APPENDIX

Appendix A

APPENDIX A— DECISION DENYING PETITION FOR PANEL REHEARING, DATED NOVEMBER 19, 2018

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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November 19, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-11888-GG
Case Style: Nausheen Zainulabeddin v. University of South Florida
District Court Docket No: 8:16-cv-00637-JSM-TGW

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Joe Caruso, GG/lt
Phone #: (404) 335-6177

REHG-1 Ltr Order Petition Rehearing

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-11888-GG

NAUSHEEN ZAINULABEDDIN,

Plaintiff - Appellant,

versus

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

BEFORE: ROSENBAUM, BRANCH, and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41

APPENDIX B— DECISION DENYING CONSOLIDATED APPEAL FOR THE 11TH CIR. DATED SEPTEMBER 5, 2018

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 17-11888, 17-12134, 17-12376
Non-Argument Calendar

D.C. Docket No. 8:16-cv-00637-JSM-TGW

NAUSHEEN ZAINULABEDDIN,

Plaintiff-Appellant,

versus

UNIVERSITY OF SOUTH FLORIDA BOARD OF TRUSTEES,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(September 5, 2018)

Before ROSENBAUM, BRANCH, and FAY, Circuit Judges.

PER CURIAM:

Nausheen Zainulabeddin, proceeding *pro se* on appeal, is a former medical student at the University of South Florida's Morsani College of Medicine (the "medical school"). After her dismissal from the medical school in May 2013,

Zainulabeddin, who has attention deficit hyperactivity disorder ("ADHD"), sued the University of South Florida Board of Trustees ("USF"), contending that she was discriminated against due to that disability and that USF otherwise breached its obligations to her. She brought discrimination and retaliation claims under the Rehabilitation Act, 29 U.S.C. § 794, and claims of breach of fiduciary duty and negligent misrepresentation under Florida law. The district court granted summary judgment to USF, denied her post-judgment motions for reconsideration of that ruling and recusal of the district judge, and granted USF's motion to tax costs. Zainulabeddin appeals all of these rulings, which we have consolidated. After careful review, we affirm the district court in all respects.

I. Factual Background[1]

In 2008, Zainulabeddin was "informally" diagnosed with ADHD or generalized anxiety disorder, or both, and she began taking ADHD medication. The following year, in August of 2009, she began classes at the medical school. The medical-doctor program has four academic years, which must be completed within a total of six years. Zainulabeddin completed two academic years in a total of four years. She was dismissed from the program in March 2013.

[1] When reviewing a decision on summary judgment, we view all the evidence and draw all reasonable inferences in favor of the non-moving party—in this case, Zainulabeddin. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 767 (11th Cir. 2005).

Zainulabeddin began having academic difficulties in her first year in the program (academic year 2009–10). After doing poorly on a cardiology exam in March 2010, she contacted Dr. Steven Specter, the Associate Dean for Student Affairs at the medical school. Concerned about failing out of school, she disclosed the informal ADHD diagnosis to Dr. Specter, who suggested she see a psychiatrist for her anxiety. She did so. The school psychiatrist told her that disability accommodations would be the next step if her medications were not working. But before she could be accommodated, the psychiatrist explained, she would have to receive a formal diagnosis.

Zainulabeddin met with Dr. Specter again and asked whether she should take a leave of absence from the program. Dr. Specter advised against it, suggesting that she try to finish the remaining month and a half of the academic year. She testified that she likewise felt at that time that she did not need a leave of absence. Zainulabeddin finished the academic year, but she failed all but one class. She stopped taking her ADHD medication once the academic year ended.

Because Zainulabeddin failed her first year of the medical-doctor program, the medical school's Academic Performance Review Committee (the "Committee")—composed of the medical school's course directors—required her to obtain a "comprehensive assessment of [her] learning style," at the school's expense. Dr. Mike Schoenberg, a psychologist employed by USF, conducted the

assessment and then prepared a written report, which he submitted to Dr. Specter. Zainulabeddin refers to this assessment as a "neuropsychological evaluation," so we do, too.

Zainulabeddin met with Dr. Specter in October 2010 to go over the results of her neuropsychological evaluation. Dr. Specter stated that, based on his review of Dr. Schoenberg's report, there was "nothing to worry about" and she should continue studying hard. At that time, Zainulabeddin was unsure whether she had ADHD or whether she qualified for accommodations, and she did not request any accommodations. She believed at the time that her attention difficulties may have been caused by challenging life circumstances rather than ADHD.

For academic year 2010–11, her second year, the Committee permitted Zainulabeddin to repeat her first-year curriculum while on academic probation. She completed the repeat first year after being allowed to remediate one class.

Zainulabeddin was taken off probation for her second-year coursework during academic year 2011–12, her third year. She failed two courses in her first semester, however, and the Committee dismissed her from the medical school in January 2012 and denied her first appeal of the dismissal. Zainulabeddin had not been taking ADHD medication since April 2010.

After her appeal was denied, Zainulabeddin requested and obtained a copy of her neuropsychological evaluation from Dr. Specter. Contrary to Dr. Specter's

earlier statements that the evaluation revealed "nothing to worry about," the evaluation actually indicated diagnostic impressions of ADHD, and it said that she qualified for accommodations—testing in a distraction-free environment—based on having attention difficulties or ADHD, or both. Dr. Specter apologized for his earlier misrepresentation and said he would correct his mistake by arranging a meeting with Committee.[2] The Committee then reversed its decision, citing "new information" not previously available, and reinstated her on academic probation. Because the reinstatement decision occurred midway through the semester, the Committee put her on a leave of absence for the rest of the 2011–12 academic year. Meanwhile, Zainulabeddin resumed taking ADHD medication in February 2012, once she received a copy of the neuropsychological evaluation.

Zainulabeddin returned in the fall for academic year 2012–13, her fourth year in the program, to repeat the second-year curriculum. That year, she took all exams with accommodations, including increased time and a distraction-free environment. Her instructors also permitted her to view lectures online from her home rather than attending class. Nevertheless, she still failed two courses: Doctoring II and Evidence Based Clinical Reasoning II ("EBCR II").

Zainulabeddin believes she was singled out to fail these courses because, among other things, she received "U" or "unsatisfactory" grades, rather than the

[2] Dr. Specter disputed Zainulabeddin's testimony on this fact, but we resolve this dispute in her favor.

"T" or "temporary" grades that, according to her, other failing students received. Testimony and documents reflect that T grades are not reported on a student's transcript and are used to designate the need to correct a minor or narrow issue. Once corrected, the T grade is converted to a passing grade. U grades, by contrast, are reported on transcripts and used to designate more global deficiencies.

In light of her two failed courses and her prior academic difficulties, the Committee decided to dismiss Zainulabeddin from the medical school on March 14, 2013. She appealed. While her appeal was pending, she was allowed to remediate the two courses she had failed, and she ultimately passed both courses, thereby completing the second-year curriculum. Nevertheless, despite her remediation, the medical school refused to reconsider its dismissal decision and denied her appeal in May 2013.

Meanwhile, on March 12, 2013, two days before the Committee dismissed her from the program, Zainulabeddin contacted Dr. Frazier Stevenson about obtaining accommodations for an upcoming test called the Comprehensive Basic Science Exam ("CBSE"). Because the test was administered by the National Board of Medical Examiners ("NBME"), her accommodations had to be arranged with that organization. The medical school contacted the NBME to arrange disability accommodations for Zainulabeddin, though, ultimately, she did not take the exam that year because she was dismissed from the medical school.

II. Procedural History

Zainulabeddin filed this case with the assistance of counsel on January 22, 2016. She claimed that USF violated the Rehabilitation Act of 1973, 29 U.S.C. § 794, by dismissing her from the medical school on the basis of disability and retaliating against her for requesting disability accommodations for the CBSE. She alleged state-law claims of breach of fiduciary duty and negligent representation against Dr. Specter, relating to his failure to accurately convey to her the results of the neuropsychological evaluation in October 2010.[3]

After removing the case to federal court, USF moved for summary judgment, contending that Zainulabeddin's Rehabilitation Act claims failed on the merits and that her state-law claims were barred either by the statute of limitations or by sovereign immunity. In response, Zainulabeddin (1) argued that sufficient evidence of discrimination and retaliation existed; (2) conceded that her breach-of-fiduciary-duty claim was "facially barred by the applicable statute of limitations" but asserted that USF was equitably estopped from asserting that defense because its "affirmative misconduct" caused her to forgo bringing suit at an earlier time; and (3) disputed that USF was entitled to sovereign immunity against the state-law claims.

[3] Zainulabeddin conceded at summary judgment that her remaining state-law claims—for breach of contract and unjust enrichment—were barred by sovereign immunity, and she does not address these claims directly on appeal. We therefore deem them abandoned.

The district court granted summary judgment to USF. The court found insufficient evidence of discrimination or retaliation. As for Zainulabeddin's state-law claims, the court concluded that her breach-of-fiduciary-duty claim was time barred and that her negligent-representation claim failed either because it was time barred or because USF was protected by sovereign immunity.

Post-judgment, Zainulabeddin filed a motion seeking reconsideration of the summary-judgment ruling and recusal of the district judge. In support of her recusal request, she claimed that the judge had a "potentially significant conflict of interest" because he was a member of the USF Economic Development Board and Chair of the USF School of Psychology Advisory Committee. The district judge denied the motion, stating that he had not served on any board or committee for USF since the late 1990s and that he had no involvement with the medical school.

