APPENDIX

United States Court of Appeals For the Fifth Circuit

No. 20-50981

Symon Mandawala

v

Northeast Baptist Hospital, Counts 1, 2, and 11; Blaine Holbrook, Counts 4, 5, 6, and 11; North Central Baptist Hospital; St. Luke's Hospital; Baptist Medical Center; Resolute Hospital; Mission Trails Baptist Hospital; Tenet; Nicki Elgie

Before Jones, Smith, and Haynes, Circuit Judges.*

Jerry E. Smith, Circuit Judge:

Appeal from the United States District Court for the Western District of Texas No. 5:19-CV-1415

Symon Mandawala flunked out of a medical sonography program, so he sued. Seven complaints, three venues, and two appeals later, the trial court dismissed nearly all the pro se plaintiff's dozen-or-so claims and all but one defendant, the school.

* Judge Haynes concurs in the judgment only.

Mandawala asks us to reverse and to order the assignment of a different district judge. We disagree on all counts and affirm.

I.

A.

A few years ago, Symon Mandawala attended a medical sonography program at Baptist School of Health Professions. After failing to graduate, Mandawala sued the school in small-claims court to recoup his cost of atten-dance and damages for emotional distress. In his small-claims petition, Mandawala alleged that he flunked the program because the school did not staff its clinics adequately, which prevented Mandawala from completing his clinical duties. The petition contained no other allegations. The court dis-missed, deeming the claimed damages to exceed its jurisdiction.

Mandawala then brought the same claims in state district court. Unable to comprehend Mandawala's complaint, the school issued a general denial and moved for a more definite complaint. The court so ordered, and Mandawala filed an amended complaint. The new complaint, though no clearer than the first, added several new claims, including claims under vari-ous education and privacy laws. Mandawala also alleged, for the first time, that the school had failed him out of racial animus.

On the school's motion and after a hearing, the state district judge dismissed Mandawala's amended petition. During the hearing, Mandawala complained that he lacked adequate notice and time to prepare for the pro-ceeding. He also stated falsely that the school had admitted his claim's validity and thus was estopped from opposing him. Noting those objections, the state judge announced her ruling and told Mandawala that he could appeal.Rather than appeal, Mandawala sued again—this time, in federal dis-trict court—raising at least eleven claims. Among them were racial and sex

discrimination, fraudulent misrepresentation, breach of contract, conver-sion, defamation, intentional infliction of emotional distress, and violations of the First and Twenty-Sixth Amendments.[1]

[1] The Twenty-Sixth Amendment states that adult citizens' right to vote "shall not be denied or abridged . . . on account of age." U.S. Const. amend. XVI, §

The complaint also added the school's attorney, Blaine Holbrook, as a defendant. Just before the state-court hearing, Mandawala claimed, Hol-brook left the courtroom with a stack of documents and returned empty-handed. A few minutes later, the judge entered the courtroom with a docu-ment that, like Holbrook's, bore a colorful post-it note. Mandawala con-cluded that Holbrook had given that document to the judge to rig the hearing against him. He sued Holbrook, claiming that Holbrook conspired with the state judge to deny him his civil rights and his right to a fair trial. The defen-dants promptly replied with a motion to dismiss.

Nearly two months later, and without seeking leave of court, Manda-wala amended his complaint to add claims against Holbrook's colleague, Nicki Elgie. After implicating Elgie in Holbrook's alleged conspiracy, Man-dawala's late filing accused Elgie of filing motions late with intent to violate his constitutional rights and cause "psychological injury." When the defen-dants replied that the pleading was tardy, Mandawala filed it again. The district court struck the amended complaint but let the plaintiff file a fourth to correct deficiencies in his earlier pleadings. That new

complaint added Tenet, the school's corporate parent,[2] as a defendant. It otherwise restated or clarified old allegations.

ltimately, the district court dismissed with prejudice nearly all the claims. Against Baptist School, the court dismissed the claims of racial dis-

crimination, First Amendment retaliation, procedural due process, conver-sion, defamation, and intentional infliction of emotional distress ("IIED"). The court also rejected all claims arising from the state-court hearing and dismissed the attorney defendants from the suit. When the dust settled, only

Mandawala's sex-discrimination and breach-of-contract claims survived. Because Mandawala had never served Tenet, the school's supposed corpor-ate parent, the court dismissed Tenet, leaving

Baptist School as the lone defendant. The court then ordered the parties to mediate the surviving claims.

[2]So the plaintiff says. The school denies that Tenet is its parent.

Unhappy with those decisions, Mandawala sought a writ of manda-mus, demanding that we disqualify both the district judge and the magistrate judge for bias. Mandawala never explained why we should replace the magis-trate judge. As for the district judge, Mandawala claimed that he dismissed the claims relating to the state-court hearing to favor the state district judge, whom the federal judge knew from his time on the state appellate bench. Also motivating dismissal, according to Mandawala, was a friendship be-tween Holbrook (the school's lawyer) and partners of a firm that employed the district judge before he joined the federal bench.

Finally, Mandawala suggested that the district court had applied Bap-tist law, rather than federal law, and pointed to the judge's membership in the Baptist church as another source of bias. Describing Mandawala's claims as spurious, unfounded, and speculative, we denied the writ. Only then did Mandawala file a recusal motion with the district court. That, too, was denied.

Since we denied the writ, the case has ground to a halt, despite the district judge's best efforts. The judge forged ahead with mediation, setting the first hearing before a new magistrate judge. But months after the date was set, Mandawala told the court that he would refuse to participate, asserting, without basis, that the mediation's "hidden purpose" is "to hurt [his] right to appeal." With progress stalled, the district court stayed the case until further notice.

B.

