## APPENDIX TABLE OF CONTENTS

## OPINION OF THE ELEVENTH CIRCUIT (MAY 10, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

ASHLEY WILCOX PAGE,

*Plaintiff-Appellant*,

v.

TODD L. HICKS, NNA, CRNA,
SUSAN P. MCMULLAN, PHD, CRNA,
PETER M. TOFANI, MS, LTC (R),
UNIVERSITY OF ALABAMA AT BIRMINGHAM,
UNIVERSITY OF ALABAMA,
BOARD OF TRUSTEES,

*Defendants-Appellees*.

---

No. 18-10963

D.C. Docket No. 2:16-CV-01993-KOB

Appeal from the United States District Court
for the Northern District of Alabama

Before: TJOFLAT, NEWSOM, and
GRANT, Circuit Judges.

---

PER CURIAM:

Ashley Page appeals the district court's order dismissing her claims against the University of Alabama at Birmingham's Board of Trustees and

several UAB employees based on her removal from UAB's School of Nursing Anesthesia. Specifically, Page sued the Board of Trustees and UAB employees Todd L. Hicks, Susan P. McMullan, and Peter M. Tofani under 42 U.S.C. § 1983 for violating her procedural- and substantive-due-process rights to continued enrollment in the Nursing Anesthesia program, seeking both monetary damages for her time enrolled and re-instatement in the program. After careful review, we affirm the district court's dismissal of all claims.

## I

Ashley Page enrolled in the University of Alabama at Birmingham's Nursing Anesthesia Program in August 2014. In August 2016, as part of the curriculum, Page began a clinical rotation at Baptist South Hospital in Montgomery, Alabama. A few weeks later, she received a call from UAB's clinical coordinator notifying her of a required meeting with Appellee Susan P. McMullan, the Nursing Anesthesia Program Director.

At the meeting, McMullan showed Page three negative clinical evaluations from staff at Baptist South Hospital, which McMullan had received from Professor Todd L. Hicks.[1] McMullan then informed Page that she would be receiving a failing grade in

---

[1] Throughout the proceedings, Page has insisted that one of the three evaluations concerned another student in the program. Taking the facts alleged in the light most favorable to Page as the non-moving party, this opinion considers only the two undisputed evaluations. *See Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam) (explaining that, in reviewing a motion to dismiss, this Court "accept[s] the allegations in the complaint as true and construe[s] them in the light most favorable to the [non-moving party]").

her clinical course and that she would be dismissed from the Nursing Anesthesia program immediately. At the meeting's end, Appellee Peter M. Tofani, Dean of Student Affairs, provided Page with his contact information in case she decided to appeal the dismissal decision.

Following the meeting, some confusion ensued about whether Page's dismissal was effective immediately or would instead take effect at the end of the semester. After receiving copies of the evaluations leading to her dismissal, Page met with Tofani and John Updegraff, Director of Student Affairs. Tofani informed Page at that time that her dismissal would be effective at the semester's end and that she would not be reinstated. Page then appealed the decision to the Dean of the Nursing School. The Dean responded by scheduling an Advisory Committee Hearing Panel to review Page's appeal. At the hearing, Page had two lawyers present and questioned witnesses, although several UAB employee witnesses whom Page wished to question were not present. A few weeks after the hearing, the panel upheld Page's dismissal.

Page sued the UAB Board of Trustees, along with McMullan, Hicks, and Tofani, for due process violations, requesting monetary damages and reinstatement as a student in the Nursing Anesthesia program.[2] The

---

[2] Page also brought state-law negligence claims against each individual defendant. But after dismissing each of Page's federal claims, the district court properly exercised its discretion to dismiss without prejudice her accompanying state-law claims. *See Raney v. Allstate Ins., Co.*, 370 F.3d 1086, 1088-89 (11th Cir. 2004) (encouraging district courts to dismiss state claims when no federal claims remain). Page's state-law claims are not before us on appeal.

defendants moved to dismiss all claims. The district court dismissed the claims against the Board of Trustees on the basis that it was entitled to Eleventh Amendment immunity. The court also dismissed all claims against the individual defendants, finding first that all defendants were entitled to Eleventh Amendment immunity for the monetary-damages claims against them in their official capacities, and second, that Page had failed to state a claim upon which relief could be granted.

## II

Page asserts that each defendant violated her procedural-and substantive-due-process rights by dismissing her without following the Nursing School's established procedures.[3] We will first consider Page's claims against the Board of Trustees, followed by her claims against the individual UAB employees. In so doing, we will review *de novo* the district court's dismissal of claims both for Eleventh Amendment immunity, *see Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288, 1290 (11th Cir. 2003) (per curiam), and for failure to state a claim upon which relief can be granted, *Douglas v. United States*, 814 F.3d 1268, 1273-75 (11th Cir. 2016).

### A

Page sued the Board for both monetary and injunctive relief—specifically, for her lost tuition and

---

[3] Page's complaint vaguely references "due process"; however, because she sought both monetary and injunctive relief the district court construed the complaint as alleging both substantive- and procedural-due-process claims and analyzed them as such. We do the same here.

for reinstatement in the Nursing Anesthesia program. She is entitled to neither, but for two different reasons.

First, the Board is immune from liability for monetary damages. Under the Eleventh Amendment, "the 'Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the . . . States' by citizens of another State, U.S. Const., Amdt. 11, and (as interpreted) by its own citizens." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). That being said, a State remains free to waive its immunity from suit in a federal court. And in *Lapides*, the Supreme Court held that a State necessarily waives its immunity from suit when it removes a proceeding to federal court. 535 U.S. at 618-19. Relevant to this case, state universities, such as UAB, are "arms of the state" and thus are entitled to Eleventh Amendment immunity. *See Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985) (holding that the Eleventh Amendment bars suit under 42 U.S.C. § 1983 against Troy State University).

Page contends that the Board waived its Eleventh Amendment immunity from liability by removing the case to federal court. But Page misunderstands *Lapides*, which held that a State's removal to federal court waives "its immunity from a federal forum"—that is, its immunity from suit, not from liability. *Stroud v. McIntoch*, 722 F.3d 1294, 1302 (11th Cir. 2013). We have clarified that "nothing in *Lapides* suggests that a state waives any defense it would have enjoyed in state court—including immunity from liability for particular claims." *Id.* Here, no one contests that the

Board waived its Eleventh Amendment immunity from suit by removing the case to federal court. But under this Court's precedent interpreting *Lapides*, this removal did not affect the Board's immunity from liability for monetary damages.

Page also seeks relief from the Board in the form of reinstatement as a student at UAB. Generally, "requests for reinstatement"—like the one Page brings—"constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception and, thus, are not barred by the Eleventh Amendment." *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (quotation marks omitted). This exception, however, applies only to state officers—"suits against the States and their agencies, . . . are barred regardless of the relief sought." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Because the Board is an "arm of the state" itself—and not an individual officer—Page's request for injunctive relief against the Board fails too. *See, e.g.*, *Harden*, 760 F.2d at 1163.

**B**

1

Next, we consider Page's claims against the individual defendants.[4] Looking first to her procedural-

[4] Page's monetary-damages claims against the individual defendants in their official capacities are barred for the same reason that her monetary-damages claims against the Board-as-an-arm-of-the-State are barred. *See Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) ("Official capacity actions seeking damages are deemed to be against the entity of which the officer is an agent.") (citations omitted).

due-process claim, the parties agree that "a § 1983 claim alleging the denial of procedural due process requires proof of three elements: (1) deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Cook v. Randolph County*, 573 F.3d 1143, 1148-49 (11th Cir. 2009) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)). The Supreme Court has not addressed whether a graduate student has a constitutionally-protected liberty or property interest in her continued enrollment at a public university, although the Court presumed without deciding the existence of such a right in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 84-85 (1978). And while this Court has held that, outside of a state university's proper application of its own disciplinary procedures for behavioral misconduct, a student has a "legitimate claim of entitlement to remain enrolled," *Barnes v. Zaccari*, 669 F.3d 1295, 1304 (11th Cir. 2012), we have not extended that holding from the disciplinary to the academic context.

Even assuming, though, that Page held a constitutionally-protected property interest in her enrollment at UAB, we cannot say, on these facts, that she has alleged constitutionally-inadequate process.[5] To start, the Supreme Court has rejected the contention that, in an academic-dismissal case, a school's failure to follow its own procedures in and of itself amounts to a due process violation. *See Horowitz*, 435 U.S. at 92 n.8. This Court has also made clear that the standards guiding academic dismissals are not as "strict"

---

[5] The second prong—the presence of state action—is undisputed.

as those governing disciplinary actions. *Haberle v. Univ. of Ala.*, 803 F.2d 1536, 1539 (11th Cir. 1986). Indeed, under our precedent, "[f]ormal hearings are not required in academic dismissals"— instead, "the decision-making process need only be 'careful and deliberate.'" *Id.* (quoting *Horowitz*, 435 U.S. at 85). Our case law also explains that even when a state's pre-deprivation process is less than perfect, it is "only when the state refuses to provide a process sufficient to remedy the procedural deprivation [that] a constitutional violation actionable under section 1983 arise[s]." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc) (emphasis added).

The question for our purposes, then, becomes whether Page has alleged a lack of "careful and deliberate" process surrounding her dismissal, rising to the level of constitutionally-inadequate process. We think not. Although Page points to the somewhat confused and confusing initial communications surrounding her dismissal as proof of improper process, it is clear from the facts alleged in her complaint that any less-than-perfect pre-deprivation process was remedied. *See McKinney*, 20 F.3d at 1557. First, immediately following Page's initial meeting with McMullan, Assistant Dean Tofani provided Page with his contact information in order to facilitate any appeal she might wish to pursue. Next, Page both wrote to and personally met with several levels of Nursing School staff and administrators to contest the decision, including the Program Director and the Dean of the Nursing School. Finally, UAB provided Page with more than what is constitutionally required for academic dismissals: a formal panel hearing at which she was able to appeal the decision, present and cross-examine

witnesses, and plead her case for several hours. *See Haberle*, 803 F.2d at 1539 (stating that "careful and deliberate" process rather than a "formal hearing" is all that is required in an academic dismissal).

Because Page's complaint makes clear that UAB went above and beyond the level of "careful and deliberate" consideration required to ensure a constitutionally-adequate process in the academic-dismissal context, and that any notification deficiencies were remedied through plentiful post-deprivation processes, she has failed to state a procedural-due-process claim against McMullan, Hicks, or Tofani in either their individual or official capacities.

2

Page also claims that the individual defendants violated her substantive-due-process rights by dismissing her "intentionally, willfully, negligently, maliciously, with deliberate indifference, and/or with a reckless disregard for the natural and probable consequences of their act." This claim also fails. In *Regents of University of Michigan v. Ewing*, the Supreme Court assumed without deciding that a medical student had a constitutionally-protected, substantive-due-process right in his continued enrollment in medical school. 474 U.S. 214, 222-23 (1985). In evaluating the medical student's claim, the Court cautioned that "[w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Id.* at 225. Judges "[p]lainly" should not "override" faculty decisions concerning academic dismissals, the Court continued, unless a decision represents "such a substantial

departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* This is because an academic-dismissal decision requires "an expert evaluation of cumulative information" that is "not readily adapted to the procedural tools of judicial or administrative decision-making." *Id.* at 226 (quoting *Horowitz*, 435 U.S. at 90).

Here, nothing in Page's complaint indicates that the individual defendants "substantial[ly] depart[ed]" from academic norms in a manner that would require judicial "override." *Ewing*, 474 U.S. at 225. Clinical supervisors evaluated Page's nursing and found it to be "unsafe," the negative clinical evaluations resulted in a failing grade, Page was dismissed for failing her clinicals, and her appeal was thoroughly considered. In the absence of any allegations tending to show that UAB faculty members abdicated their responsibility to exercise professional judgment, Page fails to state a substantive-due-process claim against McMullan, Hicks, or Tofani in either their individual or official capacities.

## III

In sum, the district court properly dismissed all claims. The Board of Trustees of the University of Alabama at Birmingham is entitled to Eleventh Amendment immunity. The individual defendants acting in their official capacities also are entitled to Eleventh Amendment immunity as to the monetary damages, and Page has otherwise failed to state a procedural-or substantive-due-process claim against them in their individual or official capacities.

AFFIRMED.

## MEMORANDUM OPINION OF THE DISTRICT COURT OF ALABAMA (FEBRUARY 12, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA; ET AL.,

*Defendants*.

2:16-CV-01993-KOB

Before: Karon Owen BOWDRE,
Chief United States District Judge.

Ashley Wilcox Page, a former student in the University of Alabama at Birmingham's ("UAB") School of Nursing Anesthesia Program, filed suit against Todd Hicks, Susan McMullan, Peter Tofani, and the Board of Trustees of the University of Alabama, alleging that they wrongfully dismissed her from the Program. (Doc. 25). In Counts 1 and 2, Ms. Page raises due process claims against the Board of Trustees and all three individual defendants in their official and individual capacities; in Count 3, Ms. Page asserts a negligence claim against Mr. Hicks and Ms. McMullan in

their official and individual capacities; in Count 4, Ms. Page presents a negligence claim against Ms. McMullan in her official and individual capacities; and in Count 5, Ms. Page pleads a negligence claim against Mr. Tofani in his official and individual capacities. (*Id.*). In the federal due process claims, she seeks monetary damages and injunctive relief, and in the state law negligence claims, she seeks only monetary damages.