Meanwhile, USF moved to tax certain costs of litigation against Zainulabeddin. USF sought a total of $5,802.15 for the costs of the removal fee, service of subpoenas, deposition transcripts, witness fees, and copying fees. Over Zainulabeddin's opposition, the district court determined that USF was entitled to recover a total of $5,382.15 in costs and then declined to exercise its discretion to reduce the costs award. The court explained that Zainulabeddin had not provided sufficient documentation of her inability to pay the costs award and that USF should not be penalized through the denial of its costs.

Zainulabeddin timely appealed the grant of summary judgment against her (No. 17-11888), the denial of her motion for reconsideration/recusal (No. 17-12134), and the order awarding costs to USF (No. 17-12376). We granted her motion to consolidate these appeals. We address each ruling in turn.

III. Summary Judgment (No. 17-11888)

We review de novo a district court's grant of summary judgment, construing all facts and drawing all reasonable inferences in favor of the non-moving party. *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 919 (11th Cir. 2018). Summary judgment is proper if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The central inquiry at summary judgment is whether the evidence, construed in the light most favorable to the non-moving party, would permit a reasonable jury to return a verdict in her favor. *See Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742–43 (11th Cir. 1996).

We liberally construe briefs filed by *pro se* parties. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). Even so, "issues not briefed on appeal by a *pro se* litigant are deemed abandoned." *Id.*

A. Rehabilitation Act

The Rehabilitation Act prohibits any program or activity that receives federal financial assistance, which includes the medical school here, from

discriminating against any "otherwise qualified individual with a disability . . . solely by reason of her or his disability." 29 U.S.C. § 794(a). In the context of postsecondary education, an otherwise qualified individual is a person who is able to meet the academic and technical standards requisite to admission or participation in the education program or activity. *See Onishea v. Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999) (*en banc*); 34 C.F.R. § 104.3(l)(3). The district court found that Zainulabeddin was not an "otherwise qualified" individual, but we do not reach that issue.[4] No reasonable jury could conclude that she was discriminated against solely by reason of her disability.

Discrimination claims under the Rehabilitation Act are governed by the same standards used in cases brought under the Americans with Disabilities Act ("ADA").[5] *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000). When a plaintiff offers circumstantial evidence to prove a discrimination claim, courts analyze the claim using the burden-shifting framework outlined in *McDonnell Douglas Corp.*

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[4] Because the district court's analysis on this issue was bound up with the inquiry into whether USF's proffered reason was pretextual, we consider whether Zainulabeddin met the medical school's academic standards at the pretext stage of the analysis. *Cf. Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010) (stating that issues "bound up in the inquiry into whether [the employer's] proffered reason . . . was a pretext for discrimination" should be considered "at the pretext stage of the analysis").

[5] Zainulabeddin asserts that the district court incorrectly applied Title I of the ADA to her Rehabilitation Act claims, when Title II of the ADA provided the proper standards. She does not explain in clear terms what she means by this, however. And under our precedent, the district court properly applied the analysis for disability-discrimination claims under the ADA to her discrimination claim under the Rehabilitation Act, which required her to prove discrimination "solely by reason of her . . . disability."

v. Green, 411 U.S. 792 (1973). *See Durley v. APAC, Inc.*, 236 F.3d 651, 657 (11th Cir. 2000). Under this framework, if a plaintiff establishes a *prima facie* case of discrimination and the employer proffers a legitimate, non-discriminatory reason for its adverse action against the plaintiff, then the plaintiff must show that the employer's proffered reason was a pretext for discrimination. *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272–73 (11th Cir. 2002).

In certain circumstances, an educational institution's refusal to accommodate the needs of a disabled person amounts to discrimination against that person because of her disability. *See Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412–13 (1979). However, the Rehabilitation Act does not require an educational institution to lower or effect substantial modifications of standards to accommodate a student's disability. *Id.* at 413. Where the purpose of an educational program is to train persons to serve their profession in customary ways, an institution's refusal to make "major adjustments" to its program does not amount to disability-based discrimination. *Id.*

The Rehabilitation Act also incorporates the anti-retaliation provision from the ADA. *See* 29 U.S.C. §§ 791(f), 793(d), 794(d). Under the ADA's anti-retaliation provision, "[n]o person shall discriminate against an individual because such individual has opposed any act or practice made unlawful by this chapter." 42 U.S.C. § 12203(a). This anti-retaliation provision is similar to Title VII's

prohibition on retaliation. *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1287 (11th Cir. 1997). Accordingly, we assess retaliation claims pursuant to the Rehabilitation Act under the framework used for Title VII retaliation claims. *See id.*

Here, the district court properly granted summary judgment to USF. Construing the evidence and drawing all reasonable inferences in her favor, no reasonable jury could conclude that USF discriminated against Zainulabeddin because of her disability, refused to provide reasonable accommodations, or retaliated against her for requesting accommodations. Rather, the record makes clear that Zainulabeddin was dismissed from the program for poor academic performance.

USF produced ample and largely uncontroverted evidence of Zainulabeddin's academic difficulties throughout her four years of study at the medical school. She was initially dismissed from the program in January 2012 after taking two years to complete the first-year curriculum and failing two second-year courses in the first semester of her third year. Eventually, the Committee reinstated her and allowed her to repeat the second-year curriculum with accommodations for her ADHD, including increased time for exams and a distraction-free environment. She also received numerous extensions to complete assignments and exams. But she continued to struggle nonetheless, failing two

courses, Doctoring II and EBCR II, which she then had to remediate to earn passing grades. In short, Zainulabeddin finished two years of coursework in four years and was still struggling to pass even with disability accommodations.

Because the medical school required all of its students to finish the four-year medical-doctor program in six years, the Committee had substantial reason to doubt that Zainulabeddin could successfully complete the remaining two years of the program in the maximum time allotted. Moreover, its decision to dismiss her from the program was consistent with its policies as reflected in the student handbook. According to the student handbook, a student was subject to dismissal from the program at any time if she had more than one failing grade at a time or failed any course while on academic probation. Additionally, the handbook provided that a student was subject to dismissal even if she had passing performance where her record consisted of multiple deficiencies or failures with subsequent remediation. All of these deficiencies are reflected in Zainulabeddin's academic record, including, most notably, that of her fourth and final year, when she failed two courses while on probation and then passed only with subsequent remediation. Thus, the Committee's decision to dismiss Zainulabeddin from the program was fully supported by her academic record and the medical school's policies.

Zainulabeddin has not shown that USF's legitimate, non-discriminatory and non-retaliatory reason for her dismissal—poor academic performance—was actually a smokescreen for disability discrimination or retaliation. Liberally construed on appeal, Zainulabeddin's briefing claims that USF refused to accommodate her ADHD and held her to a different academic standard than other, non-disabled students.[6] The record does not support these contentions, however.

USF did not fail to provide reasonable accommodations. Zainulabeddin did not request accommodations until after January 2012 and, in fact, did not believe that she needed any before that time.[7] USF was not obligated to accommodate her before she requested accommodations. *See Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999) ("[A] plaintiff cannot establish a claim under the Rehabilitation Act alleging that the defendant discriminated against him by failing to provide a reasonable accommodation unless he demanded such an accommodation."). Then, once Zainulabeddin requested accommodations,

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[6] In addition, Zainulabeddin asserts that Congress abrogated state sovereign immunity for claims brought under the ADA and that her federal claims were not time barred because the federal fallback statute, 28 U.S.C. § 1658, applies. These arguments appear to be responding, albeit in misguided fashion, to the court's resolution of her state-law claims. Therefore, we address them, to the extent relevant, below. To the extent she intends these arguments to relate to her Rehabilitation Act claims, they provide no basis for relief because the court did not find that USF was entitled to sovereign immunity against her federal-law claims or conclude that these claims were untimely.

[7] Zainulabeddin's earlier question to Dr. Specter about taking a leave of absence cannot reasonably be construed as a request for an accommodation because she did not clearly request a leave of absence and did not feel that she needed a leave of absence at that time. Nor did she attribute her academic difficulties at that time to her ADHD.

USF reinstated her and permitted her to repeat her second-year coursework with accommodations, and she does not clearly identify any deficiency in the accommodations she received after February 2012.

Further, the record does not support Zainulabeddin's claim that USF held her to a different standard than other students because of her disability. There is no evidence that she was held to a different standard than any other repeating student, whether disabled or not. In fact, she conceded that USF had a standard that repeating students "should not fail any classes, period."

Nor can Zainulabeddin rely on her status as a repeating student on probation as evidence of disability discrimination in this case. While the medical school may have had reason to suspect that her poor academic performance in previous years was due to her unaccommodated disability, that recognition was embodied in the decision to allow her to repeat the second-year curriculum with accommodations. In other words, the Committee's decision indicates its judgment that her unaccommodated ADHD may have inhibited her academic performance, so it gave her a chance to prove otherwise. Despite that recognition, however, USF was not required to make "major adjustments" to its medical-doctor program to accommodate her, by, for example, extending its normal maximum time limit to complete the program or altering its rules for students who fail an academic year. *See Davis*, 442 U.S. at 413. Because she ultimately failed two courses even after

receiving disability accommodations, the Committee's subsequent dismissal decision cannot reasonably be attributed to discrimination. Nor is there any evidence of retaliation, since Dr. Stevenson was not part of the Committee and did not have any clear input into that decision.