Mandawala presents several issues on appeal. His theories fall into four buckets. First, Mandawala contests the dismissal of most of his claims against Baptist School. He thinks that we should restore his claims of racial discrimination, First Amendment retaliation, loss of procedural due process, defamation, and intentional infliction of emotional distress.[3] Second, Mandawala urges us to restore his claims against Holbrook and Elgie for their alleged misconduct during the state-court proceeding. Third, Mandawala disagrees with Tenet's dismissal from the case. And

[3] The district court also dismissed Mandawala's conversion claim. But Mandawala does not discuss that claim on appeal, so we do not address it here.

fourth, Mandawala renews his complaints about the district judge. He again accuses the judge of bias and demands his recusal. We reject all those arguments and affirm.

II.

On defendants' motion, the district court dismissed Mandawala's claims against Baptist School of racial discrimination, First Amendment retaliation, loss of procedural due process, defamation, and IIED. We agree and affirm.

We review de novo the district court's ruling. Cicalese v. Univ. of Tex. Med. Branch, 924 F.3d 762, 765 (5th Cir. 2019). To withstand a motion to dismiss under Rule 12(b)(6), a complaint must present enough facts to state a plausible claim to relief. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A plaintiff need not provide exhaustive detail to avoid dismissal, but the pleaded facts must allow a reasonable inference that the plaintiff should prevail. Facts that only conceivably give rise to relief don't suffice. See id. at 555. Thus, though we generally take as true what a complaint alleges, we do not credit a complaint's legal conclusions or "[t]hreadbare recitals of the elements of a cause of action." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A.

Mandawala says that the district court should not have dismissed his claim of racial discrimination, which he brings under Title VI of the Civil Rights Act of 1964. We disagree.

Federally funded programs may not intentionally discriminate based on race. 42 U.S.C. § 2000d. An official policy of discrimination, such as a university that refuses admission to a racial group's members, breaches that principle. But sometimes, the claimed discrimination does not arise from an official policy. In those cases, the plaintiff must allege that an official knew of the intentional discrimination but refused to stop it despite having author·ity to do so. See Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998).

Mandawala is black. He claims that one of his instructors, Debra For·minos, gave him poor grades because of his race. Mandawala proffers three facts to back that claim. First, a former student of

the program told him that she felt that Forminos dislikes nonwhite people. Second, Mandawala says that he felt as though he suffered discrimination. Third, after Mandawala sought a transfer to another hospital, Forminos told Melissa Moorman, the clinical coordinator, that she would accept another student to take his place. And that student happened to be white.

This evidence is bare and conclusory and does not come close to allowing a reasonable inference of intentional discrimination. At bottom, Mandawala alleges just that he and a former student felt that Forminos treated nonwhites differently. Subjective belief alone cannot prove intentional discrimination. See, e.g., Mohamed v. Irving Indep. Sch. Dist., 252 F. Supp. 3d 602, 627-28 (N.D. Tex. 2017).

Mandawala also has not shown that any school official knew of inten-tional discrimination against him and refused to act. Mandawala says that he told a senior faculty member that a former student believed that Forminos had treated her differently because of her race. But even if that faculty mem-ber had authority to remedy discriminatory conduct, Mandawala relayed only a student's feeling that Forminos disliked nonwhites. That is not evidence of discriminatory conduct. And Mandawala cannot obtain relief unless he shows that Baptist School had actual notice of a violation. See Gebser, 524 U.S. at 287-91. Neither Mandawala nor anyone else reported racially discriminatory conduct to a school official with power to act. That dooms his claim.

Styling Mandawala's claim as a claim of disparate impact does not change our conclusion. Private plaintiffs cannot bring disparate-impact claims under Title VI. See Alexander v. Sandoval, 532 U.S. 275, 291-92 (2001). Mandawala cites Griggs v. Duke Power Co., 401 U.S. 424 (1971), for support. But Griggs applied a different part of the Civil Rights Act that does not apply here. Id. at 425. And even if a disparate-impact test did apply, Mandawala would not satisfy it.

To show disparate impact, a plaintiff must identify a "facially neutral personnel policy or practice" that disparately impacted members of a pro-tected class. McClain v. Lufkin Indus., Inc., 519 F.3d 264, 275 (5th Cir. 2008). Mandawala never tells us what neutral policy he contests or how it caused his harm. Even if we could

graft Griggs's disparate-impact test onto Manda-wala's claims, he still would lose.

B.

Mandawala claims that Baptist School unlawfully retaliated against him for exercising his First Amendment rights. The district court dismissed that claim. We affirm.

To state a claim for First Amendment retaliation, Mandawala must show that Baptist School retaliated against him for constitutionally protected speech. Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019). That retaliation also must have caused Mandawala's claimed injury. Id. (citing Hartman v. Moore, 547 U.S. 250, 259 (2006)). That is, Mandawala must plead that the school would not have failed him from the medical sonography program absent his protected speech. Id.; see also Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 285-86 (1977).

Mandawala's retaliation claim boils down to this: A teacher, Chelsea Jackson, instructed him to perform a carotid-artery scan. Mandawala replied that his course of study did not require the scan. So Jackson gave Mandawala a low grade, sought to remove him from the clinical site, and recommended that Baptist School fail him from the program. Mandawala concludes that Baptist School flunked him to punish him for stating his view that the scan was elective. Even if we assumed that the First Amendment could protect Mandawala's statement, his claim would fail.

First, Mandawala has not shown that "the adverse action . . . would not have been taken absent the retaliatory motive." Nieves, 139 S. Ct. at 1722 (emphasis added). Mandawala claims that the school dismissed him for stat-ing that the scan was elective. But he also has said that the images he took were poor and that he did not study how to take better ones. And his com-plaint later contends that the school failed Mandawala because a patient said that he had injured her. From those undisputed facts, we cannot infer that Mandawala would have passed the course if he had held his tongue. Of course, Mandawala adequately pleads that his statement partially motivated his dismissal. But that ill motive will not suffice because "non-retaliatory grounds" justified the

penalties of which he complains. See id. (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006)).