Defendants move to dismiss the amended complaint, asserting that they are entitled to Eleventh Amendment immunity, sovereign immunity, state agent immunity, and qualified immunity, and in the alternative, that the amended complaint fails to state a federal claim. (Doc. 26). The court WILL GRANT Defendants' motion to dismiss and WILL DISMISS the amended complaint.

The court finds that the Board of Trustees is entitled to Eleventh Amendment immunity, so the court WILL DISMISS WITHOUT PREJUDICE the Board of Trustees as a defendant.

The court finds that the individual defendants in their official capacities are entitled to Eleventh Amendment immunity from the federal claims seeking monetary damages, but that under the *Ex parte Young* doctrine, they are not entitled to Eleventh Amendment immunity from the federal claims seeking injunctive relief. Although the court finds that the individual defendants are not entitled to Eleventh Amendment immunity from the federal claims seeking injunctive relief, the court finds that Ms. Page fails to state a procedural or substantive due process claim. As a result, the court WILL DISMISS WITHOUT PREJUDICE the federal claims raised against the individ-

ual defendants in their official capacities seeking monetary damages, and WILL DISMISS WITH PREJUDICE the federal claims raised against the individual defendants in their official capacities seeking injunctive relief.

The court also finds that the individual defendants are entitled to qualified immunity from the federal claims seeking monetary damages from them in their individual capacities because Ms. Page's allegations fails to establish a constitutional violation. The court WILL DISMISS WITH PREJUDICE the federal claims raised against the individual defendants in their individual capacities.

Finally, in light of the court's dismissal of all of the federal claims, the court declines to exercise supplemental jurisdiction over the state law claims. The court WILL DISMISS WITHOUT PREJUDICE Counts 3, 4, and 5 for lack of jurisdiction.

## I. Background

At the motion to dismiss stage, the court must accept as true the allegations in the complaint and construe them in the light most favorable to the plaintiff. *Butler v. Sheriff of Palm Beach Cty.*, 685 F.3d 1261, 1265 (11th Cir. 2012); *Stalley v. Orlando Reg'l Healthcare Sys.*, 524 F.3d 1229, 1232-33 (11th Cir. 2008). Taken in that light, in August 2014, Ms. Page enrolled as a student at the UAB's School of Nursing Anesthesia Program. (Doc. 25 at 3). In August 2016, she began a clinical rotation at Baptist South Hospital in Montgomery, Alabama. (*Id.*).

Apparently, between August 18 and August 25, 2016, during Ms. Page's clinical rotation, three evalu-

ators filled out negative evaluations about her performance. (*Id.* at 3, 9). Ms. Page contends that one of the evaluations was not actually about her, but about a different nursing student. (*Id.* at 5, 10). Assistant Professor Todd Hicks received the three negative clinical evaluations about Ms. Page and he sent them to the Director of the Nurse Anesthesia Program, Susan McMullan. (*See id.* at 4-5, 9). On August 28, 2016, Ms. McMullan emailed Ms. Page instructing her to attend a meeting with several UAB employees, including herself and the Assistant Dean for Student Affairs, Peter Tofani. (*See id.* at 6).

The meeting took place on August 29, 2016. (*Id.* at 5). At the meeting, Ms. McMullan gave Ms. Page the three evaluations, told her that she "would not be allowed to continue in the Program as an unsafe nurse," and informed her that she "was dismissed from the UAB School of Nursing Anesthesia program effective immediately." (*Id.* at 5-6). According to Ms. Page, Ms. McMullan made the "unilateral decision" to dismiss her. (*Id.* at 12). Mr. Tofani gave Ms. Page a business card and asked her to call him when she was ready to learn about her options to appeal the dismissal. (*Id.* at 5-6).

In September 2016, Ms. Page attended a meeting with Mr. Tofani and another UAB employee. (*Id.* at 7). At that meeting, Mr. Tofani told Ms. Page that she had been dismissed from the program for safety reasons, but also stated that she was still a student, she had received a failing grade, and she would be dismissed at the end of the semester. (*Id.* at 7-8). He told her that she would not be reinstated. (*Id.*).

For several months after the August meeting, Ms. Page continued to correspond and meet with UAB

administrators about her dismissal. (*Id.* at 8-13). Different administrators told Ms. Page that she had or had not yet been dismissed from school, and that she could follow the academic misconduct grievance procedure or the student academic complaint process described in the School of Nursing Handbook. (*Id.* at 8-10). On December 7, 2016, the School convened a grievance hearing panel to consider Ms. Page's challenge to her dismissal. (*Id.* at 12). Ms. Page's attorney was present, but not allowed to speak; most of the witnesses that Ms. Page requested did not attend; and Ms. Page was not allowed to present testimony from those missing witnesses. (*Id.* at 12-13). On December 19, 2016, the Dean of the School of Nursing sent Ms. Page a letter stating that she was "dismissed from the Nurse Anesthesia specialty track of the MSN program." (*Id.* at 13-14).

Ms. Page filed suit against Mr. Hicks, Ms. McMullan, Mr. Tofani, and the Board of Trustees of the University of Alabama,[1] asserting the following federal counts: (1) Defendants deprived her of due process, in violation of the Fourteenth Amendment to the U.S. Constitution, by dismissing her without following School of Nursing's requirements for dismissing a student ("Count 1"); and (2) Defendants deprived her of due process, in violation of 42 U.S.C. § 1983, by dismissing her intentionally, willfully, negligently, maliciously, with deliberate indifference, and/or with a reckless disregard for the natural and

---

[1] Ms. Page's initial complaint incorrectly named as a defendant the University of Alabama at Birmingham, but after the case was removed to federal court, the court substituted the Board of Trustees of the University of Alabama as the correct defendant. (*See* Doc. 17).

probable consequences of their act ("Count 2"). (Doc. 25 at 14-17). For those counts, she seeks monetary damages and injunctive relief in the form of reinstatement as a student. (*Id.)*.

Ms. Page also asserts the following state law negligence claims against the individual defendants: (1) negligence by Mr. Hicks and Ms. McMullan for using a different student's clinical evaluation as grounds to dismiss Ms. Page from the school ("Count 3"); (2) negligence by Ms. McMullan for failing to follow the School of Nursing's procedures for dismissing a student ("Count 4"); and (3) negligence by Mr. Tofani for failing to follow the School of Nursing's procedures for dismissing a student ("Count 5"). (*Id.* at 14-20). For those counts, she seeks only monetary damages.[2] (*Id.* at 20-21).

Ms. Page initially filed suit in state court. (Doc. 1-1). Defendants removed the case to federal court, (doc. 1), and then moved to dismiss the amended complaint for lack of jurisdiction and failure to state a claim, (doc. 26).

## II. Discussion

Defendants move to dismiss the amended complaint on various immunity grounds under Federal Rule of Civil Procedure 12(b)(1). (Doc. 26 at 7-20, 26-

---

[2] In her response to the motion to dismiss, Ms. Page states that she also seeks declaratory relief. (Doc. 28 at 22). The amended complaint, however, does not request declaratory relief in those counts. (*See* Doc. 25 at 20-21). Ms. Page may not amend her complaint via briefing on a motion to dismiss. *Cf. Georgia-Carry.Org v. Georgia*, 687 F.3d 1244, 1258 n.26 (11th Cir. 2012) ("[A] plaintiff may not amend the complaint through argument at the summary judgment phase of proceedings.").

30). In the alternative, they move, under Rule 12(b)(6), to dismiss Counts 1 and 2—the federal counts—for failure to state a claim. (*Id.* at 20-26).

Rule 12(b)(1) permits a district court to dismiss for "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). Rule 12(b)(6) permits a district court to dismiss "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

Before addressing the motion to dismiss, the court must clarify some preliminary matters about the amended complaint. First, the two federal counts, Counts 1 and 2, each refer vaguely to "due process" violations. (*See* Doc. 25 at 14-17). Such a vague assertion of "due process" violations does not state a recognizable cause of action. However, because Ms. Page seeks both monetary damages and equitable relief in the form of reinstatement, the court construes her amended complaint in the light most favorable to her, and assumes that she raises both procedural and substantive due process claims. *See McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc) ("In substantive due process cases, the claimant seeks compensatory damages for the value of the deprived right. In procedural due process cases, however, although the claimant may seek compensatory damages, the primary relief sought is equitable. . . . ").

The court construes Count 1 to raise a procedural due process claim because the claim is based on Defendants' alleged failure to give Ms. Page proper notice and an opportunity to be heard before dismissing her from the Program. (*See id.* at 15). The court construes Count 2 to raise a substantive due process claim because the claim is based on Defendants' actions that Ms. Page alleges were intentional, willful, negli-

gent, malicious, deliberately indifferent, and taken with "reckless disregard for the natural and probable consequences of their act." (*See id.* at 16).

In addition, Count 1 appears to be a freestanding due process claim, while Count 2 is a § 1983 process claim. (*Id.* at 14, 16). But "[w]here a statute provides an adequate remedy, [the court] will not imply a judicially created cause of action directly under the Constitution." *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244, 1254 n.15 (11th Cir. 2012). Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. As a result, the court "will not imply a judicially created" freestanding due process claim, but will instead construe Count 1 as a § 1983 due process claim. *See Anderson v. Edwards*, 505 F. Supp. 1043, 1045 (S.D. Ala. 1981) ("[N]o claim exists under the first and fourteenth amendments to the United States Constitution because no implied cause of action exists under those amendments. Instead, where rights granted by the first or fourteenth amendments are violated a plaintiff must vindicate those rights through 42 U.S.C. § 1983.").

Finally, the amended complaint does not indicate whether the claims are against the individual defendants in their official or individual capacities. (*See generally* Doc. 25 at 14-20). Ms. Page states in her response to the motion to dismiss that she intended for each count to be against the individual defendants in both capacities. (Doc. 28 at 21). "In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. The course of proceedings in such cases typically will indicate the nature of the liability sought to be im-

posed." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) (quotation marks omitted). The amended complaint seeks monetary damages for all of the claims, and also seeks injunctive relief in the form of reinstatement as a student for the federal claims. (Doc. 25 at 14-21).

Assuming that no immunity bars any of the claims, Ms. Page could obtain the injunctive relief she seeks from the individual defendants in their official capacities, but she could not obtain the injunctive relief she seeks from the individual defendants in their individual capacities. *See Ingle v. Adkins*, ___ So.3d ___, 2017 WL 5185288, at *2 (Ala. 2017) ("[A] suit for injunctive relief against a State official in his or her individual capacity would be meaningless. This is so, because State officials act for and represent the State only in their official capacities.") (quoting *Ex parte Dickson*, 46 So.3d 468, 474 (Ala. 2010)) (emphasis in original). As a result, the court will not construe Counts 1 and 2—the only counts in which Ms. Page seeks injunctive relief—to assert claims for injunctive relief against the individual defendants in their individual capacities.

In summary, the court construes the amended complaint to raise the following claims against the following defendants:

- Counts 1 and 2 (§ 1983 procedural and substantive due process claims): seeking monetary damages and reinstatement from the Board of Trustees; seeking monetary damages and reinstatement from the individual defendants in their official capacities; and seeking only monetary damages from the individual defendants in their individual capacities

- Count 3 (negligence claim): seeking monetary damages from Mr. Hicks and Ms. McMullan in their official and individual capacities
- Count 4 (negligence claim): seeking monetary damages from Ms. McMullan in her official and individual capacities
- Count 5 (negligence claim): seeking monetary damages from Mr. Tofani in his official and individual capacities

### A. Jurisdiction

"A defendant can move to dismiss a complaint under Rule 12(b)(1) for lack of subject matter jurisdiction by either facial or factual attack." *Stalley*, 524 F.3d at 1232. In this case, Defendants make only a facial attack on the court's jurisdiction. "A facial attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. . . . " *Id.* at 1232-33 (quoting *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (quotation, citation, and alterations omitted)).

Defendants contend they are entitled to various forms of immunity from various combinations of the claims. As for Ms. Page's federal claims, all Defendants contend they are entitled to Eleventh Amendment immunity, and the individual defendants contend they are entitled to qualified immunity from the claims brought against them in their individual capacities. (Doc. 26 at 7-19). As for Ms. Page's state law claims, the individual defendants contend they are entitled to state sovereign immunity from the claims against them in their official capacities, and state agent

immunity from the claims against them in their individual capacities. (*Id.* at 26-30). But because the court concludes that it must dismiss the federal claims in part for lack of jurisdiction and in part for failure to state a claim, the court will not address Defendants' arguments about the various state law immunities.