Zainulabeddin also takes issue with her grades in the two courses she failed in her fourth year. But she has not rebutted the ample record evidence from multiple sources, recounted by the court in its thorough summary-judgment ruling, showing that she had significant and wide-ranging difficulties in her EBCR II and Doctoring II courses, despite her instructors' efforts to ensure she passed. As the district court explained, she failed the final exam in Evidence-Based Medicine portion of EBCR II.[8] With regard to the Doctoring II course, Zainulabeddin received negative evaluations from multiple sources throughout the course, including a negative midterm evaluation and a "below expectations" rating on two of the three stations of her final exam from two evaluators who had no prior experience with her. Finally, like the district court, we can see nothing discriminatory in Zainulabeddin's receipt of "U" grades rather than "T" grades, even if the grading system is otherwise subject to criticism.

[8] Zainulabeddin claims that she should have received a passing grade in the Evidence-Based Medicine portion of EBCR II because she received a 67.5 grade on the final, which, combined with her presentation score, amounted to a passing grade. However, we disregard this contention because, at her deposition, she testified that she received a 65 on the final the first time she took it. She also prepared a summary of her grades in EBCR II that listed her final exam score as 65. And as the district court explained, because the exam constituted 90% of her grade, she could not have passed the course with a 65 on the final exam.

For all of these reasons, no reasonable jury could conclude that USF was motivated by discriminatory or retaliatory animus in dismissing Zainulabeddin from the medical doctor program. We therefore affirm the district court's grant of summary judgment to USF on her claims under the Rehabilitation Act.

B. State-Law Claims

Zainulabeddin's claims for breach of fiduciary duty and negligent misrepresentation arise out of Dr. Specter's failure to inform her that she qualified for disability accommodations in October 2010. The court concluded that the breach-of-fiduciary claim was time barred and that the negligent-misrepresentation claim either was time barred or barred by sovereign immunity.

Taking the timeliness issue first, Zainulabeddin offers two reasons why, in her view, her claims were improperly dismissed as untimely. First, she asserts, the limitations period did not begin to run until she discovered the contents of her neuropsychological evaluation in February 2012. Second, she argues, USF is equitably estopped from asserting a statute-of-limitations defense. Neither contention is availing.

Under Florida law, a four-year limitations period applies to claims for negligence, including breach of fiduciary duty. *See* Fla. Stat. § 95.11(3); *Patten v. Winderman*, 965 So. 2d 1222, 1224 (Fla. Dist. Ct. App. 2007). In general, "a cause of action accrues or begins to run when the last element of the cause of action

occurs." *Davis v. Monahan*, 832 So.2d 708, 709 (Fla. 2002). This rule is subject to an exception. Under the "delayed discovery" doctrine, "a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the cause of action." *Hearndon v. Graham*, 767 So.2d 1179, 1184 (Fla. 2000). The Florida Supreme Court has made clear, however, that this doctrine does not apply unless the Florida legislature has incorporated it into the relevant statute of limitations. *See Davis*, 832 So.2d at 701–11.

Here, the delayed discovery doctrine does not apply to Zainulabeddin's claims because the relevant statute of limitations does not incorporate that doctrine. *See Patten*, 965 So.2d at 1224 ("[T]he trial court properly determined that the delayed discovery doctrine does not apply to Patten's breach of fiduciary duty count."). And she does not otherwise dispute the district court's finding that her claims accrued in October 2010. Because she did not file this action until January 2016, well after the four-year limitations period ran, the court properly concluded that her claims were untimely.

Furthermore, the district court properly concluded that equitable estoppel did not apply. "Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct." *Major League Baseball v. Morsani*, 790 So.2d 1071, 1077 (Fla. 2001). Florida courts apply equitable estoppel to prevent a defendant from asserting the statute of limitations

as a defense when the defendant's misconduct induced the plaintiff to forbear bringing suit within the applicable limitations period. *See id.* at 1078–79.

Here, however, USF's actions did not prevent her from filing suit within the limitations period. By February 2012, she knew that Dr. Specter had misrepresented the contents of her neuropsychological evaluation, and by May 2013, she knew that her appeal of her second dismissal from the program had been denied, leaving her with well over a year in which to file suit. Because USF's conduct did not prevent her from filing on time, we conclude that equitable estoppel does not apply.

On the issue of sovereign immunity, Zainulabeddin fails to address the district court's conclusion that sovereign immunity applies to her negligent-misrepresentation claim to the extent it was based on bad faith rather than negligence. While she makes reference to Congress's abrogation of state immunity through the ADA or the Rehabilitation Act, these issues of federal law are not relevant to her state-law claims. We conclude, therefore, that she has abandoned any challenge on this issue. *See Timson*, 518 F.3d at 874.

In any case, we cannot say that the district court erred. Under Florida law, the state and its agencies have sovereign immunity and cannot be sued unless the Florida legislature has waived that privilege. *See Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So.2d 4, 5 (Fla. 1984). State agencies sharing in that immunity

include "state university boards of trustees," like the defendant here. *See* Fla. Stat. § 768.28(2). Although Florida has generally waived immunity for torts, it has retained immunity for torts committed in bad faith by its employees. Fla. Stat. § 768.28(9). Zainulabeddin's negligent-misrepresentation claim, if based on a theory of bad faith, was barred by sovereign immunity because Florida has not waived immunity for torts involving fraud. And if based on a negligence theory, it was time barred for the reasons explained above. Accordingly, we affirm the grant of summary judgment on her state-law claims.

IV. Reconsideration/Recusal (No. 17-12134)

Zainulabeddin contends that Judge Moody, the district judge who handled her case, should have recused himself because he previously served as a member of the USF Economic Development Board and the Chair of the USF School of Psychology Advisory Committee.

We review a judge's decision not to recuse for abuse of discretion. *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir. 2001). Recusal is required in any proceeding in which the judge's impartiality might reasonably be questioned—that is, where an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality. 28 U.S.C. § 455(a); *Curves, LLC v. Spalding County, Ga.*, 685 F.3d 1284, 1287 (11th Cir. 2012). A judge must also disqualify himself where he has a personal bias concerning a party. 28 U.S.C. § 455(b)(1).

Section § 455(b)(1) requires that the judge actually have a personal bias or prejudice concerning a party and is narrower than § 455(a). *Curves, LLC*, 685 F.3d at 1288.

Here, the district judge did not abuse his discretion by denying Zainulabeddin's motion for recusal and declining to recuse himself. Under the narrower standard of § 455(b)(1), Zainulabeddin presented no evidence of actual bias, so Judge Moody was not required to recuse himself under that section. *See Curves, LLC*, 685 F.3d at 1288. Nor was Judge Moody required to recuse under the broader standard of § 455(a). A fully informed lay observer would not entertain significant doubt about Judge Moody's impartiality. *See id.* at 1287. As Judge Moody stated, he had no involvement with the medical school and had not served on the two committees since the late 1990s. Zainulabeddin has not raised any argument or presented any evidence refuting these statements. Accordingly, Judge Moody did not abuse his discretion by denying Zainulabeddin's motion for recusal and declining to recuse himself.

As for the district court's denial of Zainulabeddin's motion for reconsideration, she does not directly address that decision, so we conclude that she has abandoned her challenge to that ruling. *See Timson*, 518 F.3d at 874. In any event, having reviewed her motion and the supporting documentation, we cannot say that the district court abused its discretion in denying the motion on the

ground that it did not call into doubt the correctness of the summary-judgment ruling.

V. Costs (No. 17-12376)

We review costs awards for an abuse of discretion. *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 846 F.3d 1159, 1163 (11th Cir. 2017). "Under the abuse of discretion standard, the proper inquiry is not how the reviewing court would have ruled if it had been considering the case in the first place, but whether the premise upon which the district court exercised its discretion was correct." *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 639 (11th Cir. 1991).

Costs other than attorney's fees should be allowed to the prevailing party. Fed. R. Civ. P. 54(d)(1). However, courts may only tax costs authorized by statute. *U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 620 (11th Cir. 2000). Courts may tax costs including fees for service, witnesses, and depositions necessarily obtained for use in the case. *See id.*; 28 U.S.C. § 1920. The party seeking an award of costs must submit a request that enables the court to determine the party's entitlement to those costs. *Loranger v. Stierham*, 10 F.3d 776, 784 (11th Cir. 1994). Even where the non-prevailing party is indigent, the district court needs a sound basis to overcome the strong presumption that a prevailing party is entitled to costs. *See Mathews v. Crosby*, 480 F.3d 1265, 1276–77 (11th Cir. 2007).

Here, the district court did not abuse its discretion by awarding costs to USF. The court awarded costs for filing fees, service, transcripts and copies necessarily obtained for use in the case, and witnesses, all of which are statutorily accepted costs. *See* 28 U.S.C. § 1920. The court specifically discussed each cost requested by USF and reduced the cost award to the extent the expenses were unnecessary.

As in *Mathews*, Zainulabeddin primarily argues that she is indigent and should not have to pay USF's costs. *See* 480 F.3d at 1276–77. But even where the non-prevailing party is indigent, there must be a sound basis to overcome the presumption that the prevailing party is entitled to costs, and Zainulabeddin has not provided one. *See id.* Accordingly, the district court did not abuse its discretion when it awarded costs to USF.