Second, Mandawala must show that the school had retaliatory intent. See id. (requiring a connection between "a defendant's animus" and the plaintiff's injury (emphasis added)). He has not shown that. He has said only that Jackson gave him a low grade and urged the school to fail him. Nowhere does he say that the school failed him because he said that the carotid scans were elective. The school did support its decision to fail Mandawala with emails from Forminos and Jackson. But Mandawala never alleges that those emails offered his statement as the reason he failed. He otherwise offers no evidence that Baptist School flunked him to punish him for stating that he did not have to perform carotid scans. He thus has not met his burden to plead the school's retaliatory intent.

Finally, much as Mandawala tries to frame his statement to Jackson as an "expression of feeling" that enjoys First Amendment protection, his real complaint seems to be that he lost "the right to choose the topic" he wanted to study. Mandawala faults the district court for not seeing a "constitu-tional" issue in Mandawala's failure to "follow Mrs. Jackson's direction." He protests that Baptist School violated his "constitutional right to choose" his course of study. But the First Amendment confers no such right. We may not treat Mandawala's failure to complete his studies as expressive conduct meriting constitutional protection.[4]

Because Mandawala failed to state a claim for First Amendment retali-ation, dismissal with prejudice was proper.

C.

Mandawala says that Baptist School violated the Fourteenth Amend-ment by depriving him of procedural due process. The district court dis-missed that claim because Mandawala's

complaint showed that he received notice and an opportunity to be heard when the school told him that he had failed the course.

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[4] See Voting for Am., Inc. v. Steen, 732 F.3d 382, 389 (5th Cir. 2013) ("[NOon-expressive conduct does not acquire First Amendment protection whenever it is combined with another activity that involves protected speech.").

We agree with the district court that the school supplied adequate pro-cess. Dismissals for academic cause entitle a student only to an "informal give-and-take" with an administrator. Bd. of Curators of Univ. of Mo. v. Hor-owitz, 435 U.S. 78, 86 (1978) (quoting Goss v. Lopez, 419 U.S. 565, 584 (1975)). That is what Mandawala got. As the district court stated, school adminis-trators "met with Mandawala, informed him he failed the course, explained to him why he failed the course, and told him that he would have to retake the course in order for it to count toward his graduation requirements." Such process far exceeds what the Constitution requires.[5]

There is another ground for dismissal: The Fourteenth Amendment applies only to state actors. See Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295-98 (2001). Baptist School is a private educational institution. Though it receives public funds, that alone cannot transform it into a state actor. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982).[6] Mandawala presents no other evidence that would support imputing the school's conduct to the government. Cf. Brentwood Acad., 531 U.S. at
295-96. So the Fourteenth Amendment does not apply, and no process was due.

D.

The district court dismissed Mandawala's defamation claim. We concur.

In Texas, a defendant is liable for defamation if he negligently pub-lishes a false statement that defames the plaintiff and

[5] See, e.g., Davis v. Mann, 882 F.2d 967, 975 (5th Cir. 1989); see also Ekmark v. Matthews, 524 F. Zpp'x 62, 64 (5th Cir. 2013) (per curiam) (holding that mere notice preceding a dental student's academic dismissal satisfied the Fourteenth Zmendment).

[6] See also Aldridge v. Tougaloo Coll., 847 F. Supp. 480, 488 (S.D. Miss. 1994) (hold-ing that federal financial assistance "is entirely not determinative in considering whether there is state action").

causes damage. D Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 434 (Tex. 2017). To plead defamation in federal court, a plaintiff generally must specify when and where the statement was published. Otherwise, the claim may be too vague to give adequate notice to the defendant of the claim he must contest.[7]

According to Mandawala, Baptist School's employees defamed him by criticizing him internally. Mandawala highlights three communications: An email from Forminos to Moorman, the clinical coordinator, described Mandawala as a student whom "apparently no one wants." Another mes-sage from Forminos relayed that a patient had accused Mandawala of hurting and disrespecting her. Finally, Moorman told faculty that Mandawala was moved from one clinical site "due to his behavior and lack of professional-ism." Mandawala says all those statements were false. That may be. But as the district court observed, Mandawala never says that the school's employ-ees shared their criticisms with third parties. Publication is required for the tort of defamation to lie. So his claim must fail. Mandawala ignores that problem. Instead, he posits that Forminos committed defamation per se when she relayed the patient complaint. Defam-ation per se, he says, requires almost no proof at all—not of damages, time or place, or even publication. That is inaccurate.[8] But we will not belabor the demerits of that theory. Because Mandawala never raised that contention in the district court, he has forfeited it on appeal. See Rollins v. Home Depot USA, 8 F.4th 393, 397 (5th Cir. 2021) (citing United States v. Zuniga, 860 F.3d 276, 284 n.9 (5th Cir. 2017)).

E.

Mandawala claims IIED. The district court correctly dismissed that claim. A plaintiff may recover for IIED only when the

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[7] Cf. Jackson v. Dallas Indep. Sch. Dist., No. 98-CV-1079, 1998 U.S. Dist. LEXIS 10328, at *13 (N.D Tex. Jul. 2, 1998) ("Defamation claims must specifically state the time and place of the publication."), aff'd without opinion, 232 F.3d 210 (5th Cir. 2000); Cantu v. Guerra, No. 20-CV-0746, 2021 U.S. Dist. LEXIS 119681, at *40-42 (W.D. Tex. June 28, 2021).

[8] Look no further than Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002), which

defendant intentionally or recklessly engaged in "extreme and outrageous" conduct that causes severe emotional distress.[9] The tort exists to capture acts that are obviously tortious but are so unusual that they evade condemnation on other tort theo-ries. See Standard Fruit & Vegetable Co. v. Johnson, 985 S.W.2d 62, 68 (Tex. 1998). Mandawala alleges no such conduct. His IIED claim duplicates his others. His interminable briefing suggests that if he had any viable claim, other tort theories would supply a remedy.