### 1. Federal Claims

#### a. Eleventh Amendment Immunity

"The Eleventh Amendment provides that the 'Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the . . . States' by citizens of another State, U.S. Const., Amdt. 11, and (as interpreted) by its own citizens." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002). The amended complaint raises two federal due process claims against each defendant. (Doc. 25 at 14-17). Defendants contend that under the Eleventh Amendment, the court lacks jurisdiction over those counts. (Doc. 26 at 7-11). Ms. Page responds that Defendants waived their Eleventh Amendment immunity defense by removing the case to federal court. (Doc. 28 at 10-16). The court agrees that Defendants waived their Eleventh Amendment immunity from suit in this federal forum, but concludes that they did not waive their immunity from liability.

The Supreme Court has held that "the State's act of removing a lawsuit from state court to federal court waives [Eleventh Amendment] immunity." *Lapides*, 535 U.S. at 616. In *Lapides*, a plaintiff sued officials of the State of Georgia in state court. *Id.* Because the State had statutorily waived sovereign

immunity from state law suits in state court, it removed the case to federal court and argued that it was entitled to Eleventh Amendment immunity from suit. *Id.* The Supreme Court rejected that contention, in part because "[t]o adopt the State's Eleventh Amendment position would permit States to achieve unfair tactical advantages." *Id.* at 621.

The Court in *Lapides* limited its holding to situations in which the lawsuit does not raise a valid federal claim and the State has waived sovereign immunity from state law suits in state court. *Id.* at 616-18. But "[n]otwithstanding the express limitation on its holding, the Court's . . . reasoning was in many ways quite broad." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200, 1205 (11th Cir. 2012). "[U]nder *Lapides*' reasoning, a state waives its immunity from a federal forum when it removes a case, which voluntarily invokes the jurisdiction of that federal forum." *Stroud v. McIntosh*, 722 F.3d 1294, 1302 (11th Cir. 2013) (emphasis added). Under *Lapides* and *Stroud*, Defendants waived any objection to this federal forum by removing the case from state court.

But the waiver of Eleventh Amendment forum immunity does not end the inquiry, because "nothing in *Lapides* suggests that a state waives any defense it would have enjoyed in state court—including immunity from liability for particular claims. *Lapides* specifies that it is addressing only immunity to a federal forum." *Stroud*, 722 F.3d at 1302; *see also Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."). In other words, this court must determine whether

some other form of immunity would bar Ms. Page's amended complaint if the case had never been removed—if a state court, instead of a federal court, were deciding the motion to dismiss on immunity grounds.

Under Alabama law, Article I, § 14 of the Alabama Constitution protects the State from liability for state law claims brought against it, and the Eleventh Amendment to the United States Constitution protects the State from liability for federal claims brought against it. *See Ala. State Univ. v. Danley*, 212 So.3d 112, 124 (Ala. 2016) ("[Section] 14 provides absolute immunity from suit—and thus liability—for monetary damages based on state-law claims. . . . "); *id.* at 133 ("[Section] 14 provides [the Alabama State University and individual members of its Board of Trustees] no immunity from Danley's federal-law claims. Rather, for [those defendants], immunity for liability as to Danley's federal-law claims derives from the Eleventh Amendment to the United States Constitution.") (citations omitted).

As discussed above, Defendants' invocation of this federal forum waives Eleventh Amendment forum immunity, but it does not necessarily waive Defendants' immunity from liability. *See Stroud*, 722 F.3d at 1301 ("The Supreme Court has repeatedly recognized that sovereign immunity is a flexible defense with multiple aspects that states can independently relinquish without affecting others."); *id.* ("[A] state, if it chooses, can retain immunity from liability for a particular claim even if it waives its immunity from suit in federal courts."). In this case, the State asserts the same defense it could have asserted in state court. *See, e.g.*, *Danley*, 212 So.3d at 133 (indicating that Eleventh

Amendment immunity is an available defense to liability in Alabama state court). As a result, the court must determine whether the Board of Trustees and the individual defendants in their official capacities are entitled to Eleventh Amendment immunity from liability on the two federal claims against them.[3]

The first question the court faces is whether the Board of Trustees and the individual defendants in their official capacities are considered the State for purposes of Eleventh Amendment immunity. The court finds that they are. "The Eleventh Circuit has determined that state universities in Alabama, as arms of the state, are entitled to Eleventh Amendment immunity." *Harris v. Bd. of Trs. Univ. of Ala.*, 846 F. Supp. 2d 1223, 1233 (N.D. Ala. 2012) (citing *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985)). And "agents and instrumentalities of the State" are also arms of the State. *Manders v. Lee*, 338 F.3d 1304,

---

[3] The individual defendants in their individual capacities are not entitled to Eleventh Amendment immunity because, if Ms. Page prevails against them, they, not the State, would be liable. *See Hobbs v. Roberts*, 999 F.2d 1526, 1528 (11th Cir. 1993) ("The Eleventh Amendment protects no personal assets in 'individual' or 'personal' capacity suits in federal court."); *Jackson v. Ga. Dep't of Transp.*, 16 F.3d 1573, 1577 (11th Cir. 1994) ("The essence of an individual capacity suit is that the plaintiff is seeking to recover from the individual defendant who is personally liable for the judgment."). That conclusion stands even if the State of Alabama provides insurance coverage for judgments against state officials sued in their individual capacities. *See Jackson*, 16 F.3d at 1578 ("We conclude that the existence of a voluntarily established liability trust fund does not make the state the real party in interest in this action and that the trust fund does not extend the state's Eleventh Amendment immunity to its employees sued in their individual capacity.") (footnote omitted).

1308 (11th Cir. 2003) (*en banc*); *see also Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1503 (11th Cir. 1995) ("Official capacity actions seeking damages are deemed to be against the entity of which the officer is an agent.").

The next question is whether an exception to Eleventh Amendment immunity prevents the State's invocation of immunity. Three exceptions to Eleventh Amendment immunity exist. First, Congress may abrogate a State's immunity. *Cross*, 49 F.3d at 1502. Second, the State may consent to be sued or waive its immunity. *Id.* And third, under the *Ex parte Young* doctrine, "official-capacity suits against state officials are permissible . . . when the plaintiff seeks 'prospective equitable relief to end continuing violations of federal law." *Lane v. Central Ala. Comm. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (citation altered) (emphases in original) (quoting *Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999)); *see also Ex parte Young*, 209 U.S. 123 (1908).

"Congress has not abrogated Eleventh Amendment immunity in Section 1983 cases," *Quern v. Jordan*, 440 U.S. 332, 338 (1979), and the State of Alabama has not waived its immunity to liability. *See* Ala. Const. art. I, § 14 ("[T]he State of Alabama shall never be made a defendant in any court of law or equity."). Thus, neither of the first two exceptions applies. Those are the only exceptions that permit claims for monetary damages, so the Eleventh Amendment bars Ms. Page's federal claims for monetary damages from the State, *i.e.*, from the Board of Trustees and the individual defendants in their official capacities.

But Ms. Page also seeks injunctive relief from both the Board of Trustees and the individual defendants in their official capacities, in the form of reinstatement as a student at UAB. (*See* Doc. 25 at 14-17). The *Ex parte Young* doctrine permits lawsuits against state officials "when the plaintiff seeks prospective equitable relief to end continuing violations of federal law." *Lane*, 772 F.3d at 1351 (quotation marks omitted) (emphases in original).

Ms. Page's request for injunctive relief from the Board of Trustees—an arm of the State—must fail because the *Ex parte Young* exception "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). But her request for injunctive relief from the individual defendants in their official capacities falls within the *Ex parte Young* exception.[4] The Eleventh Circuit has held that "requests for reinstatement constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception and, thus, are not barred by the Eleventh Amendment." *Lane*, 772 F.3d at 1351.

In summary, the Eleventh Amendment bars Counts 1 and 2—the federal claims—against the Board of Trustees. Because Ms. Page raises no other claims against the Board of Trustees, the court WILL

---

[4] In their first motion to dismiss, Defendants argued that the individual defendants lack the authority to grant the injunctive relief Ms. Page seeks. (Doc. 14 at 6 n.3). The court granted that motion on other grounds. (Doc. 20). Defendants do not repeat the lack-of-authority argument in their current motion to dismiss, so the court does not address it.

DISMISS WITHOUT PREJUDICE the Board of Trustees for lack of jurisdiction.

The Eleventh Amendment also bars Counts 1 and 2 against the individual defendants to the extent that those counts seek monetary damages from them in their official capacities. The court WILL DISMISS WITHOUT PREJUDICE Counts 1 and 2 against the individual defendants in their official capacities to the extent those counts seek monetary damages.

But under the *Ex parte Young* doctrine, the Eleventh Amendment does not bar Ms. Page's requests for injunctive relief from the individual defendants in their official capacities. Defendants contend, in the alternative, that Counts 1 and 2 fail to state a claim. The court will address that argument in the next section, which also addresses whether the individual defendants are entitled to qualified immunity from the federal claims brought against them in their individual capacities for monetary damages.

### b. Qualified Immunity

The individual defendants in their individual capacities contend that they are entitled to qualified immunity as to Counts 1 and 2—the federal claims—insofar as those counts seek monetary damages. (Doc. 26 at 11-19).

Qualified immunity protects government officials performing discretionary functions from suit in their individual capacities unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The purpose

of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law. . . . " *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation and quotation marks omitted). The court must "compare the acts of each defendant to analogous case law to determine whether each defendant has violated a clearly established constitutional right." *Corey Airport Servs. v. Decosta*, 587 F.3d 1280, 1288 n.6 (11th Cir. 2009).

To prove that a public official is entitled to qualified immunity, the official "must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Penley ex rel. Estate of Penley v. Eslinger*, 605 F.3d 843, 849 (11th Cir. 2010) (quoting *Lee*, 284 F.3d at 1194). Accepting as true the facts alleged in Ms. Page's amended complaint, it appears the individual defendants were acting in the scope of their discretionary authority when they took the allegedly wrongful acts because their "actions were undertaken pursuant to the performance of [their] duties and within the scope of [their] authority." *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988) (quotation marks omitted).

"Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Id.* (quoting *Lee*, 284 F.3d at 1194). The question whether qualified immunity is appropriate is, itself, a two part test that the court may address in either order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). One part of the test is "whether [the]

plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (quotation marks and citation omitted). The second part is whether the constitutional violation was clearly established at the time of the alleged wrongful conduct. *Pearson*, 555 U.S. at 816. The public official is entitled to qualified immunity unless the plaintiff establishes both parts of the test; failure to establish either prong dooms the plaintiff's case.

"A government official's conduct violates clearly established law when, at the time of the alleged conduct, the contours of the right are sufficiently clear that every 'reasonable official would have understood that what he is doing violates that right.'" *Mikko v. City of Atlanta*, 857 F.3d 1136, 1146 (11th Cir. 2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The court "look[s] only to binding precedent—holdings of cases drawn from the United States Supreme Court, [the Eleventh Circuit], or the highest court of the state where the [conduct] took place." *Id.* (last alteration in original) (quotation marks omitted). Courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741.

### i. Count 1: Procedural Due Process

Count 1 asserts that the individual defendants in their individual capacities violated Ms. Page's procedural due process rights by dismissing her without following the School of Nursing's procedures for dismissing a student. (Doc. 25 at 14-15).

"[A] § 1983 claim alleging the denial of procedural due process requires proof of three elements: (1) a

deprivation of constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Cook v. Randolph County, Ga.*, 573 F.3d 1143, 1148-49 (11th Cir. 2009) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)).

Because the court must address each individual defendant separately, the court will describe the alleged actions of each defendant. *See Corey Airport Servs.*, 587 F.3d at 1288 n.6. According to Ms. Page's amended complaint:

- Mr. Hicks sent the three negative clinical evaluations, including one that was about another nursing student, to Ms. McMullan. (Doc. 25 at 5).
- Ms. McMullan made a unilateral decision to dismiss Ms. Page based on the three negative evaluations. (Doc. 25 at 12). On August 28, 2016, she called a meeting to be held on August 29, 2016, with Ms. Page, Mr. Tofani, and several other unidentified people. (*Id.* at 5-6). At the meeting, Ms. McMullan informed Ms. Page that she would be receiving an F in her clinical course and was dismissed from the Program "effective immediately." (*Id.* at 5-6). Ms. McMullan did not provide Ms. Page with any pre-or post-meeting written notice of the people who would be present at the meeting, the proposed dismissal, the reasons for the proposed dismissal, or the negative evaluations. (*Id.* at 5).

  On October 5, 2016, about five weeks after the August meeting, Ms. McMullan wrote a memorandum outlining the three negative

evaluations. (*Id.* at 9). Ms. McMullan gave that memorandum to the Senior Associate Dean for Academic Affairs, but not to Ms. Page. (*Id.*). The Senior Associate Dean eventually sent Ms. McMullan's memorandum to Ms. Page. (*Id.*).

- Mr. Tofani was present at the August 29, 2016 meeting during which Ms. Page was informed of her dismissal from the Program. (Doc. 25 at 5-6). After Ms. McMullan informed Ms. Page of her dismissal, he gave Ms. Page his business card and asked her to call him when she was ready to discuss her options to appeal the dismissal. (*Id.* at 6). Mr. Tofani did not provide Ms. Page with any pre- or post-meeting written notice of failing the clinical course or being dismissed from the Program. (*Id.*).