VI. Outstanding Motions

Finally, we address several outstanding motions. Zainulabeddin has filed motions (1) to exceed the type-volume limitation for a motion for an injunction pending appeal; (2) for a "permanent" injunction pending appeal; (3) to file redacted exhibits in support of her injunction motion; and (4) to expedite ruling on the motion for an injunction. Because we have resolved her appeals and concluded that she is not entitled to relief on the merits of her claims, we **DENY AS MOOT** these motions.

Zainulabeddin has also filed a motion for sanctions against USF, and USF has responded in kind. We **DENY** both motions. Sanctions against USF are not warranted because Zainulabeddin's numerous allegations of unethical conduct on the part of USF and its counsel are not supported by any evidence in the record, and its challenged response to one of her motions on appeal was not unreasonable or vexatious. At the same time, we cannot conclude that these same allegations, though inflammatory and unsupported, warrant the imposition of sanctions against Zainulabeddin, particularly in light of her *pro se* status and the stress of this saga, which should now come to a close.

VII.

This case is unfortunate. We acknowledge Zainulabeddin's desire to become a medical doctor and her belief that she can realize that goal, but the record is clear that the medical school did not discriminate or retaliate against her when it dismissed her from the medical-doctor program for poor academic performance. We therefore affirm the district court's grant of summary judgment to USF under the Rehabilitation Act, and we affirm the court's other rulings for the reasons previously stated.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 05, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-11888-GG ; 17-12134 -GG ; 17-12376 -GG
Case Style: Nausheen Zainulabeddin v. University of South Florida
District Court Docket No: 8:16-cv-00637-JSM-TGW

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Pursuant to Fed.R.App.P. 39, costs taxed against the appellant.

Please use the most recent version of the Bill of Costs form available on the court's website at www.ca11.uscourts.gov.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Joe Caruso, GG at (404) 335-6177.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

PS order enclosed.

OPIN-1A Issuance of Opinion With Costs

Appendix C: DECISION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, DENYING MOTION FOR RECONISDERATION, DATED MAY 3, 2017

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NAUSHEEN ZAINULABEDDIN,

Plaintiff,

v. Case No: 8:16-cv-637-T-30TGW

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Defendant.

ORDER

THIS CAUSE comes before the Court upon Plaintiff's Motion for Reconsideration (Doc. 48) and Motion for Recusal (Doc. 50). Upon review, the Court denies both motions.

Motion for Recusal

28 U.S.C. section 455(a) requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. "This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000).

Plaintiff argues that the Court should recuse itself because Judge James S. Moody, Jr.'s role as a member of the USF Economic Development Board and Chair of the USF School of Psychology Advisory Committee create a potentially significant conflict of interest for him. Judge Moody has not served on any board or committee for USF since the late 1990s, over seventeen years ago. In addition, he had no involvement with USF's Morsani College of Medicine ("USF MCOM"). Thus, no reasonable observer would

question his impartiality in this case, and the Court will deny Plaintiff's Motion for Recusal.

Motion for Reconsideration

Motions for reconsideration of orders are permitted when there is (1) an intervening change in controlling law, (2) newly discovered evidence, or (3) the need to correct clear error or manifest injustice. *Tristar Lodging, Inc. v. Arch Speciality Ins. Co.*, 434 F. Supp. 2d 1286, 1301 (M. D. Fla. 2006), *aff'd sub nom. Tristar Lodging, Inc. v. Arch Specialty Ins. Co.,* 215 Fed. App'x. 879 (11th Cir. 2007). A motion for reconsideration must demonstrate why the court should reconsider its prior decision and "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id.* A motion for reconsideration cannot be used to re-litigate old matters, raise arguments, or present evidence that could have been raised prior to the entry of judgment. *See Parker v. Midland Credit Management, Inc.*, 874 F. Supp. 2d 1353, 1359 (M. D. Fla. 2012); *see also Arthur v. King,* 500 F.3d 1335, 1343 (11th Cir. 2007). "The decision to alter or amend a judgment is an 'extraordinary remedy.'" *Tristar Lodging, Inc.*, 434 F. Supp. 2d at 1301.

Plaintiff seeks reconsideration of the Court's April 19, 2017 order granting summary judgment in favor of Defendant. Plaintiff reargues many of the points made during the summary judgment proceedings. Although she attached over 350 pages of new documents as exhibits to her motion, none of these documents constitute newly discovered evidence. Some of the documents appear to have been in Plaintiff's possession since the initiation of her lawsuit, and others were provided to Plaintiff by Defendant during the

discovery period. Moreover, none of these documents persuade the Court that its prior order was clearly in error or manifestly unjust.[1]

The Court sympathizes with Plaintiff but is constrained to apply the law as it sees it. It must deny Plaintiff's Motion for Reconsideration.

It is therefore ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Reconsideration (Doc. 48) is denied.

2. Plaintiff's Motion for Recusal is denied. (Doc. 50)

DONE and **ORDERED** in Tampa, Florida, on May 3, 2017.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

[1] If anything, Plaintiff's documents lend further support for the Court's legal conclusions in its April 19 order. Of note, Plaintiff attached documents indicating the U.S. Department of Education, Office for Civil Rights ("OCR") conducted an investigation to determine whether USF MCOM discriminated against Plaintiff on the basis of her disability when it denied her request to be readmitted to its program, and OCR concluded that there was insufficient evidence to establish a violation of the Rehabilitation Act.

Appendix D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

NAUSHEEN ZAINULABEDDIN,

Plaintiff,

v. Case No: 8:16-cv-637-T-30TGW

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Defendant.

ORDER

THIS CAUSE comes before the Court upon Defendant's Motion for Summary Judgment (Doc. 22), Plaintiff's Response in Opposition (Doc. 27), Defendant's Reply (Doc. 37), and Plaintiff's Surreply (Doc. 41). Having reviewed the Parties' submissions and the record evidence, the Court concludes Defendant's motion should be granted.

BACKGROUND

Plaintiff Nausheen Zainulabeddin filed this action on January 22, 2016, asserting six claims against her former medical school, the University of South Florida's Morsani College of Medicine ("USF MCOM"). Plaintiff attended the medical school from August 2009 to May 2013, at which point she was dismissed from the program. Plaintiff alleges that USF MCOM violated Section 504 of the Rehabilitation Act because its decision to dismiss her constituted (1) discrimination on the basis of her disability and/or (2) retaliation in response to her requesting accommodations on the National Board of Medical Examiners' Comprehensive Basic Science Examination ("CSBE"). In addition,

Plaintiff alleges that (3) USF MCOM's Vice Dean of Educational Affairs, Dr. Specter, breached his fiduciary duty to her, (4) Dr. Specter negligently misrepresented to her that she did not have a disability or need accommodations for her disability, (5) USF MCOM breached its contractual relationship with her by refusing to reimburse some of her tuition, and (6) USF MCOM was unjustly enriched by keeping her tuition.

In its Motion for Summary Judgment, USF argues that the Court should enter judgment for USF on all six of Plaintiff's claims. Plaintiff concedes that her claims for breach of contract and unjust enrichment are barred by sovereign immunity because USF is a state agency. (Pl.'s Resp. 2.) Because Plaintiff has abandoned those two claims, the Court will grant summary judgment on those claims without further discussion. The Court will now outline the facts relevant to the other four claims.

RELEVANT FACTS

Before attending medical school, Plaintiff completed a Master's degree in Medical Sciences at USF. Midway through her Master's program, she began to have difficulties with her studies, particularly in preparing for the MCAT. As a result, Plaintiff sought medical treatment. In July 2008, a psychiatrist "informally" diagnosed her with Attention Deficit Hyperactivity Disorder ("ADHD") and prescribed her medication for ADHD.[1] Plaintiff's psychologist thought her difficulties were due to anxiety. (Pl. Aff. Ex. E, at 3.)

[1] Plaintiff describes the diagnosis as informal because the psychiatrist made it based on Plaintiff's self-reported history, consultation with her psychologist, and a standardized examination, as opposed to a neuropsychological evaluation. (Zainulabeddin Dep. 60:7-20, 65:11-18, 67:3-14.)

Nevertheless, Plaintiff took Adderall on and off from July 2008 to July 2009, and her academic performance improved.

In August 2009, Plaintiff enrolled in USF's Morsani College of Medicine ("USF MCOM"). Plaintiff did not tell anyone at the school about her ADHD or anxiety or request any accommodations. She took Adderall consistently that year. Despite this fact, she began to have academic difficulties in her first semester. In March 2010, after thinking she had failed a cardiology examination, she met with Dr. Specter. They discussed whether she should take a leave of absence from school. Ultimately, Plaintiff finished out the year, and she failed all but one of her final examinations. As a result, she did not pass her first year of medical school.

USF MCOM has an Academic Performance Review Committee ("APRC") that discusses students with deficiencies in their academic performance or professional behavior and determines what kind of corrective action to take. The APRC consists of the medical school's course directors. After Plaintiff failed the first year, the APRC decided that she could repeat it subject to certain conditions. It placed her on academic probation, required her to meet with an academic advisor monthly, and required her to obtain "a comprehensive assessment of [her] learning style" (Pl. Aff. Ex. B), i.e., a neuropsychological evaluation.

USF MCOM helped students obtain these evaluations because the Vice Dean of Education recognized that students who struggled academically for no apparent reason might have "some kind of neuropsychological deficit." (Specter Dep. 24:16-25.) Pursuant to USF policy, students needed a neuropsychological evaluation in order to obtain

disability accommodations. Obtaining the evaluations "was a way of trying to make certain that [USF MCOM] could provide all the help necessary to a student who needed help." (*Id.* at 25:3-5.)