III.

Mandawala accused Baptist School's lawyers, Holbrook and Elgie, of conspiring with the state judge to deprive him of his constitutional rights. The district court dismissed those claims and both defendants. On appeal, Mandawala asks us to revive his claims. We decline.

Let's reprise the plaintiff's wafer-thin allegations. Start with the claims against Holbrook. Before the state court hearing, Holbrook left the courtroom with a stack of documents

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Cont· Man-dawala cites for support. Though finding defamation per se, the Bentley majority spent dozens of pages studying the tort's other elements. Id. at 577-607.

Defamation per se differs from ordinary defamation only as to damages. The law regards statements that are defamatory per se, such as accusing a judge of corruption or calling someone a thief, as so egregious that the "jury may presume general damages." John J. Dvorske & Lucas Martin, 50 Tex. Jur. 3d Libel & Slander § 3. But a plaintiff still must prove the other elements of the tort. Even if Forminos's statement was defamatory per se, Mandawala should lose, because he has not pleaded publication.

Plus, the other statements that Mandawala highlights likely do not qualify as defamation per se. See 50 Tex. Jur. 3d Libel & Slander § 23. As to those state-ments, Mandawala must prove his damages. Yet he has offered nothing more than con-clusory allegations of reputational harm. Those will not do.

[9] MVS Int'l Corp6 v6 Int'l Advert6 Sols6, LLC, 545 S.W.3d 180, 203 (Tex. App.—El Paso 2017, no pet.) (citing Tiller v. McLure, 121 S.W.3d 709, 713 (Tex. 2003) (per curiam)).

bearing a colorful post-it note. Minutes later, the judge entered the courtroom with a document that also bore a col-orful post-it note. Mandawala asks us to conclude from this that Holbrook conspired with the state judge to deny him his civil rights and his right to a fair trial. Mandawala accuses Elgie, the school's other lawyer, of the same conspiracy, even though Mandawala's second complaint admits that Elgie wasn't even present. Without a shred of evidence, he also claims that Elgie and Holbrook tardily filed and served documents with intent to prejudice his rights. Finally, Mandawala says that the attorneys violated various state-court filing rules—again with intent to prejudice his rights.

Mandawala seeks relief under 42 U.S.C. §§ 1983, 1985, and 1986. But none entitles him to relief. Section 1983 applies only to actions taken "under color of" state law, custom, or usage, which actions deprive the plaintiff of a federal right. 42 U.S.C. § 1983; see also West v. Atkins, 487 U.S. 42, 48 (1988). But Elgie and Holbrook are private attorneys. And private attorneys are not state actors, as we have repeatedly and emphatically held. See, e.g., Gipson v. Rosenberg, 797 F.2d 224, 225 (5th Cir. 1986) (per curiam). Nor does Manda-wala plausibly allege that the attorneys deprived him of his due process rights. Mandawala "was present at the state court hearing and . . . was allowed to argue" the pending motions. The state judge ruled only after reviewing the pleadings and hearing the arguments. After dismissing Mandawala's com-plaint, the judge reminded him that he could appeal. In short, no facts show or even suggest that the state court proceedings were unfair.

Mandawala's claims under Sections 1985 and 1986 are even more bizarre. For instance, both sections require that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" undergirds the conspirators' action.[10] Mandawala never alleges that Holbrook or Elgie har-bored any animus at all, racial or otherwise. Instead, he suggests that we should impute racial animus to the attorneys just because Mandawala had accused Baptist School of racial discrimination. That argument, if one could call it that, is jaw-dropping. It has no support in the caselaw.

We will not prolong our review here. The district court carefully examined Mandawala's civil rights claims and

correctly decided that they merited dismissal with prejudice. Because no claim against the school's attorneys survived, the district court properly dismissed those defendants from the suit.

IV.

All the claims that we have addressed were dismissed with prejudice. Such dismissals have preclusive effect, which means that Mandawala cannot bring them again.[11] Desiring a fifth bite at the apple, Mandawala protests that dismissal with prejudice is "extreme and rare" and requires a showing of "contumacious conduct or apparent deliberate delays."

Mandawala gets the law backwards. In fact, we presume that a dismis-sal is with prejudice "unless the order explicitly states otherwise." Fernandez-Montes v6 Allied Pilots Ass'n, 987 F.2d 278, 284 n.8 (5th Cir. 1993). Courts should allow a plaintiff to amend his complaint "when justice so requires." Fed. R. Civ. P. 15(a)(2). But once the plaintiff has had a "fair

opportunity to make his case," additional pleadings are futile and wasteful. Schiller v. Physicians Res. Grp. Inc., 342 F.3d 563, 566 (5th Cir. 2003) (quoting Jacquez v. Procunier, 801 F.2d 789, 792-93 (5th Cir. 1986)).

Mandawala has filed four complaints in federal court. He filed the last only after the district court had explained why his previous ones fell short. After so many chances, the district court acted reasonably in refusing another. The court certainly did not abuse its discretion. Cf. id. Dismissal with prejudice was proper.

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[10] Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (for § 1985's requirements)8 see also Newberry v. E. Tex. State Univ., 161 F.3d 276, 281 n.3 (5th Cir. 1998) (noting that § 1986 claims cannot survive absent proof of all elements of a § 1985 claim).

[11] See Guajardo v. JP Morgan Chase Bank, N.A., 605 F. Łpp'x 240, 244 (5th Cir. 2015) (per curiam) (citing Williams v6 allas Cnty6 Comm'rs, 689 F.2d 1212, 1215 (5th Cir. 1982)).

V.

