially withdrew Mbawe from the program on October 15, 2013, that decision did not become final until November 5, 2013. (L.R.1-9, PgID#86-91). During the intervening period, FSU worked with Mbawe to ensure that he was given a reasonable accommodation. Mbawe submitted his written appeal (L.R.58-37, PgID#1315-1317), and thereafter he met with Dr. Bates, Dean Durst and Dr. Blake. (L.R.1-9, PgID#86-91). Throughout that process, it remained abundantly clear that Mbawe was no longer eligible to hold a pharmacy intern license, and that Dean Durst and Dr. Bates had an obligation to report him. Mbawe offered absolutely nothing to ameliorate FSU's concerns regarding his impairment, and of course, there was no way he could have because the state probate court had already concluded that he was impaired.

Further, after interacting with Mbawe during the appeal, Dean Durst, Dr. Bates, and Dr. Blake confirmed that Mbawe did not “possess the emotional and mental health required for full utilization of [his] abilities” as required by the Technical Standards. (App. 16a). Mbawe was refusing to acknowledge his own mental illness, refusing to engage in treatment or

monitoring, and refusing to address his licensing issues at all. Consequently, FSU offered Mbawe the only reasonable accommodation available: they explained to Mbawe that his withdrawal would stand, but that if HPRP determined that he was no longer impaired (through monitoring, counseling, medication, or otherwise) that he would be readmitted. (L.R., PgID#87-88). The relevant point is that the interactive process occurred and a reasonable accommodation was identified. Mbawe merely rejected that reasonable accommodation when he refused to sign the HPRP monitoring agreement. (App. 18a).

As such, Mbawe cannot support his erroneous contention that reasons exist to grant his petition. The Sixth Circuit was absolutely correct to reject Mbawe's untrue claim that FSU's officials did not engage in an "interactive process" or otherwise "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." (App. 18a). The Sixth Circuit's holding is not only correct because Mbawe neglected to request an accommodation, but the holding is also correct because FSU worked with Mbawe, identified the one and only reasonable accommodation that was available, and then offered that accommodation to him. "Mbawe cannot now claim that FSU should have provided him another specific accommodation – one that he did not propose [and one that did not exist] – when he refused the reasonable accommodation that actually was offered to him by the university." (App. 18a) (quoting *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 307 (6th Cir. 2016)).

In other words, Mbawe cannot provide this Court with a valid reason to resolve some supposed conflict between the circuits regarding an entity's obligation to engage in the interactive process. Even if such a conflict exists (and it appears not to), resolution of that conflict would have no impact on the case at bar.<sup>25</sup> Mbawe's ADA and §504 claims failed not because he neglected to propose a reasonable accommodation. His claims failed because he refused to accept the reasonable accommodation that was identified and offered.<sup>26</sup> Because Mbawe failed to make a *prima facie* showing that he was qualified to continue in the pharmacy program with or without an accommodation, it was not necessary to even consider issues regarding the interactive process. *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384, 395 (6th Cir. 2017).

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<sup>25</sup> Most (if not all) of the cases that Plaintiff contends demonstrate a conflict between the circuits do not support that contention. The cases generally recognize, like the Sixth Circuit did in the case at bar, that in the educational context, the plaintiff bears the burden to prove that some accommodation would have allowed the plaintiff to meet the essential eligibility requirements. See e.g., *Dean v. Univ of Buffalo School of Medicine*, 804 F.3d 178, 190 (2d 2015); see also *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 314 (3d Cir. 1999) (holding that because the school district had enough information to put it on notice that the plaintiff might have a disability, the plaintiff "only needed to request an accommodation" in order to trigger the interactive process).

<sup>26</sup> None of the other possible accommodations discussed in the Petition were reasonable because none of them would have resolved Mbawe's licensing issue. In any event, Mbawe could not force FSU to provide a specific accommodation because FSU offered an alternative reasonable accommodation. *Tennial v. United Parcel Service*, 840 F.3d 292 307 (6th Cir. 2016).

In short, the Sixth Circuit's holding is unchanged by Mbawe's contention that some circuits have held that the interactive process is triggered by the employer's recognition of the need of an accommodation. (App. 18) (citing *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000)). Whether or not Mbawe recognizes that the interactive process occurred in this case, he does not (and cannot) dispute that FSU offered him a reasonable accommodation. See e.g., *Fjellestand v. Pizza Hut of America, Inc.*, 188 F.3d 944, 952 (8th Cir. 1999) (recognizing that "an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible."); and *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) (holding that even if the employer failed to fulfill its obligation to engage in the interactive process, the plaintiff is not entitled to recover unless he can show that a reasonable accommodation was possible).<sup>27</sup> Mbawe's petition should be denied.

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<sup>27</sup> See also *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 115 (9th Cir. 2000). Mbawe relies heavily on *Barnett* to support his erroneous argument that a split exists among the circuits. However, *Barnett* stated that "[m]ost circuits have held that liability ensues for failure to engage in the interactive process when a reasonable accommodation would otherwise have been possible." 228 F.3d 1105, 1115 (9th Cir. 2000). Therefore, a reasonable accommodation must be a possibility before liability will be assigned. In the case at bar, because there was no reasonable accommodation other than the one that was offered to Mbawe, summary judgment would have been appropriate under the reasoning of *Barnett* too.

## **II. THE SIXTH CIRCUIT'S DECISION WAS CORRECT.**

Mbawe fails to explain why this Court should grant his petition with regard to his due process claim other than to erroneously argue that the Sixth Circuit's decision was somehow incorrect. As the Sixth Circuit correctly held, the amount of process that Mbawe was due prior to his withdrawal depends on whether the action constituted an academic or disciplinary dismissal. (App. 21a). When a student is dismissed for academic reasons, the procedural requirements are "far less" stringent. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978). Because Mbawe was subjected to an academic dismissal, FSU was not obligated to afford him a formal hearing. (App. 22a). Instead, because the FSU officials responsible for Mbawe's medical withdrawal were "careful and deliberate," and because Mbawe was fully informed of their decision, the district court properly granted summary judgment of the due process claim. (App. 23a-24a).

## **CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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