  On September 16, 2016, about two weeks after the August meeting, Ms. Page met again with Mr. Tofani and a non-party, Director of Student Affairs John Updegraff. (Doc. 25 at 7). At the meeting, Mr. Tofani represented both that Ms. Page had been dismissed from the Program and that she had not yet been dismissed, but that she would be dismissed at the end of the semester. (*Id.*). He also stated that she would not be reinstated. (*Id.*).

  On October 27, 2016, Mr. Tofani emailed Ms. Page a letter describing a "'written investigative report discussing allegations of misconduct' against Plaintiff Page" and explaining the appeals process. (Doc. 25 at 10). Ms. Page responded to his email by sending a letter telling him that the School and its personnel had refused to follow the procedural steps for

addressing "academic misconduct." (*Id.* at 11). He sent that letter on to the Dean of the Nursing School, Dr. Doreen Harper. (*Id.* at 10-11).

Based on those allegations, Mr. Hicks is entitled to qualified immunity. Ms. Page alleges only that he provided negative evaluations about her performance to Ms. McMullan. That allegation does not constitute a "deprivation of constitutionally-protected liberty or property interest." *Cook*, 573 F.3d at 1148-49. Professors and supervisors must be allowed to provide evaluations of students to school administrators. What the school administrators do with those evaluations is a different issue, and whether Ms. McMullan and Mr. Tofani are entitled to qualified immunity is a closer question.

Ms. Page does not assert that Mr. Tofani made the decision to dismiss her from the Program; she alleges only that Ms. McMullan made that "unilateral" decision. (Doc. 25 at 12). But she does allege that Ms. McMullan and Mr. Tofani were involved in the meeting during which they informed Ms. Page that she was being dismissed, and that they were involved in the post-dismissal actions taken by the School and other administrators. (*Id.* at 7-11). At the motion to dismiss stage, that is enough to allege that Mr. Tofani was involved in the purported deprivation. So the court must determine whether, taken as true, Ms. Page alleges facts showing that Ms. McMullan's and Mr. Tofani's actions: (1) deprived her of a constitutionally-protected liberty or property interest; (2) constituted state action; and (3) provided constitutionally inadequate process. *Cook*, 573 F.3d at 1148-49. The court concludes that, taken as true, the amended complaint asserts a deprivation of a constitutionally pro-

tected property interest, but it does not assert constitutionally inadequate process because the post-deprivation process cured any inadequate pre-deprivation process.

In *Barnes v. Zaccari*, the Eleventh Circuit held that when a State's official regulations create a "legitimate claim of entitlement to remain enrolled" at a state university, the student has a constitutionally protected property interest in that enrollment. 669 F.3d 1295, 1304 (11th Cir. 2012). In that case, the State's official regulations limited the university's authority to discipline students for misconduct unless disciplinary sanctions were "for cause." *Id.*

As in *Barnes*, in this case, Ms. Page alleges that the School of Nursing Student Handbook requires the School and its personnel to follow certain procedures before taking action against a student for academic misconduct. (Doc. 25 at 12). And as in *Barnes*, it appears that the Student Handbook creates a "legitimate claim of entitlement to remain enrolled" until the decision-makers follow those procedures. *Barnes*, 669 F.3d at 1304. Thus, at this stage, it appears that Ms. Page's amended complaint adequately alleges that she had a property interest in remaining enrolled at the School of Nursing until the School followed the procedures laid out in the Student Handbook.

Defendants do not contest that Ms. Page adequately alleged the second element of a procedural due process claim—state action. *See Cook*, 573 F.3d at 1148-49. So the court proceeds to the third element—constitutionally inadequate process. *Id.* A student dismissed from a public school for academic misconduct is entitled to less process than a student dismissed for disciplinary reasons. *Haberle v. Univ. of Ala.*, 803

F.2d 1536, 1539 (11th Cir. 1986). "Formal hearings are not required in academic dismissals. Rather, the Supreme Court held that the decision-making process need only be 'careful and deliberate.'" *Id.* (quoting *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978)). The Supreme Court explained that academic dismissals require less process because "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural rules of judicial or administrative decision-making." *Horowitz*, 435 U.S. at 90.

Taking as true the allegations in Ms. Page's amended complaint, she arguably did not receive constitutionally adequate pre-dismissal process. The dismissal that Ms. Page describes was not "careful and deliberate," but rushed and, perhaps, confused. Mr. Hicks received some negative evaluations, one of which was not about Ms. Page, between August 18 and August 24, and forwarded them to Ms. McMullan. (Doc. 25 at 4-5, 9). By August 28, Ms. McMullan and, apparently, Mr. Tofani, had decided to dismiss Ms. Page based on those evaluations, which they had not independently investigated or shown to Ms. Page. (*Id.* at 5-6, 12). And the court lacks any information about the content of the two evaluations that were about Ms. Page, so the court cannot determine whether the hasty nature of the pre-dismissal process was warranted. Taken in the light most favorable to Ms. Page, that is not "careful and deliberate."

Nevertheless, the court finds that Ms. Page fails to state a procedural due process claim. "[O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional

violation actionable under section 1983 arise." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc). "This rule . . . recognizes that the state must have the opportunity to remedy the procedural failings of its subdivisions and agencies in the appropriate fora—agencies, review boards, and state courts—before being subjected to a claim alleging a procedural due process violation." *Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir. 2000) (quotation marks omitted).

Ms. Page alleges that, after her dismissal, she corresponded at length with different administrators, and the School eventually held a hearing at which she was permitted to present evidence and argument. (Doc. 25 at 12-13). She takes issue with the adequacy of that hearing, but, because this was an academic dismissal, she was not entitled to any hearing at all, as long as the process afforded her was "careful and deliberate." *Horowitz*, 435 U.S. at 90; *Haberle*, 803 F.2d at 1539. And nothing in the amended complaint indicates that the panel hearing was anything other than "careful and deliberate."

Ms. Page does not assert that Ms. McMullan or Mr. Tofani interfered with the panel hearing or the witnesses that she would have liked to call, or that the panel members made their decision based on anything other than records of her academic performance, including the two negative evaluations that were indisputably about her. To the extent she contends that the hearing was inadequate because the School failed to follow its own rules for the appeals process, the Supreme Court has rejected the assertion that, in an academic dismissal case, a school's failure to follow its own rules may amount to a procedural due process violation. *See Horowitz*, 435 U.S. at 92

n.8 ("[Plaintiff] also contends that [defendants] failed to follow their own rules respecting evaluation of medical students and that this failure amounted to a constitutional violation. . . . We disagree with . . . [the plaintiff]'s . . . legal contention[ ] . . . [The cases on which the plaintiff] relied[ ] enunciate principles of federal administrative law rather than of constitutional law binding upon the States.") (citation altered); *Rollins v. Bd. of Trustees of the Univ. of Ala.*, 647 F. App'x 924, 938 (11th Cir. 2016) (unpublished) (stating that the plaintiff received "significantly more process than the Constitution requires," because "[e]ven though the Supreme Court has held that a formal hearing is not necessary for academic decisions, the university held a formal hearing during which [Plaintiff] testified on his own behalf, called witnesses, and was allowed to have an adviser present"). Although the process was not perfect, it was constitutionally adequate.

Even if Ms. Page's allegations stated a claim for a violation of procedural due process, the court finds that such a right was not clearly established in 2016, when Ms. Page was dismissed from the Program. Ms. Page has not pointed to any cases holding or placing beyond debate that Ms. McMullan's and Mr. Tofani's conduct in this case violated her procedural due process right. *See Ashcroft*, 563 U.S. at 741. The cases on which Ms. Page relies are disciplinary misconduct cases, which use a different standard from academic dismissals. (*See* Doc. 28 at 17-19); *Goss v. Lopez*, 419 U.S. 565, 569 (1975) (addressing dismissals for "disruptive or disobedient conduct"); *Barnes*, 669 F.3d at 1298 (dismissing a student because the president of the university concluded that he presented a "clear and present danger"); *Dixon v. Ala.*

*State Bd. of Ed.*, 294 F.2d 150, 151 (5th Cir. 1961) (discussing whether students at a public university can be "expelled for misconduct" without notice and an opportunity for a hearing).

Nor has this court's independent research located any cases clearly establishing that Ms. McMullan's and Mr. Tofani's conduct in this case violated Ms. Page's procedural due process right. The Supreme Court's *Horowitz* decision requires only that the decision to dismiss a student be "careful and deliberate"; it does not say what constitutes "careful and deliberate" decision-making, except to reject the requirement that it include a hearing. *Horowitz*, 435 U.S. at 85, 90. And the Eleventh Circuit's *Haberle* decision echoed the holding that no hearing is required where the student "was given substantial opportunity to complain to all relevant decision-makers." 803 F.2d at 1539.

Ms. Page was able to complain about her dismissal and the School responded, even if it was after the fact. She was permitted to appear at a hearing to defend her academic progress and contest the negative evaluation that was about a different student. The court has already concluded that Ms. Page failed to state a procedural due process claim based on these facts, but even if she did state a claim, the facts alleged in this case, at best, implicate an open question about the level of process due a student dismissed for academic reasons. And state officials are entitled to qualified immunity from claims raising open questions; to avoid qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741.

The court WILL DISMISS WITH PREJUDICE Count 1 to the extent it seeks monetary damages from

the individual defendants in their individual capacities, because they are entitled to qualified immunity. And because the court concludes that Count 1 fails to state a claim, the court also WILL DISMISS WITH PREJUDICE Count 1 to the extent it seeks injunctive relief from the individual defendants in their official capacities.

### ii. Count 2: Substantive Due Process

Count 2 asserts that the individual defendants in their individual capacities violated Ms. Page's substantive due process rights by dismissing her intentionally, willfully, maliciously, with deliberate indifference, and/or with a reckless disregard for the natural and probable consequences of their act. (Doc. 25 at 16-17).

In the academic dismissal context, the Supreme Court has described the standard for a substantive due process claim as follows:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

*Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (footnote omitted). The Eleventh Circuit has suggested, by negative implication, that "an improper motive" could be another basis for a substantive due

process claim relating to a student's academic dismissal. *See Haberle*, 803 F.2d at 1540.

Ms. Page does not allege that any of the individual defendants had an improper motive for dismissing her; the assumption underlying her entire complaint is that they acted negligently, not with bad faith. Even though Ms. Page makes passing reference to the individual defendants acting wantonly, that reference is conclusory and unsupported by factual allegations indicating a an improper motive. "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context. . . . [they do] not empower [a plaintiff] to plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009).

So that leaves the question whether the dismissal was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing*, 474 U.S. at 225. Under the facts as alleged, Ms. Page has not stated a claim rising to that level. Even if the defendants negligently used an evaluation about a different student in their decision-making process, Ms. Page does not contest that the two other negative evaluations were about her, or claim that those two negative evaluations were false or wrong. The court will not interfere with a school's decision to dismiss a nursing student who has received two negative clinical evaluations; that decision rests within the decision-makers' professional judgment.

Because Ms. Page has not stated a substantive due process claim relating to her academic dismissal,

the individual defendants are entitled to qualified immunity from that claim. The court WILL DISMISS WITH PREJUDICE Count 2, seeking monetary damages from the individual defendants in their individual capacities. And because the court concludes that Count 2 fails to state a claim, the court also WILL DISMISS WITH PREJUDICE Count 2 to the extent it seeks injunctive relief from the individual defendants in their official capacities.

### 2. State Law Negligence Claims

Because the court concludes that Counts 1 and 2, the only federal claims, must be dismissed, that leaves only the state law negligence claims asserted in Counts 3, 4, and 5. The Supreme Court has noted that "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). The Eleventh Circuit has also stated that "[t]he decision to exercise supplemental jurisdiction over pendant state claims rests within the discretion of the district court. We have encouraged district courts to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial." *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088-89 (11th Cir. 2004) (citations omitted) (emphasis added).

In light of the dismissal of all of Ms. Page's federal claims and the Eleventh Circuit's encouragement to dismiss state law claims when the federal claims have been dismissed before trial, the court declines to exercise supplemental jurisdiction over the state law claims. The court WILL DISMISS WITHOUT PREJUDICE the state law claims.

## III. Conclusion

The court finds that the Board of Trustees is entitled to Eleventh Amendment immunity as to all of the claims brought against it, regardless of the form of relief requested; the individual defendants in their official capacities are entitled to Eleventh Amendment immunity from Counts 1 and 2 as to the request for monetary damages, but not as to the request for injunctive relief; Counts 1 and 2 fail to state a claim; and the individual defendants in their individual capacities are entitled to qualified immunity as to Counts 1 and 2 because Ms. Page's allegations fail to establish that they violated her constitutional due process rights.