Mandawala's final complaint named Tenet, which he says is Baptist School's corporate parent, as a defendant, but Mandawala never served Tenet. When the district court asked that Mandawala show cause why Tenet should not be dismissed, Mandawala submitted no evidence of service. Instead, he claimed that service on Baptist School sufficed as service on Tenet and that Tenet, despite never entering an appearance, had waived any objection to personal jurisdiction. That did not satisfy the district judge, who then dismissed Tenet from the suit. Mandawala asks us to drag Tenet back in. We decline. Tenet never was properly served, so dismissal was required.

Serving Baptist School did not serve Tenet. The federal rules author-ize two relevant methods of service on a corporation like Tenet: First, the plaintiff may serve the corporation per the law of the state where he files the suit. Fed. R. Civ. P. 4(h)(1)(A). In Texas, one may serve a firm by serving

its president, vice president, or registered agent. Tex. Bus. Orgs. Code §§ 5.201(b) & 5.255. Second, the plaintiff may deliver the summons and com-plaint "to an officer, a managing or general agent, or any other agent author-ized by appointment or by law to receive service of process." Fed. R. Civ.P. 4(h)(1)(B). Nothing in the record suggests that Baptist School qualifies under either method of service. Serving the school could not serve Tenet.

Rather than read the service rules, Mandawala skips ahead to Rule 12 and avers that Tenet waived any objection to personal jurisdiction. That is inaccurate. Tenet never appeared in this case. Only Baptist School objected to Tenet's non-service. Nonetheless, Mandawala falsely states that Tenet did appear; he questions the district court's impartiality for concluding other-wise. We affirm Tenet's dismissal from the case. Because Tenet was not served and never appeared, that dismissal is without prejudice.[12]

VI.

Mandawala renews his baseless attacks on the district judge, saying that we must reassign the case because the judge is biased. We warned Man-dawala that his claims of bias were "unsupported," "speculative," "spuri-ous," and "plainly

insufficient." But Mandawala serves them up again any-way, distorting and misstating the record along the way. Gruel is gruel, no matter the bowl. So we will not disqualify the district judge.

At bottom, Mandawala alleges two sources of bias. First, he says that the adverse rulings of the district judge show his bias. Second, Mandawala conjures that the judge's religion and distant ties to interested parties require his disqualification. Each contention is frivolous. And more troublingly, Mandawala misstates, omits, and distorts the record to pretend support forhis claims.

We turn first to Mandawala's assertion that the district judge's ad-verse rulings evince bias. As we observed in Mandawala's last appeal, ad-verse rulings, without more, do not warrant disqualification for bias. It is obvious why: If we credited Mandawala's theory, every judge would have to recuse, because any ruling in a dispute between parties would supply prima facie evidence of bias against the loser. Also, as in his mandamus petition, Mandawala advances the judge's adverse rulings as the chief ground for dis-qualification. But even that evidence is thin. Mandawala devotes eight pages of his brief to the judge's supposed bias. At least half those pages rehash the judge's decision to appoint counsel for him in mediation. But the judge vacated that order at Mandawala's request. Therefore, the lynchpin of Man-dawala's claim of bias is a moot point that the trial court resolved in his favor. Mandawala never tells us that he prevailed, even though the district judge issued the vacatur a month before Mandawala briefed this appeal.

Mandawala's claims about the district judge's religion have the same defects. Mandawala says that the judge holds a leadership position in a Bap-tist church. Because Baptist School is affiliated with the Baptist faith, Man-dawala concludes that we must

disqualify the district judge and reassign the case.

That contention fails both legally and factually. Mandawala cites not one precedent that holds or even suggests that a judge must recuse himself or herself whenever a party appearing before that judge shares his or her religious beliefs. In fact, every source

[12] By this we do not mean to suggest that there would be a viable cause of action against Tenet.

that Mandawala does cite is either irrelevant or contradicts his position.[13]

As for the facts, Mandawala repeatedly asserts that the district judge holds a leadership position in his local church and that the church "is a party in th[eO litigation." Mandawala offers no evidence for either point. The only evidence contradicts his account. Mandawala never sued the judge's church,

[13] In Trujillo v. ABA, 706 F. Appx 868 (7th Cir. 2017) (cited in Mandawala's brief), Trujillo sued the American Bar Association. When he lost, he claimed that the district judge was biased because he was an ABA member. Id. at 871. Declaring that argument "meritless," the court held, in three sentences, that recusal was not required. Id. The Judicial Conference's advisory

Opinion No. 52 (cited at page 69 of Mandawala's brief) reaches the same conclusion as Trujillo and emphasizes that "unwarranted recusal may bring public disfavor to the bench and to the judge." Comm. on Codes of Conduct, Judicial Conference of the United States, Advisory Op. No. 52 (June 2009).

In Offutt v. United States, 348 U.S. 11 (1954) (cited in Mandawala's brief), the Supreme Court reviewed a trial judge's decision to hold an attorney in contempt. Throughout the proceedings, the judge, in the jury's presence, screamed at the lawyer, assailed his fitness to practice law, and otherwise revealed extraordinary hostility "with increasing personal overtones." Id. at 12. For example, during one heated exchange, the judge told the lawyer that "[iOf you say another word I will have the Marshal stick a gag in your mouth." Id. at 16 n.2. From those exchanges, the Supreme Court concluded that the judge's sentence of the attorney might not have been fair. Though not vacating the con-tempt charge, the Court ordered a different judge to decide an appropriate sentence. See id. at 16-18.

In Liteky v. United States, 510 U.S. 540 (1994) (cited in Mandawala's brief), the plaintiffs, like Mandawala, presented several of the district judge's rulings as grounds for his disqualification. Also like Mandawala, the plaintiffs presented no evidence that the judge had "reveal[edO an opinion," id. at 555, derived from "knowledge acquired outside [theO proceedings," id. at 556. The members of the Court quibbled over the proper basis for dismissing the appeal. But the Court unanimously agreed that "petitioners did not assert sufficient grounds to disqualify the District Judge." Id. at 557 (Kennedy, J., concur-ring in the judgment).