USF MCOM referred Plaintiff for the neuropsychological evaluation and paid for it. Plaintiff met with the evaluator, Dr. Schoenberg, on August 5, August 12, and September 2, 2010. Dr. Schoenberg issued his report on December 17, 2010. He diagnosed Plaintiff with ADHD and moderate to severe anxiety. He recommended that Plaintiff engage in cognitive-behavioral therapy and consider initiation of medication for her anxiety symptoms. He also stated that she should qualify for special education services due to her "neuropsychological deficits with primarily attention difficulties," and he indicated that she was likely to benefit from tutoring and taking tests in a distraction-free environment. Dr. Schoenberg provided a copy of his report to Dr. Specter.

At some point during fall or winter of 2010, Plaintiff met with Dr. Specter, and they discussed the report. Plaintiff did not ask Dr. Specter for a copy of the report, nor did he give her one. The Parties dispute most other details about this meeting. Plaintiff claims that she met with Dr. Specter in October 2010, and he told her that there was nothing wrong with her and she did not need accommodations. According to Plaintiff, Dr. Schoenberg had not gone over his findings with her, so she relied on what Dr. Specter said. She did not realize that Dr. Schoenberg had not completed his report at that time. In contrast, Dr. Specter claims that he met with Plaintiff after he received the report from Dr. Schoenberg. He states that he reviewed the report with Plaintiff, but not in depth, because she was already familiar with the contents of the report. According to Dr. Specter, Plaintiff did not

think that she needed the accommodations because she was doing well in her second attempt at the first-year curriculum.

That year (i.e., the 2010-2011 school year), Plaintiff passed the first-year curriculum. The APRC took her off of academic probation, and she advanced to the second year of medical school in fall 2011.

During the 2011-2012 school year, Plaintiff once again began to have academic difficulties. In September 2011, she failed Medical Sciences 1. The APRC decided to let Plaintiff remediate that course. Then, in December 2011, Plaintiff failed Medical Sciences 2.

On January 5, 2012, the APRC voted to dismiss Plaintiff from the medical school. Plaintiff appealed the decision. Initially, on February 2, 2012, the APRC decided to sustain the dismissal. However, on February 16, 2012, the APRC reconsidered its decision and overturned the dismissal based on "new info which was not available at the previous meeting." (Pl. Aff. Ex. B.)

This new information appears to have been information that Plaintiff had been diagnosed with ADHD and anxiety but had not previously received accommodations for her disabilities. Dr. Specter explained in his deposition, "[The APRC] felt that [Plaintiff] deserved the opportunity to be able to take her coursework with accommodations because they had not been granted to her previously, not because anybody denied those, but because . . . she had not applied for those accommodations." (Specter Dep. 62:14-20.)

Ultimately, the APRC agreed that Plaintiff could repeat the second-year curriculum in the 2012-2013 school year while on academic probation. It required her to continue to

meet with her academic advisor monthly, coordinate with her counselor and tutor to create an organized approach to study for the next year, and continue her enrollment in the Kaplan Classroom Anywhere course to develop successful strategies for "studying[,] developing integrative habits[,] [and] addressing knowledge base gaps."[2] (*Id.*)

On March 7, 2012, Plaintiff met with Dr. Schoenberg. She provided him with additional historical information about the extent of her attention problems, which she had not previous disclosed to him "[d]ue to cultural and historical factors." (Pl. Aff. Ex. E.) This new information did not change Dr. Schoenberg's diagnostic impressions, but he did update his recommendations to note that Plaintiff would "benefit from extra time to complete assignments/tests (time and one-half)." (*Id.*)

During the 2012-2013 school year, Plaintiff reattempted the second-year curriculum. She requested disability accommodations from USF's Students with Disabilities Services Office, and the Office approved her to take tests in a distraction-free environment and to receive extra time on tests. Her instructors provided her with these accommodations as well as others. For example, Plaintiff's instructors also provided her with a number of extensions on both assignments and tests. In addition, instructors allowed Plaintiff to view lectures online from home instead of attending class. (Zainulabeddin Dep. 191:24-192:10.)

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[2] The Court notes that, although Plaintiff had not requested disability accommodations as of February 2012, USF MCOM had already connected her with resources to help her succeed in medical school. Dr. Specter had obtained tutors for Plaintiff, and he had also connected her to a counseling program. These resources appear to be the "counselor" and "tutor" referenced by the APRC.

Despite these accommodations, Plaintiff continued to have academic problems. Plaintiff was deficient in her "ICM proficiency."[3] (Pl. Aff. Ex. B.) In addition, she received failing grades in two of her first semester classes—Doctoring II and Evidence-Based Clinical Reasoning II ("EBCR II").

Plaintiff received notification that she failed Doctoring II on March 12, 2013.

Later on March 12, Plaintiff emailed Dr. Stevenson, an Associate Dean of USF MCOM, to request an accommodation of double the time to take the National Board of Medical Examiners' Comprehensive Basic Science Exam ("CBSE"). Dr. Stevenson responded, "I would STRONGLY advise you to take the CBSE under the same testing conditions as you will use for Step 1. If that means no accommodations, then use no accommodations. Please speak with Dr. Specter or me before requesting these accommodations. We want you to succeed on Step one." (Pl. Aff. Ex. L.) Plaintiff then replied, explaining why she wanted the extra time. Dr. Specter was cc'd on all three of these emails.

The next day, on March 13, Plaintiff took the final examination for the Evidence-Based Medicine ("EBM") portion of her EBCR II class. She failed the examination, which comprised 90% of her final grade in EBM. Because she had to pass EBM to pass EBCR II, she did not pass EBCR II.[4]

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[3] It is not clear from the record what "ICM" stands for or what "ICM proficiency" is.

[4] Plaintiff now disputes whether she should have failed EBCR II. However, it is undisputed that the course director assigned her a failing grade and she did not appeal the grade using USF MCOM's internal procedures.

Then, on March 14, the APRC had its meeting to discuss students who were struggling academically. Plaintiff was on the APRC's agenda because of her failing grades in Doctoring II and EBCR II and her deficiency in ICM. The APRC voted to dismiss Plaintiff from USF MCOM.

Plaintiff appealed the decision. In a letter dated April 5, 2013, the APRC notified Plaintiff that it had sustained her dismissal. It explained that it was concerned about "significant gaps in [her] knowledge, clinical performance, clinical reasoning, physical exam skills, self-directed learning skills, data-gathering skills, and ability to logically interpret steps and follow instructions." (Specter Dep. Ex. 11.) It further noted that the additional information presented in her appeal "did not convince the Committee of [her] ability to successfully progress through the curriculum." (*Id.*)

Dr. Specter attended the APRC meetings in his role as student advocate or liaison. He was not a part of the APRC, however, and he did not vote in the meetings. In his deposition, he explained that the APRC was also concerned that Plaintiff would not be able to complete the four years of medical school curriculum within six years, the maximum amount of time allowed. The third year of medical school is more challenging than the second because students have significantly less time to study due to intensive clinical responsibilities. The APRC did not think that Plaintiff would be able to complete the third-year curriculum in one year and would therefore be unable to graduate from medical school.

Plaintiff then appealed her dismissal to the Dean of USF MCOM, Dr. Klasko. On May 28, 2013, after having met with Plaintiff and reviewed the APRC report, Dr. Klasko sustained the APRC's decision.

SUMMARY JUDGMENT STANDARD

Motions for summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* Throughout this analysis, the court must examine the evidence in the light most favorable to the nonmovant and draw all justifiable inferences in its favor. *Id.* at 255.

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories, and admissions and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson*, 477 U.S. at 248-49 (1986).

This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "[I]f factual issues are present, the Court must deny the motion and proceed to trial." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Hoffman v. Allied Corp.*, 912 F.2d 1379 (11th Cir. 1990). However, there must exist a conflict in substantial evidence to pose a jury question. *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989).

DISCUSSION

I. Plaintiff's Disability Discrimination Claim

A. Legal Framework

Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act") prohibits agencies that receive federal funding from discriminating against an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a). Discrimination claims brought under the Rehabilitation Act are governed by the same standards as claims brought under Title I of the Americans with Disabilities Act of 1990 ("ADA"). *Holbrook v. City of Alpharetta,* 112 F.3d 1522, 1526 n.2 (11th Cir. 1997). When a plaintiff offers circumstantial evidence to prove discrimination claims, courts analyze these claims using the burden-shifting framework outlined by the Supreme Court in *McDonnell Douglas*. *See Durley v. APAC, Inc.,* 236 F.3d 651, 657 (11th Cir. 2000) (holding the *McDonnell Douglas* framework applies to ADA disability discrimination claims).

Under this framework, the plaintiff must first establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the plaintiff does so, the burden then shifts to the agency to articulate some legitimate, nondiscriminatory reason for the adverse action. *Id.* If the agency meets this burden of production, the presumption of discrimination raised by plaintiff's prima facie case is rebutted. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). The plaintiff then has an opportunity to show that the agency's proffered nondiscriminatory reason is pretextual. *Id.*

B. Plaintiff Has Not Proven Her Prima Facie Case.

In order to establish a prima facie case of disability discrimination under the Rehabilitation Act, Plaintiff must demonstrate the following: (1) she is disabled, (2) she is a qualified individual, and (3) she was subjected to unlawful discrimination because of her disability. *J.A.M. v. Nova Se. Univ., Inc.*, 646 F. App'x 921, 926 (11th Cir. 2016) (citing *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000)).