Consistent with those findings, the court WILL GRANT Defendants' motion to dismiss the amended complaint. The court WILL DISMISS WITHOUT PREJUDICE for lack of jurisdiction: (1) the Board of Trustees as a defendant; (2) Counts 1 and 2, to the extent they seek monetary damages from the individual defendants in their official capacities; and (3) Counts 3, 4, and 5. The court WILL DISMISS WITH PREJUDICE: (1) Counts 1 and 2, to the extent that they seek injunctive relief from the individual defendants in their official capacities, for failure to state a claim; and (2) Counts 1 and 2, to the extent they seek monetary damages from the individual defendants in their individual capacities, because those defendants are entitled to qualified immunity.

The court will enter a separate order consistent with this opinion.

DONE and ORDERED this 12th day of February, 2018.

/s/ Karon Owen Bowdre
Chief United States District Judge

## FINAL ORDER OF THE DISTRICT COURT (FEBRUARY 12, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA; ET AL.,

*Defendants*.

2:16-CV-01993-KOB

Before: Karon Owen BOWDRE,
Chief United States District Judge.

This matter is before the court on Defendants' motion to dismiss the amended complaint. (Doc. 26). For the reasons stated in the accompanying memorandum opinion, this court GRANTS the motion to dismiss.

The court DISMISSES WITHOUT PREJUDICE, for lack of jurisdiction: (1) the Board of Trustees as a defendant; (2) Counts 1 and 2, to the extent they seek monetary damages from the individual defendants in their official capacities; and (3) Counts 3, 4, and 5. The court DISMISSES WITH PREJUDICE: (1) Counts 1 and 2, to the extent they seek injunctive relief from

the individual defendants in their official capacities; and (2) Counts 1 and 2, to the extent they seek monetary damages against the individual defendants in their individual capacities.

DONE and ORDERED this 12th day of February, 2018.

/s/ Karon Owen Bowdre
Chief United States District Judge

## MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (JULY 17, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA, ET AL.,

*Defendants*.

No. 2:16-cv-01993-KOB

Before: Karon Owen BOWDRE,
Chief United States District Judge

This matter is currently before the court on Defendants' Motion to Dismiss, in which they argue that Plaintiff's Complaint should be dismissed because the court lacks subject matter jurisdiction. (Doc. 1-23). On June 9, 2017, this court ordered the Plaintiff to show cause why it should not dismiss her claims because they are not ripe for adjudication. (Doc. 18). Plaintiff filed a response to that order explaining why she contends her claims are ripe. (Doc. 19). She correctly observes in that response, "The Defendants' attack in

this case is based solely on the Complaint's allegations and is, therefore, a facial attack." (*Id.* at 6). Indeed, by its nature, a motion to dismiss makes a "facial attack" on the sufficiency of the allegations contained in a complaint. *See also Stalley v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232-33 (11th Cir. 2008) (citing and quoting *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007)) ("A defendant can move to dismiss a complaint under Rule 12(b)(1) for lack of subject matter jurisdiction by either facial or factual attack. A facial attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [the] complaint are taken as true for the purposes of the motion."). Taking the allegations within the four corners of her Complaint as true, the question remains whether they sufficiently establish that her claim is ripe for adjudication thus properly invoking the court's subject matter jurisdiction.

As the court has already explained, Plaintiff's Complaint shows that at the time of filing, Ms. Page had not completed the School of Nursing's internal appeals process, as she must for her dismissal to be final under the rule in *Stevenson v. Bd. of Educ. of Wheeler Cty.*, 426 F.2d 1154 (5th Cir. 1970).[1] *See* (Doc. 18 at 4). In her response, Ms. Page includes new factual information not contained in her Complaint that the court cannot consider in ruling on Defendants' Motion to Dismiss. Because the Plaintiff's Complaint on its

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

face fails to allege facts to show her claims are ripe for adjudication, the court lacks subject matter jurisdiction to hear Ms. Page's claims. *See* Fed. R. Civ. P. 12(b)(1).

The court GRANTS the Motion to Dismiss. Should Ms. Page wish to file an amended Complaint, she may file a motion for leave to do so by July 20, 2017.

DONE and ORDERED this 17th day of July, 2017.

/s/ Karon Owen Bowdre
Chief United States District Judge

## ORDER TO SHOW CAUSE (JUNE 9, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA, ET AL.,

*Defendants*.

No. 2:16-cv-01993-KOB

Before: Karon Owen BOWDRE,
Chief United States District Judge

Ms. Page filed a complaint challenging her dismissal from the University of Alabama at Birmingham School of Nursing Anesthesia Program under various theories. This matter is before the court on Defendants' Motion to Dismiss Plaintiff's Complaint. (Doc. 1-23). Defendants argue that Plaintiff's Complaint should be dismissed because the court lacks subject matter jurisdiction over this matter because—in addition to other reasons—Plaintiff's procedural due process claim is not ripe. Though the court directed the parties to brief Defendants' subject matter jurisdiction challenges, *see* (doc. 6), neither Plaintiff's Response nor Defendants'

Reply addresses the ripeness question. *See Boyce v. Augusta-Richmond Cty.*, 111 F. Supp. 2d 1363, 1381 (11th Cir. 2000) (citing *Reahard v. Lee Cty.*, 978 F.2d 1212, 1213 (11th Cir. 1992)) ("Ripeness, or the question of whether a matter is ready for review, is an issue of subject matter jurisdiction.").

"The ripeness doctrine prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Pittman v. Cole*, 267 F.3d 1269, 1278 (11th Cir. 2001) (quoting *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1315 (11th Cir. 2000)). Here, ripeness requires a final decision regarding Ms. Page's status as a student in the Anesthesia Program: "[T]he expulsion decision is not ripe for adjudication absent the denial of relief to the student by the school board or the designee of the school board, for such purposes." *Stevenson v. Bd. of Educ. of Wheeler Cty.*, 426 F.2d 1154, 1157 (5th Cir. 1970).[1] Specifically, this requirement contemplates that Ms. Page complete any internal appeal procedures provided by UAB before pursuing her claims before this court, because "federal courts [should not] intervene in school personnel and management problems without requiring such prior reference to local institutional authority as may be necessary to assure that the action complained of is final within the institution in the sense that it is ripe for adjudication." *Id.* (holding that though the district court should have referred students' suspensions to the board of education before examining them on the

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

merits, school board members' testimony before the district court that they would have upheld the suspension decisions was sufficient to make the students' claims ripe).

The ripeness question at issue here is whether Ms. Page has, in fact, been dismissed from UAB, or whether she may be dismissed in the future. And the answer to that question determines whether both the procedural and substantive due process claims, as well as Ms. Page's negligence claims against the individual Defendants, are ripe, *i.e.*, ready, for disposition by this court, thus giving this court jurisdiction to adjudicate them. *See Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (citations omitted) ("[I]t is well settled that a federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.").

The court notes that Defendants' Motion appears to conflate the requirement that a claim be ripe for disposition with the elements of a procedural due process claim. Regarding the latter, "only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *See McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc). "This rule (that a section 1983 claim is not stated unless inadequate state procedures exist to remedy an alleged procedural deprivation) recognizes that the state must have the opportunity to 'remedy the procedural failings of its subdivisions and agencies in the appropriate fora—agencies, review boards, and state courts' before being subjected to a claim alleging a procedural due process violation." *Cotton v. Jackson*, 216 F.3d 1328,

1331 (11th Cir. 2008) (quoting *McKinney*, 20 F.3d at 1560).

But the *McKinney* rule did not address the question of ripeness, so it does not apply to the question of this court's subject matter jurisdiction. Ripeness addresses a court's Article III power to hear only cases and controversies; the *McKinney* standard considers whether a plaintiff has a claim at all. Here, the first question is whether Plaintiff's claims are even ripe, not whether she has claims at all.

The parties now appear to agree that Ms. Page was dismissed from UAB's School of Nursing effective August 29, 2016. *Compare, e.g.*, (Doc. 1-2 at 3-4 ¶ 16) (Plaintiff's Complaint), *and* (Doc. 11 at 6 ¶ 2) (Plaintiff's Response), *with* (Doc. 14 at 7) (Defendant's Reply). But the full course of events concerning her dismissal and appeals process is not pled in the Complaint, which Plaintiff filed on November 11, 2016. *See* (Doc. 11 at 8 n.3) (Plaintiff's Response) (submitted February 13, 2017) ("An Advisory Committee Hearing Panel convened on December 7, 2016, and submitted a recommendation to Dr. Harper. However, the Plaintiff filed her case on November 11, 2016.").

Additionally, Plaintiff's own Complaint is internally inconsistent on the question of whether and when she was dismissed. *Compare, e.g.*, (Doc. 1-1 at 3-4 ¶ 16) (stating that Plaintiff was dismissed on August 29, 2016), *and* (Doc. 1-1 at 11 ¶ 66) (requesting that the court "[i]mmediately reinstate Plaintiff Page as a student in Defendant UAB's School of Nursing anesthesia program"), *with* (Doc. 1-1 at 4 ¶ 22) (stating that Defendant Tofani informed Plaintiff that she "had received a failure in a clinical setting which would lead to dismissal at the end of the semester"), *and*

(Doc. 1-1 at 11 ¶ 66) (requesting that the court "[e]njoin Defendant UAB from issuing a failing grade in Plaintiff Page's clinical course and/or dismissing Plaintiff Page from the University of Alabama at Birmingham School of Nursing"). The Complaint also makes clear that Ms. Page's appeals process had not been completed at the time she filed her Complaint. *See* (Doc. 1-1 at 7 ¶ 33) ("On November 9, 2016, Plaintiff Page received a letter from Dr. Harper stating that on November 17, 2016 an Advisory Committee Hearing Panel would convene a hearing.").

Further, in their Motion to Dismiss, filed on December 20, 2016, Defendants maintain that Ms. Page remains a student at UAB and is only possibly subject to being dismissed from the Anesthesia Program. *See, e.g.*, (Doc. 1-23 at 2 ¶ 3) (citing ¶ 22 of the Complaint) ("Plaintiff has not been dismissed from UAB or the School of Nursing Anesthesia Program."). But in their Reply, Defendants stake out a starkly different position, arguing that Ms. Page was dismissed on August 29, 2016. (Doc. 14 at 7) (citing ¶ 16 of the Complaint) ("It is undisputed that Plaintiff is no longer a student.").

Given the lack of clarity afforded by Ms. Page's Complaint and the Motion to Dismiss briefing regarding whether and when Ms. Page was dismissed from UAB's School of Nursing Anesthesia Program, the court ORDERS Ms. Page to SHOW CAUSE IN WRITING on or before June 23, 2017 why the court should not dismiss her claims because they are not ripe.

DONE and ORDERED this 9th day of June, 2017.

/s/ Karon Owen Bowdre
Chief United States District Judge

## OPINION AND ORDER OF THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA (DECEMBER 9, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA, ET AL.,

*Defendants*.

Civil Action No. 2:16cv902-MHT (WO)

Before: Myron H. THOMPSON,
United States District Judge

Plaintiff Ashley Wilcox Page, a student enrolled at the University of Alabama at Birmingham School of Nursing Anesthesia program, brought this lawsuit in the Circuit Court of Montgomery County, Alabama against four defendants—the University of Alabama at Birmingham, as well as an administrator and two professors at the university—asserting two federal claims that they improperly dismissed her from the program in violation of her Fourteenth Amendment due process rights and 42 U.S.C. § 1983. Page also brought three state-law claims that each individual defendant

acted negligently leading up to her dismissal. The defendants then removed the action to the Middle District of Alabama. Jurisdiction is proper under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367(a) (supplemental jurisdiction).

This matter is before the court on the defendants' motion to transfer venue to the Northern District of Alabama. In their motion, the defendants argue that the case should be transferred because it would promote the convenience of the parties and witnesses pursuant to 28 U.S.C. § 1404. For reasons that will be explained, the defendants' motion will be granted.

28 U.S.C. § 1404 gives district courts authority to transfer any civil action to any district in which it could have been brought originally for "the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). "Trial judges are permitted a broad discretion in weighing the conflicting arguments as to venue." *England v. ITT Thompson Indus., Inc.*, 856 F.2d 1518, 1520 (11th Cir. 1988).

In deciding whether a transfer is proper, the court "must engage in an individualized, case-by-case consideration of convenience and fairness." *McGlathery v. Corizon, Inc.*, 2012 WL 1080789, at *1 (M.D. Ala. 2012) (Thompson, J.) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)) (internal quotation marks omitted). The court conducts this inquiry in two steps. First, it determines whether the case could "originally have been brought in the proposed transferee district court." *Id.* at *1. Next, it "must decide whether the balance of convenience favors transfer." *Id.* As to the second step, several relevant factors include

"(1) the convenience of the witnesses; (2) the

> location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances."

*Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005).

Page could have originally brought this case in the Northern District. "A civil action may be brought in . . . a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; [or a district in which] a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(1)-(2). All defendants are residents of the State of Alabama; all but one of the individual defendants reside in the Northern District; and the university is also located there. In addition, substantial events giving rise to Page's claims occurred in the Northern District, including faculty and staff communications related to her dismissal, a meeting to discuss Page's performance, and the convocation of the advisory committee hearing panel that will review Page's dismissal.