Finally, in United States v. Jordan, 49 F.3d 152, 157-58 (5th Cir. 1995) (cited in Mandawala's brief), the district judge did not recuse herself from a criminal case despite her close, decades-long friendship with a lawyer whom the defendant had slandered and harassed with false criminal allegations. Over a dissent, a panel of this court held that the judge should have recused. Her "long, close, and multi-faceted friendship" with a person with whom the defendant had "an extremely hostile relationship," id. at 157, suggested that a "reasonable person would question the impartiality of the district judge," id. at

nor does that church have any interest in the case.[14] Weeks before Mandawala filed his brief in this court, the district judge stated that he has "never held a leadership position within the church."

All this supplied clear notice that Mandawala's assertions were base-less. Yet Mandawala urges them again on appeal and omits all contrary facts. There is more: After citing as support the order in which the judge denied having any leadership role in the church, Mandawala brazenly states that the district judge "agreed that he is a Baptist church leader." He did not.

Mandawala alleges two other sources of bias. The first is a friendship between Holbrook and partners at a firm that employed the district judge for three years or so before he joined the federal bench. That connection is meaningless.[15] Mandawala identifies no authority requiring a judge to recuse whenever a friend of a former colleague appears before him.[16] Mandawala again omits contrary evidence—this time, the district judge's statement

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Cont-158. The dissent disagreed, reasoning that neither circuit nor Supreme Court precedent required recusal. Id. at 160 (E. Garza, J., dissenting).

[14] Mandawala does not list the district judge's church as an interested party in his brief on appeal. That underscores his position's absurdity. Mandawala tells us to disqualify the judge because of his connection with the Baptist church. But he does not bother to list the church in his brief so that we can decide whether we have connections with the church that would require our recusal.

[15] See, e.g., Henderson v6 ep't of Pub6 Safety & Corr6, 901 F.2d 1288, 1295-96 (5th Cir. 1990). See also Cheney v. U.S. Dist. Court for Dist. of Columbia, 541 U.S. 913, 928-29 (2004) (Scalia, J., sitting as a single Justice) (not recusing despite a cordial friendship and a hunting trip with the defendant, because a reasonable person could not doubt the Justice's impartiality).

[16] That rule, we suspect, would require recusal in a vast number of cases. After all, only three-and-a-half connections separate the average U.S. Facebook user (a reasonable proxy for the average U.S. person) from all other people in the country. See Sergey Edunov et al., Three and a Half Degrees of Separation, Facebook Research (Feb. 4, 2016), https://research.fb.com/blog/2016/02/three-and-a-half-degrees-of-separation. whom Mandawala complains were once colleagues on the state bench. That proves nothing, as we said when we denied Mandawala's mandamus petition. Mandawala points us to no case or other authority that has transformed his frivolous position into a legitimate one between then and now. No recusal is necessary or appropriate.

that he has "absolutely no recollection of meeting Mr. Holbrook." The second supposed source of bias is that the district judge and the state judge about whom Mandawalacomplaint were once collegue on the bench. That proves nothing, as we said we denied Mandawala's mandamus petition. Mandawala points us to no case or other authority that has transformed his frivolous position into a ligitimate one between then and now.
No recusal is necessary or appropriet.

* * * * *

In summary:

The district court dismissed with prejudice Mandawala's claims against Baptist School of racial discrimination (under

Title VI), First Amend·ment retaliation, loss of procedural due process, defamation, and IIED. We AFFIRM.

The district court dismissed with prejudice Mandawala's claims against Holbrook and Elgie under §§ 1983, 1985, and 1986 and dismissed defendants Holbrook and Elgie. We AFFIRM.

The district court dismissed defendant Tenet for lack of personal ser·vice. We AFFIRM that dismissal, without prejudice.

We AFFIRM the denial of Mandawala's recusal motion.

United States Court of Appeals For the Fifth Circuit

No. 20-50981

Symon Mandawala,

v

Northeast Baptist Hospital, Counts 1, 2, and 11; Blaine Holbrook, Counts 4, 5, 6, and 11; North Central Baptist Hospital; St. Luke's Hospital; Baptist Medical Center; Resolute Hospital; Mission Trails Baptist Hospital; Tenet; Nicki Elgie

Before Jones, Smith, and Haynes, Circuit Judges,

Jerry E. Smith, Circuit Judge:

ON PETITION FOR REHEARING

Treating the petition for rehearing en banc as a petition for Panel rehearing (5th Cir. R. 35 I.O.P.), The petition for panel rehearing is DENIED. Because no member of the Panel or Judge in regular active service requested that the court be polled on rehearing en banc Fed. R. App. P 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED

Entered on; November 23, 2021

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-19-CV-01415-JKP-ESC

SYMON MANDAWALA,
Plaintiff,

V.

BAPTIST SCHOOL OF HEALTH PROFESSIONS, TENET, BLAINE HOLBROOK, NICKI ELGIE,
Defendants.

ORDER

This matter is before the Court on Defendants Baptist School of Health Professions, Northeast Baptist Hospital, and Blaine Holbrook's (collectively, "Defendants") Motion to Dismiss (ECF No. 23) to which Plaintiff Symon Mandawala ("Mandawala") responded (ECF No. 25). Upon consideration of the motion, the response, the record, and the relevant law, the Court concludes the Motion to Dismiss shall be GRANTED IN PART and DENIED IN PART.