An "otherwise qualified" individual is one who is able to meet all of a program's requirements in spite of her disability. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (U.S. 1979). In the context of postsecondary education, the individual must be able to meet the academic and technical standards required by the program. *J.A.M.*, 646 F. App'x at 926 (citing *Onishea v. Hopper*, 171 F.3d 1289, 1300 (11th Cir. 1999)).

In certain circumstances, an educational institution's refusal to accommodate the needs of a disabled individual amounts to discrimination against that individual because of her disability. *J.A.M.*, 646 F. App'x at 926 (citing *Se. Cmty. Coll.*, 442 U.S. at 412-13).

However, Plaintiff does not argue that USF MCOM discriminated against her by failing to provide her reasonable accommodations, and in fact USF MCOM provided her accommodations once she requested them in the 2012-2013 school year.

Instead, Plaintiff argues that USF MCOM discriminated against her on the basis of her disability when it dismissed her from the program in spring of 2013. Plaintiff also appears to argue that the course directors for Doctoring II and EBCR II discriminated against her on the basis of her disability when they assigned her failing grades (i.e., grades of "U" for "Unsatisfactory").[5] Plaintiff has not established a prima facie case of discrimination because she has not demonstrated that she was an "otherwise qualified" individual or that these actions were taken "solely by reason of her . . . disability." 29 U.S.C. § 794(a).

i. Plaintiff has not demonstrated that she is an "otherwise qualified" individual.

Plaintiff failed her first year of medical school during the 2009-2010 school year. She then failed the second-year curriculum during the 2011-2012 school year. And when she repeated the second-year curriculum during the 2012-2013 school year, she continued to have academic deficiencies. That year, Plaintiff received a number of accommodations, like extra time on her examinations, the opportunity to take the examinations in a

[5] It is not entirely clear whether Plaintiff is arguing that her Doctoring II course directors gave her a failing grade due to her disability. She does not explicitly argue this in her Response, nor does she dispute that she received or should have received a failing final grade in Doctoring II in her Statement of Disputed Material Facts (Doc. 26). However, in her affidavit (Doc. 28), she has a heading titled, "Evidence that I Was Singled out to Fail Two Courses in March 2013 Based on My Disability . . ." The Court will address this argument out of an abundance of caution.

distraction-free setting, and extensions on examinations and assignments, including a three-month extension to take her Evidence-Based Medicine final examination. Despite receiving these accommodations—and seeing the course material for the second time around—Plaintiff did not pass ICM, Doctoring II, or EBCR II. She had to remediate these courses.

In short, it took Plaintiff four years to complete two years of medical school, and at the end of that four years she was still not performing satisfactorily. The APRC—the committee of course directors tasked with reviewing students' progress in the curriculum—determined that Plaintiff was not performing up to USF MCOM's standards. Even Plaintiff herself acknowledged that she was not meeting school standards, explaining that "when you are a repeating student there is a standard that you should not fail any classes, period." (Zainulabeddin Dep. 176:15-17.)

The standards USF MCOM sets for its students are entitled to deference, and USF MCOM had no obligation to lower its standards to accommodate Plaintiff. *See Wood v. President & Trustees of Spring Hill Coll. in City of Mobile*, 978 F.2d 1214, 1222-23 (11th Cir. 1992) (citing *Se. Cmty. Coll.*, 442 U.S. at 413). Plaintiff did not meet those standards. Accordingly, she has not demonstrated that she was an "otherwise qualified" individual within the meaning of the Rehabilitation Act.

ii. Plaintiff has not demonstrated that Dr. Stock and Dr. Valeriano discriminated against her when they assigned her a failing grade in Doctoring II.

Plaintiff argues that she was singled out to fail Doctoring II due to her disability. She points to one piece of evidence in support of this argument—that thirty-five other students had some kind of deficiency in the final examination, but they all received a grade of "T" for "Temporary" whereas she received a "U."

This piece of evidence does not support Plaintiff's argument that she was singled out to fail because of her disability. Plaintiff has not established that the only difference between her and the other students was that she had a disability. Instead, the undisputed evidence indicates that Plaintiff received a "U" because of her inferior performance in the class.

Neither "T" grades nor "U" grades are considered passing grades—the main difference involves how much remediation will be required in order to convert the grade into a passing grade and how quickly that remediation can be completed. In her deposition, Dr. Stock explained that she assigned "T" grades when students had "a small[,] focal deficit that results in a failure of a course because of something deemed to be a very small[,] easily [or] quickly remediable deficit, not a more global knowledge or skills deficit." (Stock Dep. 70:13-16.) For example, she would issue a "T" if the student had "performed poorly . . . on one specific assessment," but not if the student had "a global pattern of not doing well throughout the course." (*Id.*, 70:18-24.)

Plaintiff did not have difficulties on just one assessment like the final examination. Instead, she had difficulties throughout the course.

Doctoring II is a skills-based course in which students learn how to interview patients, take their histories, and conduct physical examinations. Faculty members and senior medical students (referred to as preceptors) observe the students' clinical performance.

As one component of the course, students have to draft histories and physicals ("H&Ps"), write-ups summarizing patients' histories and physicals the student conducted while in the clinical setting. Plaintiff's faculty preceptor, Dr. Estevez, found Plaintiff's H&Ps "completely unacceptable." (Stock Dep. Ex. 16.)

Dr. Estevez expressed additional concerns about Plaintiff's performance at the midpoint evaluation in November. She indicated that Plaintiff was "often unprepared" for doctoring sessions, "need[ed] prompting through the physical examinations," rarely spoke up in class, and had not been keeping up with the assigned reading. (Stock Dep. Ex. 9.)

In December, Dr. Estevez emailed Dr. Stock and Dr. Valeriano, asking if students ever failed Doctoring II. She stated that she had "serious concerns" that she had discussed with Plaintiff, but Plaintiff had not shown much improvement. (Stock Dep. Ex. 16). She elaborated that Plaintiff "consistently shows up unprepared, and she was embarrassingly bad at the Male GU exam, not only displaying a lack of preparation but also a lack of sensitivity toward the [patient]." (*Id.*) She further noted that Plaintiff had "lunged for [the patient's] private parts without introducing herself or telling him what she was about to do." (*Id.*)

Plaintiff failed a quiz—the Course 5 quiz—when she first took it. In addition, she did not pass the OSCE, an observed physical examination. Even though Plaintiff had been allowed to defer the OSCE for a month, the observing physician, Dr. Slone, reported that she was "totally unprepared," "performed parts of the MSK station at an unacceptable level," and did not perform the neurology station. (Stock Dep. Ex. 21.)

Thereafter, Plaintiff failed the final clinical evaluation. The two preceptors evaluating Plaintiff's performance had no familiarity with her or her previous academic performance. Dr. Stock and Dr. Valeriano rotated the preceptors for the final evaluations "to try to give [students] a very objective grade." Plaintiff's preceptors rated her performance as "below expectations without any hesitation." (Stock Dep. Ex. 25.) In addition, the patient Plaintiff examined "was furious with her regarding [her] professionalism." (*Id.*)

Lastly, at the end of the course, Dr. Estevez rated Plaintiff "as still [being] below expected in some areas." (Stock Dep. Ex. 24.)

Notably, throughout the Doctoring II course, Dr. Stock, Dr. Valeriano, and Plaintiff's preceptors worked with Plaintiff in an effort to help her pass the course. For example, they gave her multiple opportunities to remediate deficiencies (e.g., by allowing her to redo her H&Ps and retake both the Course 5 quiz and the OSCE). They provided Plaintiff extensions on assignments and tests. When Plaintiff did not complete assignments or tests within the extended time period granted, it does not appear that they penalized her. In addition, Dr. Stock and Dr. Valeriano met with Plaintiff in January to discuss their concerns, and they developed a plan intended to help her successfully pass the course.

Despite this fact, Plaintiff did not pass Doctoring II. Dr. Stock and Dr. Valeriano ultimately decided to assign Plaintiff a "U" grade due to her performance in Dr. Estevez's midpoint and final reviews, the OSCE, and the final examination.

Plaintiff has not provided evidence to suggest that Dr. Stock and Dr. Valeriano assigned her a final grade of "U" based on her disability rather than perceived global deficits in her skills and performance. During the course, multiple preceptors voiced that Plaintiff was performing below expectation. Plaintiff exhibited difficulties toward the beginning of the course and continued to exhibit difficulties throughout. Accordingly, Plaintiff has not demonstrated that Dr. Stock and Dr. Valeriano failed her due to her disability.

iii. Plaintiff has not demonstrated that Dr. Kumar and Dr. Roth discriminated against her when they assigned her a failing grade in EBCR II.

Plaintiff also argues that she was singled out to fail EBCR II due to her disability. She points to a few pieces of evidence in support of this argument, including that (1) USF MCOM has no record of her score on the Evidence-Based Medicine ("EBM") final, (2) based on the score Dr. Kumar orally reported to her, she should have passed EBM (and therefore EBCR II), (3) the fourteen other students who did not pass the EBM portion of EBCR II received a grade of "T" whereas she received a "U," and (4) Dr. Kumar assigned her a "U" instead of a "T" because he was told she had a global deficiency in multiple classes and not just his.