The court must therefore turn to the balance of the *Manuel* factors to determine whether transfer is appropriate. Because the parties do not rely on—and

have not provided evidence related to—the "relative means of the parties," or either "forum's familiarity with the governing law," *Manuel*, 430 F.3d at 1135, the court will consider only the remaining factors.

The defendants rely on the fact that located in the Northern District is the "locus of operative facts" relevant to the merits of Page's claims. The core of Page's complaint consists of the federal claims that the university and its officials failed to provide constitutionally adequate due process prior to dismissing her, and the state claims that they acted negligently in doing so; the locus of operative facts for these claims undoubtedly lies within the Northern District, where the administrators who decided her fate made their decisions and where an ongoing hearing panel has been convened to review the dismissal.[1] As such, this factor weighs heavily in favor of transfer.

The defendants also suggest that the location of witnesses supports transfer. Prior to removal Page subpoenaed for testimony at a state-court hearing three witnesses in addition to the individual defendants: each witness is a university official or instructor who is employed within the Northern District. *See* State Court Record (doc. no. 1-5) at 27-34. Although not defendants in this case, employees of a party are considered party witnesses for the purposes of the venue transfer analysis and therefore given less weight. *See*

---

[1] Admittedly, the locus of operative facts concerning Page's state-law claim of negligence against one of the individual defendants, Todd Hicks (her clinical supervisor), appears to be within the Middle District of Alabama, where he is employed. But the locus of each of Page's four other claims concerns the actions of the university or its officials within the geographic area of the Northern District.

*Weintraub v. Advanced Corr. Healthcare, Inc.*, 161 F. Supp. 3d 1272, 1280 (N.D. Ga. 2015) (Totenberg, J.) ("The convenience of a certain venue for party witnesses is given less weight because party witnesses are the parties themselves and those closely aligned with a party, and they are presumed to be more willing to testify in a different forum, while there is no such presumption as to a non-party witness." (internal quotation marks, citation and alterations omitted)). Nonetheless, the location of these university staff indicates that the most significant witnesses and the locus of operative facts are located in the Northern District. The apparent materiality and significance of these witnesses, as reflected by Page's own planned reliance on them in state court, weighs in favor of transfer.

The convenience of non-party witnesses—the most important factor in the venue analysis—weighs only slightly in favor of transfer. The defendants identify several non-party witnesses, members of the university hearing panel convened to review the appeal of Page's recommended dismissal, who are located in the Northern District.[2] These witnesses are likely to provide relevant testimony about the adequacy of the procedures employed by the defendants leading up to Page's dismissal. In an effort to oppose transfer, Page identifies 15 Certified Registered Nurse Anesthetists ("CNRAs") with whom she worked during her clinical rotation at Baptist South Medical Hospital, which is located within the Middle District's geographic area.

---

[2] A hearing panel for academic misconduct is to be comprised of three faculty and two student members. *See* University of Alabama at Birmingham School of Nursing 2016-2017 Student Handbook (doc. no. 1-4) at 33. For the purposes of this motion, it appears the two student members would be considered non-party witnesses.

However, while Page indicates that she worked with each during her rotation, she has not explained how their testimony would be relevant or material to this case, which centers not around the adequacy of her performance during the rotation but rather the adequacy of procedures provided by the university and its officials. The mere recitation of a large number of employees in a relevant group "does not, on the basis of that fact alone, necessarily mean that all of them are likely trial witnesses with material and reasonably nonduplicative knowledge." *Carroll v. Texas Instruments, Inc.*, 910 F. Supp. 2d 1331, 1337 (M.D. Ala. 2012) (Thompson, J.). Because the court should "consider the content of the witnesses' testimony in determining whether [the convenience of the witnesses] weighs in favor of transfer," *Frederick v. Advanced Financial Solutions, Inc.*, 558 F. Supp. 2d 699, 704 (E.D. Tex. 2007) (Schell, J.), the critical factor of non-party witnesses, although close, supports transfer.[3]

The convenience of parties, although given less weight than the factors discussed previously, weighs heavily in favor of transfer. Two of the three individual defendants reside in the Northern District, as does Page, and the university is located there. The parties' location also confirms that the locus of operative facts resides in the Northern District.

Page also contends that deference is due to her forum choice. However, less deference is due here because the locus of operative facts occurred outside

---

[3] To the extent that the testimony of any non-party Baptist South CNRA witness is relevant, that witness would appear to fall within the subpoena power of the Northern District because Baptist South is less than 100 miles from that court. *See* Fed. R. Civ. P. 45(c)(1)(A).

this district. "[W]here the operative facts underlying the cause of action did not occur within the forum chosen by the plaintiff, the choice of forum is entitled to less consideration." *Osgood v. Discount Auto Parts, LLC*, 981 F. Supp. 2d 1259, 1267 (S.D. Fla. 2013) (Marra, J.); *accord Internap Corp. v. Noction Inc.*, 114 F. Supp. 3d 1336, 1342 (N.D. Ga. 2015) (Totenberg, J.) ("[M]ultiple district courts within the Eleventh Circuit have found, and this Court agrees, that Plaintiff's choice of forum should be entitled to less weight where the locus of operative facts is outside of the chosen forum."). The fact that Page does not herself reside in this district also makes her forum choice deserving of less deference. *See Patel v. Howard Johnson Franchise Sys., Inc.*, 928 F. Supp. 1099, 1101 (M.D. Ala. 1996) (DeMent, J.).

Page also contends that the location of documents disfavors transfer. Although some documents related to her clinical performance are located within this district, documents relevant to the university's procedures and decision-making appear to be located in the Northern District. Accordingly, this factor is, at best, neutral. In any event, the location of documents deserves little weight in light of electronic discovery and transmission methods. *Carroll*, 910 F. Supp. 2d at 1339.

Finally, the interests of justice and the public interest weigh in favor of the case being heard in the Northern District, where the university is located and where the most relevant events occurred. As the Supreme Court has said, "There is a local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *see also Piper Aircraft v. Reyno*, 454 U.S. 235, 260 (1981).

Based on these facts, a transfer of venue is warranted.

* * *

Accordingly, it is the ORDER, JUDGMENT, AND DECREE of the court that the motion to transfer (doc. no. 7) filed by defendants Todd L. Hicks, Susan P. McMullan, Peter M. Tofani, and the University of Alabama at Birmingham is granted and this lawsuit is transferred in its entirety to the United States District Court for the Northern District of Alabama.

All other pending motions remain for resolution by the transferee court.

The clerk of the court is DIRECTED to take appropriate steps to effect the transfer.

This case is closed in this court.

DONE, this the 9th day of December, 2016.

/s/ Myron H. Thompson
United States District Judge

## PLAINTIFF'S FIRST AMENDED COMPLAINT (JULY 21, 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA, ET AL.,

*Defendants*.

Civil Action No. 2:16-cv-01993-KOB

COMES NOW, the Plaintiff, Ashley Wilcox Page, and hereby files the following First Amended Complaint against the Defendants, Todd Hicks, Susan McMullan, Peter Tofani, and the Board of Trustees of the University of Alabama. In support of this First Amended Complaint, the Plaintiff states the following:

### INTRODUCTION

This is an action challenging the lawfulness and unconstitutional actions taken by the Defendants to unlawfully dismiss from the UAB School of Nursing Anesthesia Program the Plaintiff without following the requirements of due process required by the Fourteenth Amendment to the Constitution of the

United States and provisions of federal law pursuant to 42 U.S.C. § 1983. The Plaintiff also asserts certain state law claims that arise from the same series of facts involved in her unlawful dismissal from school.

## PARTIES

1. Plaintiff Ashley Wilcox Page (hereafter referred to as "Plaintiff Page") is more than nineteen years of age, a resident of Shelby County, Alabama, and, beginning in August 2014, was a student enrolled at the University of Alabama at Birmingham School of Nursing Anesthesia Program. Plaintiff Page is a former student of the UAB School of Nursing Anesthesia Program and was dismissed from the program on August 29, 2016. Plaintiff Page had been scheduled to graduate from the program in December 2016.

2. Defendant Todd L. Hicks, NNA, CRNA is more than nineteen years of age. Defendant Hicks is a CRNA who works at Baptist South Hospital, located within Montgomery County, Alabama.

3. Defendant Susan P. McMullan, PhD, CRNA is more than nineteen years of age. Defendant McMullan is a CRNA and Associate Professor at University of Alabama at Birmingham.

4. Defendant Peter M. Tofani, MS, LTC(R) is more than nineteen years of age. Defendant Tofani is the Assistant Dean for Student Affairs in the UAB School of Nursing and oversees the admission, progression and graduation operations along with oversight in student life.

5. Defendant The Board of Trustees of the University of Alabama is a corporate entity established by the state legislature to organize and govern the Uni-

versity of Alabama. The Anesthesia Program is a program available at the University of Alabama at Birmingham's School of Nursing and all employees in that program operate under the direction and control of the Board of Trustees of the University of Alabama (hereafter referred to as "Defendant Board of Trustees").

## JURISDICTION

6. This Court has jurisdiction of the subject matter of this action, pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1367 (a) (supplemental jurisdiction).

## VENUE

7. Venue of this action lies in the Northern District of Alabama pursuant to an Opinion and Order entered by United States District Judge Myron H. Thompson dated December 9, 2016. (Doc. 1-26) Judge Thompson's Order granted a motion to transfer venue filed by the defendants pursuant to 28 U.S.C. § 1404.

## STATEMENT OF RELEVANT FACTS

8. On December 20, 2013, Plaintiff Page was accepted into the UAB School of Nursing Anesthesia Program. In August 2014 Plaintiff Page enrolled as a student at Defendant UAB. Specifically, Plaintiff Page was a part of the UAB School of Nursing Anesthesia Program.

9. After starting in the program, Plaintiff Page maintained good grades and performed well. As a student in the program, Plaintiff Page incurred over one hundred thousand dollars in student loan debt to attend school.

10. As a requirement of the program, on August 2, 2016, Plaintiff Page began a clinical rotation at Baptist South Hospital in Montgomery, Alabama.

11. On August 28, 2016 Plaintiff Page received a voicemail from Katie Woodfin, Defendant UAB's clinical coordinator. The voicemail informed Plaintiff Page that she needed to meet Ms. Woodfin, Defendant McMullan, the Nurse Anesthesia Program Director, and Dr. Laura Wright, an associate professor at Defendant UAB's School of Nursing, concerning her clinical performance.

12. On August 28, 2016, Plaintiff Page also received an email from Defendant McMullan stating that Defendant McMullan would like to meet with Plaintiff Page the following day, Monday, August 29th at 10:00 a.m.

13. Plaintiff Page returned Ms. Woodfin's missed call. When Plaintiff Page inquired what would be discussed during the meeting, Ms. Woodfin vaguely responded that it was to discuss performance issues. After talking to Ms. Woodfin, Plaintiff Page texted Defendant Hicks several times asking what was going on and what the meeting was regarding. Defendant Hicks never responded to Plaintiff Page's text.

14. Prior to the meeting that occurred on August 29, 2016, Plaintiff Page was not provided (1) any written report or complaint regarding any academic complaint, (2) any written report of alleged misconduct, or (3) any written report of any grievance reported or initiated against Plaintiff Page. Plaintiff Page was also provided no notice whatsoever that the meeting that occurred on August 29, 2016 was any type of hearing or proceeding that could result in Plaintiff

Page being dismissed from school. Plaintiff Page had received no written complaint, report, grievance, or notice that the purpose of the meeting was to advise her that she would be dismissed from school and the UAB School of Nursing Anesthesia Program.

15. On August 29, 2016, Plaintiff Page arrived at the scheduled meeting. To Plaintiff Page's surprise and with no written notice of the group of persons that would participate in the meeting, five individuals attended the meeting.

16. Defendant McMullan, the UABSON Specialty Track Coordinator, led the meeting and handed Plaintiff Page three clinical evaluations from individuals at Baptist South. The first evaluation was dated August 24, 2016, the second evaluation was dated August 25, 2016, and the third evaluation was dated August 26, 2016. Plaintiff Page had never seen the evaluations. One of the evaluations presented to Plaintiff Page appeared to be on another student in the program. Defendant McMullan, without following required due process, without any written notice of the proposed action and or reasons for the dismissal from school, and apparently without any discussion or consultation with any of the additional individuals in the meeting, informed Plaintiff Page at the meeting that Page was dismissed from the UAB School of Nursing Anesthesia program.

17. As an Assistant Professor for UAB Nurse Anesthesia Program, Defendant Hicks was responsible for providing the evaluations to Defendant UAB. The clinical evaluations presented to Plaintiff Page on August 29, 2016 had been transmitted to Defendant McMullan by Defendant Hicks. Plaintiff Page is of information and belief that one of the evaluations

presented to Plaintiff Page used as a basis to dismiss Plaintiff Page from school appeared to be on another student in the program.

18. During the August 29, 2016 meeting, Defendant McMullan informed Plaintiff Page that she would not be allowed to continue in the program as an unsafe nurse. Defendant McMullan asked Plaintiff Page if she believed she was unsafe. Plaintiff Page responded that she was not unsafe and that she could provide a safe anesthetic to a patient unsupervised.