FACTUAL ALLEGATIONS

Accepted as true and taken in the light most favorable to him, Mandawala's amended complaint alleges the following. See ECF No. 22. Symon Mandawala is an African American male. Mandawala was a student in the Baptist School Of Health Professions' ("Baptist") Diagnostic Medical Sonography program from September 4, 2016 through August 26, 2018, during which he completed fifty-six of the sixty-four credits required to graduate. In September 2017, after Mandawala had successfully completed rotations at three other clinical sites (Baptist sends students to six hospitals for practicum

experience where, under supervision, they complete sonograms on patients) the clinical coordinator, Melissa Moorman ("Ms. Moorman"), assigned him to Mission Trail Baptist Hospital.

During Mandawala's time at Mission Trail, the technician at the site, Sandra, did not allow Mandawala to conduct any scans (sonograms). The only time Mandawala was allowed to conduct scans was when Sandra was not working and a technician named Zaret Montavol was working. Mandawala informed his classroom instructor, Stacy Palmer, and a senior faculty member, Stephanie Wanat ("Ms. Wanat"), that he was not being allowed to do any scans. After five weeks at Mission Trail, Ms. Moorman transferred Mandawala to Baptist Medical M&S Imaging, where he was able to successfully complete the class requirements. Mandawala was then assigned to Northeast Baptist Hospital.

At Northeast Baptist Hospital ("Northeast"), Mandawala was supervised by technicians Virj Pascale and Debra Forminos ("Ms. Forminos"). Mr. Pascale supervised Mandawala's work approximately eighty percent of the time and Ms. Forminos the remaining twenty percent. Mandawala observed that the evaluations he received from Mr. Pascale were generally positive, while Ms. Forminos's evaluations were wholly negative. Ms. Forminos demanded that Mandawala show her deference based on her long service with Baptist; she insisted she grade Mandawala's work even though, in conformance with school policy, Mandawala had requested Mr. Pascale grade his work; and Ms. Forminos and a technician named Stacy spoke in whispers about Mandawala. Once, after two obstetrical patient scans, Ms. Forminos suggested to Mandawala sonography is a career better suited for women. She illustrated her point by saying that some female patients refused to be scanned by Mr. Pascale.

Based on his observations and experiences, Mandawala believed Ms. Forminos and Stacy were treating him differently than his female peers. Mandawala shared this with Ms. Wanat and asked to be assigned to a different location. Ms. Wanat responded that Ms. Forminos had

made the same request, citing scheduling difficulties. However, email communications among Baptist staff and the Northeast supervising technicians suggest that Ms. Forminos's request was made not because of scheduling difficulties but because she preferred to have white female students in the clinical rotations she supervised. Mandawala received a poor grade from Ms. Forminos and, despite his complaint that she had been treating him differently than his female peers and his request to be graded by Mr. Pascale, the school allowed the grade to stand.

Mandawala was assigned to Resolute Hospital for his final clinical rotation. There, clinical instructor Chelsea Jackson directed Mandawala to conduct an ultrasound of a patient's carotid artery. Mandawala was unprepared to conduct this ultrasound because vascular sonography was an elective and not part of the core curriculum. He objected to the assignment, telling Ms. Jackson, "I cannot do this because it's not part of my schoolwork." ECF No. 22, par. 31 Mandawala was not opposed to doing the sonogram. If vascular sonography was to be a mandatory part of the curriculum, he only wanted notice and time to prepare. In response, Ms. Jackson demanded Mandawala's immediate removal from the site, gave him a "low" grade, and recommended that Baptist fail him. On the last day, Baptist told Mandawala he had failed the course and he would have to retake the course and pay for it. Baptist supported its decision with emails from Ms. Forminos and Ms. Jackson to Ms. Moorman. Baptist deemed this interaction a hearing and thereupon, its decision to fail Mandawala became final.

LEGAL STANDARD

To survive a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A court addressing a motion to dismiss pursuant to Rule 12(b)(6) must "construe the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff's favor," Severance v. Patterson, 566 F.3d 490, 501 (5th Cir. 2009), and "must limit itself to the contents of the pleadings, including attachments thereto." Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp., 748 F.3d 631, 635 (5th Cir. 2014). The focus is not on whether the plaintiff will ultimately prevail, but whether that party should be permitted to present evidence to support adequately asserted claims. Twombly, 550 U.S. at 563 n.8.

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. Frith v. Guardian Life Ins. Co., 9 F.Supp.2d 734, 737-38 (S.D. Tex. 1998). Thus, to qualify for dismissal under Rule 12(b)(6), a complaint must, on its face, show a bar to relief. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986).

DISCUSSION

A. Discrimination Based on Race or Gender

Defendants contend that in his amended complaint, Mandawala "still failed to plead sufficient facts from which the Court can infer that any Defendant engaged in intentional discrimination based on his race or sex." ECF No. 23 at 8. Specifically, Defendants assert that the allegations in the amended complaint allege only a subjective belief that Ms. Forminos favors female students over male students, that Mandawala's allegations contain contradictions, and that even though he alleges he discussed Ms. Forminos's alleged conduct with an administrator, his allegations do not give rise to "actual knowledge of discrimination" as required by Gebser. Id. at 9 (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)).

To state a claim for discrimination under Title VI, a plaintiff must plausibly allege defendant (1) received

federal financial assistance, and (2) intentional discrimination on the basis 4 of race, color, or national origin. Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (emphasizing that a private right of action is available only for intentional discrimination); Kamps v. Baylor Univ., 592 F. App'x 282, 286 (5th Cir. 2014) (noting Title VI prohibits only intentional discrimination). To state a claim for discrimination under Title IX a plaintiff must plausibly allege the defendant (1) received federal financial assistance, and (2) excluded him from participation in defendant's educational programs because of his sex. Cannon v. Univ. of Chicago, 441 U.S. 677, 680, 717 (1979). In a private cause of action, the plaintiff must allege that an "appropriate person"—an official authorized to institute corrective measures—had "actual knowledge" of the discrimination and responded with "deliberate indifference." Gebser, 524 U.S. at 290 (distinguishing claims involving an official policy of discrimination from those seeking to hold an institution liable for the discriminatory acts of an individual).