None of this evidence indicates that Dr. Kumar and/or Dr. Roth singled Plaintiff out to fail based on her disability. For example, there is an obvious, non-discriminatory reason why the EBM grading spreadsheet referenced by Plaintiff does not reflect Plaintiff's grade on the final examination—Dr. Kumar granted her a three-month extension to take her final, and he drafted the spreadsheet well before she had taken it.

Although Plaintiff argues in her affidavit that she should have passed EBM based on her score on the final, this portion of the affidavit should be disregarded as a sham. Plaintiff's EBM grade was based on two scores—her score on the final accounted for 90% of her grade, and her score on the presentation accounted for 10% of her grade. In her affidavit, Plaintiff states that Dr. Kumar told her she received a 67.5 on the final. (Pl. Aff. ¶ 65.) She argues that, when considered along with her score of 80 on the presentation, she should have passed EBM. (*Id.* at ¶¶ 66-68.) However, Plaintiff's affidavit is directly contradicted by (1) her previous deposition testimony, in which she stated that she received a 65 on the final (Zainulabeddin Dep. 150:20-21, 151:3, 158:12-13) and (2) her written summary of her performance in EBCR II, in which she noted that she received a 65 (Kumar Dep. Ex. 13; Roth Dep. Ex. 6). Plaintiff's affidavit does not attempt to explain this discrepancy, so the Court need not consider it. *See Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1530 (11th Cir. 1987). If Plaintiff did indeed receive a 65 on her final, she would have failed the class regardless of what score she received on her presentation. (*See* Kumar Dep. 45:6-13, 52:12-14.)

Lastly, the fact that Dr. Kumar gave other students who failed "T's" but Plaintiff a "U" does not support Plaintiff's argument that he singled her out to fail because of her

disability. Dr. Kumar testified that he assigned "U" grades when students had more global deficiencies and were doing poorly in other classes as well. (Kumar Dep. 59:1-25.) Although the Court agrees that the fairness of this grading practice might be open to question, it does not indicate that Dr. Kumar treated Plaintiff differently than similarly situated students without disabilities. There is no evidence that other students with global deficits but without disabilities received a "T." The evidence indicates simply that Dr. Kumar applied this same, possibly unfair grading practice to all of his students, not that he singled Plaintiff out to fail because of her disability.

iv. Plaintiff has not demonstrated that the APRC or Dr. Kloski discriminated against her when they decided to dismiss her from USF MCOM in spring of 2013.

Plaintiff also argues that she was dismissed from USF MCOM due to discriminatory animus. According to Plaintiff, her Doctoring II and EBCR II course directors singled her out to fail. Therefore, she contends, the Court can infer that USF MCOM made the decision to dismiss her based on disability discrimination. The Court disagrees.

As discussed in sections I(B)(ii) and I(B)(iii), supra, Plaintiff has not demonstrated that her course directors assigned her "U" grades due to her disability or that they harbored any discriminatory animus toward her. However, even if Plaintiff had proven this, it would not demonstrate that the APRC and/or Dr. Klasko decided to dismiss her based on her disability.

As a preliminary matter, Plaintiff has not pointed to any evidence that the APRC or Dr. Klasko had any bias against students with disabilities. In fact, when Plaintiff failed her

first year of medical school in 2010, the APRC decided to fund an expensive neuropsychological evaluation so that Plaintiff could better understand her learning style and whether she needed disability accommodations. And when the APRC first learned of Plaintiff's disability—after she had failed the second year of medical school and was appealing the initial decision to dismiss her—the APRC voted to reverse her dismissal to see if she could successfully complete the second-year curriculum with disability accommodations.

Second, even if Plaintiff were correct that her Doctoring II and EBCR II course directors had discriminatory animus toward her, they did not get a vote in whether she should be dismissed. Although course directors were on the APRC, they recused themselves from votes regarding their own students.

Likewise, even if Plaintiff had proven that her Doctoring II and/or EBCR II course directors assigned her "U" grades because of her disability, there is no evidence that the APRC or Dr. Klasko knew that. The APRC voted to dismiss Plaintiff because it believed she had deficiencies in ICM, Doctoring II, and EBCR II while repeating the second-year curriculum, and even one deficiency was grounds for dismissal. While there is no evidence regarding why Dr. Klasko decided to sustain Plaintiff's dismissal, there is also no evidence that he did so because she had a disability.

For these reasons, Plaintiff has not demonstrated that USF MCOM dismissed her due to her disability.

C. Plaintiff Has Not Proven that USF MCOM's Legitimate, Non-Discriminatory Reason for her Dismissal was Pretextual.

Lastly, the Court notes that even if Plaintiff had proven her prima facie case, her discrimination claim would still fail. USF MCOM offered a legitimate, non-discriminatory reason for dismissing her from its program—her poor academic performance. Plaintiff failed two years of medical school, she continued to experience academic difficulties while repeating the curriculum with disability accommodations, and the APRC did not believe she would be able to successfully complete the third-year and fourth-year curriculum in the maximum time allotted.

Plaintiff may show pretext by pointing to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in USF MCOM's proffered reason. *Brooks v. Cnty. Comm'n of Jefferson Cnty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (internal quotation marks omitted). She has not done so. The APRC's decision to dismiss Plaintiff comported with USF MCOM's policy, as described by both Plaintiff and Dr. Specter. (Zainulabeddin Dep. 176:15-17; Specter Dep. 72:19-73:9.) In addition, Plaintiff has not demonstrated that the APRC and/or Dr. Klasko treated her differently than a similarly-situated student without a disability. *See Walker v. St. Joseph's/Candler Health Sys., Inc.*, 506 F. App'x 886, 889 (11th Cir. 2013) (internal citations omitted) ("A typical means of establishing pretext is through comparator evidence.").

Plaintiff provides nothing more than speculation that USF MCOM dismissed her due to her disability, as opposed to her academic performance. This is insufficient as a matter of law.

II. Plaintiff's Retaliation Claim

The Rehabilitation Act includes an anti-retaliation provision that prohibits agencies from discriminating against an individual because he or she has opposed an action that is unlawful under the Act. *Burgos-Stefanelli v. Sec'y, U.S. Dep't of Homeland Sec.*, 410 F. App'x 243, 245 (11th Cir. 2011) (internal citations omitted). When plaintiffs offer circumstantial evidence to prove a retaliation claim, courts analyze these claims using the same burden-shifting framework outlined in section I(A), supra. *Id.* at 245-46 (internal citation omitted).

To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in statutorily protected expression, (2) she suffered a materially adverse action, and (3) there was some causal relationship between the two events. *Simpson v. State of Alabama Dep't of Human Res.*, 501 F. App'x 951, 954 (11th Cir. 2012) (citing *Holifield v. Reno*, 115 F.3d 1555, 1566 (11th Cir. 1997)). In order to demonstrate a causal relationship, the plaintiff must, at a minimum, establish that the decision-maker was actually aware of the protected expression at the time it took the adverse action against the plaintiff. *Holifield*, 115 F.3d at 1566.

Plaintiff argues that she was dismissed from USF MCOM because she emailed Dr. Stevenson on March 12, 2013 to ask for an accommodation of double the time on the National Board of Medical Examiners' Comprehensive Basic Science Examination ("CBSE"), and Dr. Stevenson opposed this, so he had the APRC vote to dismiss Plaintiff from USF MCOM two days later.

To begin with, it is not clear that Dr. Stevenson actually opposed Plaintiff receiving accommodations. He recommended that she take the CSBE under the same conditions that she would take Step 1 (i.e., the Boards) because he "want[ed] [her] to succeed on Step [1]." (Pl. Aff. Ex. L.)

In any event, there is no evidence that the APRC voted to dismiss Plaintiff due to her email exchange with Dr. Stevenson, in large part because there is no evidence that anyone on the APRC knew about it. It is undisputed that Dr. Stevenson was not on the APRC, and there is no evidence that he told members of the APRC about it.

Plaintiff points out that Dr. Specter was cc'd on the email exchange and attended the APRC meetings, so he could have influenced the APRC to retaliate against her. Again, there is no evidence the Dr. Specter told anybody on the APRC about the emails, or that he had even read the emails before the March 14, 2013 APRC meeting. Furthermore, although Dr. Specter was cc'd on the email chain, he did not discourage Plaintiff from seeking an accommodation. In fact, he wrote a letter to the National Board of Medical Examiners a few weeks later, encouraging the agency to grant Plaintiff's request for accommodations on Step 1. (Specter Dep. Ex. 19.)

Under ordinary circumstances, the short amount of time between Plaintiff's request for accommodations and her dismissal might indicate foul play. However, the unique circumstances in this case negate this inference. The APRC had regularly scheduled meetings; it did not convene on March 14 specifically to discuss Plaintiff. In addition, the APRC would have discussed Plaintiff at the March 14 meeting regardless of her emails to Dr. Stevenson. Plaintiff was on the APRC's agenda for that meeting because she had failed

Doctoring II and ECBR II and had a deficiency in ICM. For reasons similar to those outlined in sections I(B)(ii) and (iii), supra, Plaintiff has not demonstrated that she received these grades in retaliation for requesting accommodations on the CBSE.

III. Plaintiff's Breach of Fiduciary Duty Claim

In addition to her claims under the Rehabilitation Act, Plaintiff contends that Dr. Specter breached his fiduciary duty to her when he allegedly (1) advised her not to take a leave of absence from medical school in spring of 2010 and (2) told her that she did not have a disability in fall of 2010.