19. At the end of the meeting, Defendant McMullan told Plaintiff Page that she had all the information she needed. Defendant McMullan, without further discussion with any of the additional individuals in the meeting, informed Plaintiff Page that she was dismissed from the UAB School of Nursing Anesthesia program effective immediately. Plaintiff Page was thereafter removed from the nursing program and not allowed to attend class or participate in any further clinical rotations as part of her studies. Plaintiff Page did not at this time receive any report or written document explaining the reasons or findings from her dismissal from the program.

20. Defendant McMullan also informed Plaintiff Page that she would be receiving an F in her clinical course.

21. Before leaving, Defendant Tofani, Assistant Dean for Student Affairs, handed Plaintiff Page his business card and asked Plaintiff Page to call him when she was ready to follow up for the alleged purpose of explaining to Plaintiff Page her options to appeal the dismissal decision.

22. Plaintiff Page did not receive any documents memorializing the meeting, stating she had been put on notice of a course failure, or any stating that she had been dismissed from the program. Plaintiff Page received no written notice of the actions taken against her nor did she receive any written explanations of the reasons for her immediate dismissal.

23. On September 1, 2016, Plaintiff Page, by and through undersigned counsel, hand delivered and mailed a letter to Dr. Linda Moneyham, the Senior Associate Dean for Academic Affairs, requesting any and all appeals available to her to appeal the decision of the school to dismiss her from the Nursing Anesthesia Program.

24. Shortly thereafter, undersigned counsel was contacted by Ms. Audrey DuPont, legal counsel for the University of Alabama System. Ms. DuPont was uncertain about the facts surrounding Plaintiff Page's dismissal but did inform undersigned counsel that Plaintiff Page and her counsel would be allowed to attend the meeting between Plaintiff Page and with Defendant Tofani.

25. On September 16, 2016, undersigned counsel and Ms. Page met with Defendant Tofani and John Updegraff, Director of Student Affairs. During the meeting led by Defendant Tofani, Plaintiff Page was informed by Defendant Tofani that she had received a failure in the clinical program. Defendant Tofani also confirmed that Plaintiff Page had been told in the August 29, 2016 meeting that she was dismissed from the program for safety reasons. Later in the meeting, Defendant Tofani changed this representation and suggested that Plaintiff Page would be dismissed at the end of the semester. Defendant Tofani

also confirmed that Plaintiff Page would not be allowed to continue as a student in the program. Defendant Tofani further stated that Plaintiff Page would not be reinstated. Defendant Tofani also confirmed in this meeting that Defendant McMullan had made the decision to fail Plaintiff Page. Defendant Tofani informed Plaintiff Page that the August 29, 2016 meeting was not a grievance committee but was a group of assembled faculty members. Defendant Tofani stated to Plaintiff Page that she had received a failure in a clinical setting which would lead to dismissal at the end of the semester. Defendant Tofani stated that Ms. Page was still a student at the UAB School of Nursing; however, Plaintiff Page could not enter back into a clinical setting. Defendant Tofani explained to Plaintiff Page that Page was to follow the "Student Academic Complaint" grievance procedure in the UAB School of Nursing Handbook. At no time in the September 16, 2016 meeting did Defendant Tofani ever contend that Plaintiff Page was involved in any "Academic Misconduct" proceeding. Defendant Tofani also confirmed that Plaintiff Page had received nothing in writing about her clinical failure although the clinical failure would lead to dismissal from the program. Defendant Tofani stated that Page would not receive anything until the end of the semester.

26. On September 22, 2016, counsel for Plaintiff Page contacted Ms. DuPont again via telephone. Ms. DuPont informed undersigned counsel that Plaintiff Page had failed a clinical setting and could <u>not</u> return or enroll in classes. She stated that, after an individual had called and stated Plaintiff Page was unsafe, the August 29, 2016 meeting was convened as an unsafe nursing practice meeting. In disagreement

with Defendant Tofani, Ms. DuPont informed undersigned counsel that Plaintiff Page was to follow the "Academic Misconduct" grievance procedure in the UAB School of Nursing Handbook.

27. On September 28, 2016, Ms. DuPont sent a correspondence to undersigned counsel stating that, after three incidents of unsafe nursing practices, Baptist South notified Defendant UAB that her clinical placement was terminated and that she was not allowed to return to Baptist South. She further stated that the termination of Plaintiff Page's clinical placement for unsafe nursing practices "will result in a course grade F and her dismissal" from school. Although Ms. DuPont claimed Plaintiff Page was still a student, she claimed that Plaintiff Page was not allowed to participate in the clinical practicum or correlated special topics course because she has been terminated from a clinical practicum for unsafe practices.

28. On October 17, 2016, several weeks after Plaintiff Page was dismissed from school, Dr. Linda Moneyham, Senior Associate Dean for Academic Affairs, wrote correspondence to Plaintiff Page stating that she had reviewed the "report of clinical performance that was the basis" of Plaintiff Page's "F" grade. Moneyham further wrote in the letter to Plaintiff Page that Moneyham supported the faculty's decision "in assignment of a grade of "F" for the course and "your subsequent dismissal from the Nurse Anesthesia specialty track" of the MSN program."

29. Attached to Dr. Moneyham's October 17, 2016 correspondence to Plaintiff Page was a Memorandum dated October 5, 2016 and signed by Defendant McMullan. The memorandum outlined three alleged incidents of Academic Misconduct: an August 18, 2016

email addressed to Defendant Hicks, an August 25, 2016 evaluation, and an August 24, 2016 evaluation.

30. Dr. Moneyham's October 17, 2016 correspondence to Plaintiff Page was the first time Plaintiff Page had ever seen the August 18, 2016 email that was relied upon to dismiss Plaintiff Page from school. Plaintiff Page had not been presented the email communication during the August 29, 2016 meeting that resulted in her dismissal from school and had no knowledge of its existence.

31. One of the evaluations presented to Plaintiff Page with the correspondence from Moneyham was an evaluation dated August 25, 2016 signed by a Mr. Gary Hammond. Plaintiff Page never worked with anyone by the name of Mr. Hammond. The summary of events included in Defendant McMullan's October 5, 2016 memorandum and the August 25, 2016, evaluation did not occur with Plaintiff Page. Mr. Hammond, apparently submitted and mistook a different student for Plaintiff Page when he wrote his evaluation.

32. These three alleged incidents were described as "academic misconduct" and were the entire basis of Plaintiff Page's improper dismissal by the Defendants—one being an email communication that Plaintiff Page was never given the opportunity to refute and another being an evaluation that apparently was prepared about another student and written by someone Plaintiff Page had never worked with.

33. In Compliance with Section 4.5(a)(6) of the UAB School of Nursing Student Handbook, on October 24, 2016, Plaintiff Page submitted a timely written letter to the Dean of the Nursing School, Dr. Doreen

C. Harper, appealing the Senior Associate Dean for Academic's decision.

34. On October 27, 2016, Plaintiff Page received an e-mail correspondence from Defendant Tofani attaching a letter dated October 26, 2016. In this letter, Defendant Tofani, who had informed Plaintiff Page in the September 16, 2016 meeting after Page was dismissed from school, that Page was involved in an appeal of a "Student Academic Complaint" process, now described a "written investigative report discussing allegations of misconduct" against Plaintiff Page. In what can only be described as a post dismissal effort to correct the ongoing failure to provide proper due process to Plaintiff Page by the Defendants and to follow their own policies and procedures, Defendant Tofani attempted to explain the appeals process to Plaintiff Page. The appeals process described by Defendant Tofani suggested an appeal to Dr. Moneyham, who already had announced her decision about Plaintiff Page in the October 17, 2016 correspondence sent to Plaintiff Page from Moneyham.

35. In response to Defendant Tofani's email, on November 3, 2016, Plaintiff Page sent a letter to Defendant Tofani reminding Defendant Tofani that the Defendants and other school personnel had continued to refuse to follow the procedural steps for "academic misconduct" outlined in the School of Nursing's Student Handbook.

36. On November 9, 2016, Plaintiff Page received a letter from Dean Doreen C. Harper, acknowledging receipt of Page's November 3, 2016 letter. In this letter, Dean Harper advises Plaintiff Page that on November 17, 2016 an "Advisory Committee Hearing Panel" would convene a hearing to review the appeal

by Plaintiff Page. In this November 9, 2016 correspondence, Dean Harper confirmed that the dismissal of Plaintiff Page from school had occurred and stated that "the decision to dismiss you was investigated and made after your August 29, 2016 meeting." Additionally, Dean Harper suggested that the submission of the "written report" to Plaintiff Page that was received simultaneously with Moneyham's October 17, 2016 decision to uphold Page's dismissal from school on August 29, 2016 was somehow compliant with school policies and procedures outlined in the UAB School of Nursing Student Handbook. The Student Handbook, however, requires that such "written report" be presented to the student before any such student dismissal occurs, not after the fact, almost two months later, as occurred regarding Plaintiff Page's dismissal from school.

37. The UAB School of Nursing Student Handbook requires multiple due process procedures occur prior to taking any action against a student for alleged "academic misconduct". The Defendants failed to follow these required procedures. The decision to dismiss Plaintiff Page from school occurred on August 29, 2016. The unilateral decision to dismiss Plaintiff Page from school was made by Defendant McMullan on this date with no written report or notice to Plaintiff Page. After Page was dismissed from school, Defendant McMullan prepared a document dated October 5, 2016 that purports to be a "written report" of Academic Misconduct. This post dismissal "written report" does not comply with the notice requirements included in the UAB School of Nursing Student Handbook. Additionally, making the decision to dismiss Page from school by the Defendants prior to Plaintiff Page ever

receiving a "written report" with the required details of the alleged Academic Misconduct is a complete failure to follow the due process requirements included in the UAB School of Nursing Student Handbook.

38. On December 7, 2016, a panel described as the "Grievance Hearing Panel" convened to consider the dismissal decision of Plaintiff Page from school. The Plaintiff was required to conduct the questioning of witnesses herself. Although allowed to have her lawyers present, the Plaintiff's lawyers were not allowed to question the witnesses presented. Additionally, employee witnesses of UAB who participated in the allegations against Plaintiff Page were requested to attend the hearing to testify by Plaintiff Page. Most of these witnesses did not attend and Plaintiff Page was not allowed to present testimony from these witnesses at the "Grievance Hearing". The Grievance Panel prepared a report to Dean Harper dated December 10, 2016 that once again failed to follow the requirements of the UAB School of Nursing Student Handbook. The "Grievance Hearing Report" itself describes a process that shows that the decision to dismiss Plaintiff Page from school occurred long before any employee of UAB furnished a "written report" to Page of what allegations of "Academic Misconduct" she was required to defend against. The "Grievance Hearing Report" simply ignored the due process requirements contained in the UAB School of Nursing Student Handbook that requires that a student be provided a written copy of allegations against the student before any disciplinary action and/or dismissal of the student from school can occur. On or around December 10, 2016, the "Grievance Hearing Panel" submitted a three page report to Dean

Harper, upholding the unilateral decision of dismissal from school made by Defendant McMullan on August 29, 2016, and upheld by Moneyham on or around October 17, 2016.

39. For several months after Plaintiff Page was dismissed from school, UAB employees had several conflicting explanations on whether or not Page was dismissed from school on August 29, 2016. At times, Plaintiff Page was told she was dismissed from school on August 29, 2016. At other times, Page was misled and told that the school dismissal decision had not yet occurred. There is no longer any confusion, doubt, or misunderstanding about Plaintiff Page's status as a student in the UAB School of Nursing Anesthesia Program. On or around December 19, 2016, the Dean of the School of Nursing, Doreen C. Harper issued a letter to Plaintiff Page stating that Page was "dismissed from the Nurse Anesthesia specialty track of the MSN program". This letter by Dean Harper was apparently issued after her review and receipt of a document dated December 10, 2016 described as a "Grievance Hearing Report" summarizing findings and recommendations received from a "Grievance Hearing Panel" chaired by Dr. Jacqueline Moss, PhD, RN, FAAN.

40. Plaintiff Page has exhausted the administrative appeals available to be reinstated as a student.

41. Plaintiff Page has requested on numerous occasions that she be reinstated as a student at UAB and has requested that she be provided all due process required by the UAB School of Nursing Student Handbook and applicable law. Each of these requests have been ignored or denied.

**Count I: Violation of 14th Amendment Due Process Right Against Defendant Hicks, Defendant McMullan, Defendant Tofani, and Defendant Board of Trustees**

42. Plaintiff re-alleges and incorporates by reference all of the above paragraphs in this Count.

43. The 14th Amendment states that no state shall deprive any person of life, liberty, or property, without due process of law.

44. Plaintiff Page has property and liberty interests in her continued enrollment at Defendant UAB. Her interests enjoy the protections of due process.

45. Defendant Hicks, Defendant McMullan, Defendant Tofani, and Defendant Board of Trustees, without following the University's policies and procedures, and without following required due process and procedures for dismissal of a student required by the UAB School of Nursing Student Handbook and the Fourteenth Amendment, improperly dismissed Plaintiff Page from the nurse anesthesia program.

46. The fundamental requirement of due process is the opportunity to receive the proper notice of the allegations against the student, the specifics of the allegations, the described process by which the allegations would be investigated, presented, and defended against, and the opportunity to be heard at a meaningful time and in a meaningful manner after proper notice.

47. Plaintiff Page was not given the proper notice of allegations against her and was denied the opportunity to be heard at a meaningful time and in a meaningful manner before being dismissed as a

student in Defendant UAB's School of Nursing anesthesia program.

48. Plaintiff Page was also denied a meaningful appeal. The Defendants have failed to follow their own policies and procedures described in the UAB School of Nursing Student Handbook.

49. WHEREFORE, PREMISES CONSIDERED, Plaintiff Page requests that this Court enter a judgment in her favor in any amount that the Court may determine as compensation for the injuries caused by the Defendants, including costs and attorneys fees, and grant such other relief that restores Plaintiff Page's status as a student in the UAB School of Nursing.

**Count II: Deprivation of Rights Under 42 U.S.C. § 1983 against Defendant Hicks, Defendant McMullan, Defendant Tofani, Defendant Board of Trustees**

50. The Plaintiff re-alleges and incorporates by reference all of the above paragraphs in this Count.

51. The Constitution states that no state shall deprive any person of life, liberty, or property, without due process of law.

52. Plaintiff Page has property and liberty interests in her continued enrollment Defendant UAB.

53. Plaintiff Page's dismissal from Defendant UAB was done intentionally, willfully, negligently, maliciously, with deliberate indifference and/or with a reckless disregard for the natural and probable consequences of their act, was done without lawful justification or reason, and was designed to and did cause serious emotional pain and suffering in violation of the

Plaintiff Page's rights as guaranteed under 42 U.S.C. § 1983.

54. As a direct and proximate result of Defendant Hicks', Defendant McMullan's', Defendant Tofani's, and Defendant Board of Trustees actions, Plaintiff Page has been wrongly terminated from the UAB School of Nursing anesthesia program. Plaintiff Page, knowing the anesthesia program would require 60 hours of work a week, left her job as an RN to attend the program and sacrificed 2 years of income as a nurse along with 2 years of contribution to a 401K. Plaintiff Page has worked hard to reach this point in her career by attending classes, studying, taking tests, treating patients, and attending clinical. Plaintiff Page has also incurred over one hundred thousand dollars in student loan debt to attend the UAB School of Nursing Anesthesia Program.

55. WHEREFORE, PREMISES CONSIDERED, Plaintiff Page requests that this Court enter a judgment in her favor in any amount that the Court may determine as compensation for the injuries caused by the Defendants, including costs and attorneys fees, and grant such other relief that restores Plaintiff Page's status as a student in the UAB School of Nursing.

**Count III: Negligence against Defendant Hicks and Defendant McMullan**

56. The Plaintiff re-alleges and incorporates by reference all of the above paragraphs in this Count.

57. Defendants Hicks and McMullan each owed a duty to Plaintiff Page.

58. Defendant Hicks breached that duty and was negligent in sending a clinical evaluation to Defendant

UAB and representing that the clinical evaluation was pertaining to Plaintiff Page, when in fact it was not. Defendant McMullan breached her duty to Plaintiff Page by using a clinical evaluation on another student against Plaintiff Page after learning that the evaluation was erroneously prepared pertaining to Plaintiff Page. Defendant McMullan further breached her duty to Plaintiff Page by failing to correct the evaluation errors and by suppressing this information from other individuals employed by UAB involved in Plaintiff Page's dismissal from school.

59. As a result of Defendant Hicks' and Defendant McMullan's negligent conduct, Plaintiff Page has suffered, among other harms, damages to her career opportunities, damages to her ability to obtain her certification as a CRNA, loss of time practicing in her field, emotional distress, loss of wages, and has incurred substantial student loan fees and legal costs including attorney fees.

60. Defendant Hicks' and Defendant McMullan's negligence was the actual and proximate cause of Plaintiff Page's loss and/or injury.

61. WHEREFORE, PREMISES CONSIDERED, Plaintiff Page requests that this Court enter a judgment in her favor in an amount that a jury may determine as compensation for the injuries caused by the Defendants.

**Count IV: Negligence against Defendant McMullan**

62. The Plaintiff re-alleges and incorporates by reference all of the above paragraphs in this Count.

63. Defendant McMullan owed a duty to Plaintiff Page.

64. Defendant McMullan breached that duty and was negligent in failing to follow the basic requirements, policies, and procedures described in the UAB School of Nursing Student Handbook by unilaterally dismissing Plaintiff Page from school and by failing to provide Plaintiff Page any written notice of allegations against Page before dismissal. Defendant McMullan further breached that duty and was negligent by failing to take measures to reinstate Plaintiff Page as a student after Defendant McMullan discovered the errors in following basic requirements, policies, and procedures that had occurred.

65. As a result of Defendant McMullan's negligent conduct, Plaintiff Page has suffered, among other harms, damages to her career opportunities, damages to her ability to obtain her certification as a CRNA, loss of time practicing in her field, emotional distress, loss of wages, and incurred substantial student loan fees and legal costs including attorney fees.

66. Defendant McMullan's negligence was the actual and proximate cause of Plaintiff Page's loss and/or injury.

67. WHEREFORE, PREMISES CONSIDERED, Plaintiff Page requests that this Court enter a judgment in her favor in an amount that a jury may determine as compensation for the injuries caused by Defendant McMullan.

**Count V: Negligence against Defendant Tofani**

68. The Plaintiff re-alleges and incorporates by reference all of the above paragraphs in this Count.

69. Defendant Tofani owed a duty to Plaintiff Page.

70. Defendant Tofani breached that duty and was negligent was negligent in failing to follow the basic requirements, policies, and procedures described in the UAB School of Nursing Student Handbook by unilaterally dismissing Plaintiff Page from school and by failing to provide Plaintiff Page any written notice of allegations against Page before dismissal. Defendant Tofani further breached that duty and was negligent by failing to take measures to reinstate Plaintiff Page as a student after Defendant Tofani discovered the errors in following basic requirements, policies, and procedures that were required to be followed involving the "Student Academic Complaint" grievance procedure in the UAB School of Nursing Handbook

71. As a result of Defendant Tofani's negligence, Plaintiff Page has suffered, among other harms, her ability to obtain her certification as a CRNA, loss of time practicing in her field, emotional distress, and incurred substantial student loans and legal costs, including attorney fees.

72. Defendant Tofani's negligence was the actual and proximate cause of Plaintiff Page's loss and/or injury.

73. WHEREFORE, PREMISES CONSIDERED, Plaintiff Page requests that this Court enter a judgment in her favor in an amount that a jury may determine as compensation for the injuries caused by Defendant Tofani.

## PRAYER FOR RELIEF

74. WHEREFORE, PREMISES CONSIDERED, Plaintiff Page requests that this Court:

a. Immediately reinstate Plaintiff Page as a student in UAB's School of Nursing anesthesia program;

b. Enter all appropriate orders and grant relief necessary to require the Defendants to take all corrective action necessary to return Plaintiff Page to the status as a student that she enjoyed prior to the illegal and unlawful dismissal from school that occurred on August 29, 2016;

c. Award Plaintiff Page an amount that would compensate her for the injuries caused by the Defendants;

d. Award Plaintiff Page her costs incurred in prosecuting this action, including an award of attorneys' fees and expenses, pursuant to 42 U.S.C. §§ 1988; and

e. Award and grant Plaintiff Page any such other and further equitable relief that this Court determines Plaintiff Page is entitled to and that the Court may deem just and equitable.

PLAINTIFF DEMANDS A TRIAL BY STRUCK JURY.

Respectfully submitted this the 21st day of July 2017.

/s Mark G. Montiel, Sr.
(ASB-9485-T68M)
Attorney for the Plaintiff

OF COUNSEL:
Mark G. Montiel, P.C.
6752 Taylor Circle
Montgomery, AL 36117
(334) 356-1899

/s Jacquelyn H. Wesson
(ASB-2515-C66W)
Attorney for the Plaintiff

OF COUNSEL:
Wesson & Wesson, LLC
212 Main Street
Warrior, AL 35180
(205) 590-1128

## NOTICE OF REMOVAL (NOVEMBER 16, 2016)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ASHLEY WILCOX PAGE,

*Plaintiff*,

v.

TODD L. HICKS, NNA, CRNA;
SUSAN P. MCMULLAN PhD, CRNA;
PETER M. TOFANI, MS, LTC(R); and
UNIVERSITY OF ALABAMA AT BIRMINGHAM,

*Defendants*.

Civil Action No.:
Removed From the Circuit Court of Montgomery County, Alabama Case No. 03-CV-2016-901522.00

Pursuant to 28 U.S.C. §§ 1331, 1367, 1441 and 1446, Defendants, Todd L. Hicks, Susan P. McMullan, Peter M. Tofani, and The Board of Trustees of The University of Alabama (incorrectly named as "University of Alabama at Birmingham") (collectively, "Defendants") and hereby serve notice of removal of this case from the Circuit Court of Montgomery County, Alabama, to this Honorable Court and respectfully show as follows:

1. Plaintiff's Complaint and Verified Petition for Ex Parte Temporary Restraining Order and Motion for Preliminary Injunction were originally filed on November 11, 2016, at 4:10 p.m. in the Circuit Court of Montgomery County, Alabama and assigned case number 03-C V-2016-901522.00.

2. The Complaint seeks redress of alleged violations of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, and state law. (Complaint, Counts I, II, III, IV, V).

3. To the knowledge of the undersigned, no other pleadings have been filed as of the date of Defendants became aware the Complaint had been filed.

4. This action is being removed pursuant to 28 U.S.C. §§ 1331, inasmuch as this action could have been originally brought in this Court pursuant to 28 U.S.C. § 1331. "Federal district courts have original 'federal question' jurisdiction over 'all civil actions arising under the Constitution, laws, or treaties of the United States.'" *Clark v. Riley*, 2007 WL 1655593 *2 (M.D. Ala.) (quoting 28 U.S.C. § 1331); *Dunlap v. G&L Holding Group, Inc.*, 381 F. 3d 1285, 1289 (11th Cir. 2004). From the face of the complaint, this Court has original subject matter jurisdiction over the claims for violation of Plaintiff's rights under the Fourteenth Amendment of the United States Constitution under 42 U.S.C. §§ 1983. (Complaint, Counts I, II). These claims are federal claims and the Complaint therefore presents a federal question on its face. Accordingly, this Court has original jurisdiction over this matter.

5. This Court's original jurisdiction over this action is based upon 28 U.S.C. § 1331 and this Court

has supplemental jurisdiction over Counts III, IV, and V pursuant to 28 U.S.C. § 1367(a). Counts I and II arise under the Fourteenth Amendment of the United States Constitution. Counts I and II therefore are claims upon which the United States District Courts have original jurisdiction under 28 U.S.C. § 1331.

6. The factual allegations supporting the federal claims are identical to the factual allegations supporting the state law claims. (Complaint, ¶¶ 6-34, 42, 48, 54, 60). Because the state law claims asserted in the Complaint arise out of a common nucleus of facts and are so related to the federal claims that they form the same case or controversy, this Court has supplemental jurisdiction of the state law claims under 28 U.S.C. § 1367(a). *Pirztando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1242 (11th Cir. 2007) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

7. Because this case includes federal and state claims and because all of those claims could have properly been brought in federal court, removal is proper under 28 U.S.C. § 1331, 28 U.S.C. § 1367(a) and 28 U.S.C. § 1441(a).

8. The United States District Court for the Middle District of Alabama, Northern Division, is the federal judicial district and division embracing the Circuit Court of Montgomery County, Alabama. *See* 28 U.S.C. § 81(b)(1).

9. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b).

10. The undersigned represents all Defendants. All of the Defendants consent and join in the removal of this action, thus fulfilling the consent requirement of 28 U.S.C. § 1446(b)(2)(A).

11. Pursuant to 28 U.S.C. § 1446(d), Defendants have this day served a copy of this notice on Plaintiff and on the clerk of the State court.

12. Pursuant to 28 U.S.C. § 1446(a), attached is a copy of all process, pleadings, and orders served upon Defendants and/or filed in this action.

13. A true and correct copy of this Notice of Removal will be filed with the Clerk of the Circuit Court of Montgomery County, Alabama.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Defendants hereby remove this cause from the Circuit Court of Montgomery County, Alabama, to the United States District Court for the Middle District of Alabama, Northern Division.

Respectfully submitted this 16th day of November, 2016.

/s/ David R. Mellon
(ASB-2493-L73D)
drmellon@uasystem.edu
The University of Alabama System
UAB Office of Counsel
1720 2nd Avenue South, Suite AB 820
Birmingham, AL 35294-0108
(205) 934-3474
Attorney for Defendants Todd L. Hicks, Susan P. McMullan, Peter M. Tofani, and The Board of Trustees of The University of Alabama (incorrectly named as "University of Alabama at Birmingham")