Under Florida law, there is a four-year statute of limitations for breach of fiduciary duty claims. Fla. Stat. § 95.11(3); *Patten v. Winderman*, 965 So. 2d 1222, 1224 (Fla. Dist. Ct. App. 2007). The cause of action accrues when the last element of the cause of action occurs, and the "delayed discovery" doctrine does not toll the running of the statute of limitations for these claims. *Davis v. Monahan*, 832 So. 2d 708, 709 (Fla. 2002).

The elements of a cause of action for breach of fiduciary duty are (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages that are proximately caused by the breach. Thus, Plaintiff's breach of fiduciary duty claim arose in 2010, when the alleged breach and resulting damages occurred.

Plaintiff did not file this case until January 22, 2016, well after the four-year limitations period. Plaintiff concedes that her claim is facially time-barred but argues that USF should be equitably estopped from asserting the statute of limitations because its actions prompted Plaintiff to delay filing her claim.

Appendix D

Courts apply equitable estoppel to prevent a defendant from asserting the statute of limitations as a defense when the defendant's misconduct has induced the plaintiff to forbear bringing suit within the applicable limitations period. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1079 (Fla. 2001) (internal citation omitted). "Stated another way, '[e]quitable estoppel arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forego enforcing his right until the statutory time has lapsed.'" *Black Diamond Properties, Inc. v. Haines*, 69 So. 3d 1090, 1093 (Fla. Dist. Ct. App. 2011) (internal citations omitted); *see also Fox v. City of Pompano Beach*, 984 So. 2d 664, 667 (Fla. Dist. Ct. App. 2008) (internal citations omitted) (plaintiff can raise equitable estoppel when defendant willfully induced plaintiff to forego suit until after the limitations period has ended). "Equitable estoppel presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct." *Major League Baseball*, 790 So. 2d at 1077. The doctrine is based on the equitable principle that a party should not be permitted to profit from its own wrongdoing. *Id.* at 1079.

Plaintiff argues equitable estoppel applies in this case because Dr. Specter caused her to forego bringing legal suit when he helped her get readmitted to the medical school in 2012 and pretended to act as her advocate when appealing her second dismissal in 2013. Even if the Court assumed that these actions constituted misconduct intended to discourage Plaintiff from filing suit, this conduct ended when USF MCOM dismissed Plaintiff in May 2013, leaving Plaintiff with about one to one-and-a-half years to file suit. USF did not induce Plaintiff to forbear bringing suit until after the limitations period had ended. Thus,

Plaintiff's failure to file suit is not directly attributable to USF's conduct, and equitable estoppel does not apply.

Plaintiff also argues that the Court should apply equitable estoppel because USF has allegedly engaged in affirmative misconduct in order to conceal its wrongdoing. She relies on a Florida Supreme Court case, *S.A.P.*, for this proposition. *S.A.P.* involved unique circumstances, in which a young foster child was sexually abused by her foster parents, and the Department of Health and Rehabilitative Services actively concealed the abuse by falsifying records and hindering the police investigation into the abuse. *Florida Dep't of Health & Rehab. Servs. v. S.A.P*, 835 So. 2d 1091 (Fla. 2002). The foster parents and the Department were the only possible plaintiffs who could bring suit on the child's behalf. The child had no memory of the abuse until her late teenage years, when an internal investigation of the Department released records documenting the abuse. *Id.* Shortly thereafter, she sued the Department for its negligence during her foster care placement, and the court held that the Department could not assert the statute of limitations as a defense to her untimely suit. *Id.*

Since *S.A.P.* was decided, a few courts have cautioned that the decision was unique to the extraordinary facts of that case and was not intended to extend the law of equitable estoppel beyond its historical use. *See Ryan v. Lobo De Gonzalez*, 921 So. 2d 572, 577 (Fla. 2005) (Cantero, J., dissenting); *Rubio v. Archdiocese of Miami, Inc.*, 114 So. 3d 279, 283 (Fla. Dist. Ct. App. 2013). Moreover, this case is factually dissimilar. Plaintiff was not a minor dependent on USF MCOM to bring suit on her behalf during the limitations period; she was an adult who understood the basis for her cause of action at

the time it accrued. Plaintiff has not demonstrated that USF MCOM actively concealed Dr. Specter's alleged breaches of fiduciary duty from her during the limitations period. Indeed, she admitted that she contemplated taking legal action due to Dr. Specter's conduct as far back as 2012 (Pl. Aff. ¶¶ 41-42).

For these reasons, the doctrine of equitable estoppel is not applicable to this case. Plaintiff's claim for breach of fiduciary duty is time-barred.

IV. Plaintiff's Negligent Misrepresentation Claim

Lastly, Plaintiff alleges that Dr. Specter negligently misrepresented to her that she did not have a disability or need accommodations for her disability when they discussed the results of her neuropsychological evaluation in fall of 2010.

USF argues that this claim is also time-barred by the four-year statute of limitations. In addition, it argues that Plaintiff cannot sue USF for Dr. Specter's alleged negligent misrepresentation because it has sovereign immunity.

The State of Florida and its agencies have sovereign immunity and cannot be sued unless the Florida Legislature has waived that privilege. *See Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984) (citing Fla. Const. art. X, § 13). Although the State has generally waived its immunity for torts, Fla. Stat. § 768.28, it has retained immunity for torts committed in bad faith by its employees, Fla. Stat. § 768.28(9). USF argues that bad faith is a necessary element of a negligent misrepresentation claim because negligent misrepresentation sounds in fraud and bad faith is a necessary element of a fraud claim. Therefore, it argues, sovereign immunity bars Plaintiff's negligent misrepresentation claim against it.

Appendix D

Historically, in Florida, a claim for negligent misrepresentation has sounded in fraud. *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1511 (11th Cir. 1993) (Cox, J., concurring in part and dissenting in part) (citing *Watson v. Jones,* 25 So. 678, 683 (1899); *Ostreyko v. B.C. Morton Org., Inc.,* 310 So. 2d 316, 318 (Fla. Dist. Ct. App.1975)). Take, for example, the elements of a negligent misrepresentation claim described in *Atlantic Nat. Bank of Florida v. Vest*—an actionable suit requires (1) misrepresentation of a material fact, (2) the representor must either know of the misrepresentation, make the representation without knowledge as to its truth or falsity, or make the representation under circumstances in which he ought to have known of its falsity, (3) the representor must intend that the representation induce another to act on it, and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. 480 So. 2d 1328, 1331-32 (Fla. Dist. Ct. App. 1985). The legal scienter articulated in the second element is the same as that to establish fraud. *See Parker v. State of Florida Bd. of Regents ex rel. Florida State Univ.*, 724 So. 2d 163, 168 (Fla. Dist. Ct. App. 1998) (internal citations omitted). As a result, courts have applied the heightened pleading standard and the statute of limitations for fraud to negligent misrepresentation claims. *E.g., McGee v. JP Morgan Chase Bank, NA*, 520 F. App'x 829, 831 (11th Cir. 2013) (applying Rule 9(b) pleading standard); *Ostreyko,* 310 So. 2d at 318 (applying statute of limitations for fraud because "negligent misrepresentation is considered tantamount to actionable fraud").

Florida state courts have stated that intentional misconduct or bad faith is a necessary element of fraud. *First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539

(Fla. 1987) (intentional misconduct); *Parker*, 724 So. 2d at 169 (bad faith). This supports USF's argument that it has sovereign immunity in regard to Plaintiff's claim.

That said, it appears that today a litigant may have a cause of action for negligent misrepresentation without proving fraud or that the person who made the representation did so in bad faith. *See Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334 (Fla. 1997) (adopting the Restatement (Second) of Torts' position on negligent misrepresentation and explaining that comparative negligence principles should apply to negligent misrepresentation because a negligent misrepresenter who has "no intent to deceive but only good faith coupled with negligence" is less culpable than a fraudulent misrepresenter); Fla. Std. Jury Instr. (Civ.) 409.8 (requiring a plaintiff to prove just that the representer made a statement that he believed to be true but was in fact false and that he was negligent in making the statement because he should have known it was false).

It is not clear from Plaintiff's Response under what theory of liability she is proceeding. She did not list the elements of her negligent misrepresentation claim, and the Court cannot discern whether she intends to argue that Dr. Specter knew he was telling her a false statement or instead believed he was telling her the truth.

Ultimately, however, it does not matter. If Plaintiff intends to proceed on a theory of liability for negligent misrepresentation that sounds in fraud, she must necessarily prove that Dr. Specter acted in bad faith, so USF would be immune from suit. If Plaintiff instead intends to proceed on a theory of liability that arises out of negligence, her claim is barred by the four-year statute of limitations. Fla. Stat. § 95.11(3)(a). Her claim arose in fall of 2010, when Dr. Specter allegedly made the false representation and Plaintiff relied on it,

yet Plaintiff did not file suit until 2016. Equitable estoppel does not apply for the reasons discussed in section III, supra.

For the foregoing reasons, it is ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Judgment (Doc. 22) is granted.
2. The Clerk of Court is directed to enter final judgment in favor of Defendant and against Plaintiff.
3. After entry of final judgment, the Clerk of Court is directed to close this case and terminate any pending motions as moot.

DONE and **ORDERED** in Tampa, Florida, on April 19, 2017.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

Additional material from this filing is available in the Clerk's Office.