The amended complaint does not plausibly allege that Baptist responded with deliberate indifference to alleged race or national origin discrimination. Mandawala alleges he gave Ms. Wanat "a copy of a comment" by a former female Latino student who described how she "felt about Mrs. Forminos treatment" as proof "that Mrs. Forminos does not like students that are non-white." ECF No. 22, par. 48. The interactions with Stacy and Ms. Forminos Mandawala describes in his amended complaint make no mention of Mandawala's race or national origin. And with the exception of the former student's comment, Mandawala does not allege that he reported any incidents of race discrimination to anyone at Baptist. Thus, it is impossible to infer that Baptist knew about race or national origin discrimination by technicians at Northeast and yet was deliberately indifferent to it. Furthermore, an allegation that he shared subjective beliefs— his or another student's—with Ms. Wanat is not the same thing as alleging Baptist had actual knowledge of racial discrimination and was deliberately indifferent. Allegations of subjective views, without supporting factual

allegations, do not give rise to an inference of intentional discrimination nor an inference of deliberate indifference to discrimination. See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000). Therefore, the amended complaint does not plausibly allege a Title VI claim founded on intentional race or national origin discrimination against Mandawala. Because Mandawala failed to allege sufficient facts to support a reasonable inference of discrimination based on his race or national origin, Mandawala's Title VI claim is dismissed.

The amended complaint alleges that Mandawala told Ms. Wanat that Ms. Forminos suggested to him that sonography is a career better suited for women. He also told Ms. Wanat that Ms. Forminos was treating him differently than his female peers. As evidence, he pointed to the evaluations he received from Ms. Forminos compared to the evaluations he received from Mr. Pascale. Mandawala further avers that he asked Ms. Wanat to move him from the Northeast site because Ms. Forminos treated him differently than his female peers.

Construing the facts asserted in the amended complaint in the light most favorable to Mandawala, and upon drawing all reasonable inferences in his favor, the Court must conclude Mandawala asserted enough facts to give rise to an inference of intentional discrimination based on his sex and Baptist's deliberate indifference to that discrimination. The focus is not on whether Mandawala will ultimately prevail, but whether he should be permitted to present evidence to support any adequately asserted claims. See Twombly, 550 U.S. at 563 n.8. Because Mandawala asserted sufficient facts to support a reasonable inference of discrimination based on his sex, this claim will proceed.

B. Freedom of Speech; Deprivation of Property Right

Defendants contend Mandawala cannot make out a First Amendment retaliation claim because he has failed to establish a prima facie case. ECF No. 23 at 10. Specifically, the amended complaint does not make clear what adverse action was taken in response to

hisstatement, nor does it allege a causal connection. Id. With respect to any Fourteenth Amendment claim, Defendants argue that Mandawala does not allege he was deprived of a property interest and that a Fourteenth Amendment claim requires state action. Id. (citing Caleb v. Grier, 598 Fed. App'x 227, 233-234 (5th Cir. 2015). To state a retaliation claim in an education context, a plaintiff must establish a prima facie case by plausibly alleging: (1) he engaged in a protected activity, (2) the school or its representatives took an adverse action against him, and (3) a causal connection exists between the protected activity and the adverse action. Muslow v. Bd. of Supervisors of La. State Univ., No. 19-11793, 2020 U.S. Dist. LEXIS 65368, at *50 (E.D. La. Apr. 14, 2020) (collecting cases). Causation is plausibly alleged when the plaintiff establishes a defendant knew that the plaintiff "engaged in any protected activity" at the time of the alleged retaliation. Collins v. Jackson Pub. Sch. Dist., 609 F. App'x 792, 795 (5th Cir. 2015) (per curiam) (quoting Watts v. Kroger Co., 170 F.3d 505, 512 (5th Cir. 1999)). Because not all speech is protected by the First Amendment, to allege a plausible claim that his speech was the basis for the school's retaliation, a student must identify the statements he relies on. Judeh v. La. State Univ. Sys., No. 12-1758, 2013 U.S. Dist. LEXIS 55574, at *12 (E.D. La. Apr. 18, 2013).

A claim that an educational institution exacted discipline without first affording notice and an opportunity to be heard, requires a plaintiff to allege facts sufficient to show (1) that he was deprived of a liberty or property interest protected by the Due Process Clause, and (2) that he was deprived of that interest without constitutionally adequate process. Id. at *13.

Construed liberally, Mandawala's prima facie case for retaliation is this: (1) he objected to an assignment, saying "I cannot do this because it's not part of my school work" (protected activity); (2) Baptist failed him and required him to retake and again pay for the course (adverse action); (3) almost immediately after Mandawala voiced his objection, the instructor demanded Baptist remove Mandawala from the clinical site and recommended it fail him

(causal connection). Mandawala's due process claim alleges: (1) he was denied the opportunity to complete a course he paid for (property interest); and (2) being told on the last day of school that Baptist failed him and he would have to retake and again pay for the course is not consistent with due process.

In an education context, First Amendment rights are "analyzed in light of the special characteristics of the school environment." Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981). Where there is "no finding and no showing" that engaging in speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," a prohibition against speech "cannot be sustained." Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

Construing the facts in the light most favorable to Mandawala, Ms. Jackson gave him a low grade and recommended Baptist fail him because he verbally contradicted her directive to conduct a vascular sonogram. Mandawala alleges he was genuinely surprised when Ms. Jackson instructed him to conduct a vascular sonogram and questioned the assignment because he believed vascular sonography was an elective.

Defendants argue that Mandawala's claim must fail because he "has not alleged that this speech was a matter of public concern." ECF No. 23 at 10. Mandawala's speech was not made in a context that requires the Court to include that discussion in its analysis. See, e.g., Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d 814, 816 (5th Cir. 2000) (noting that "[a]s a threshold requirement to constitutional protection, the public employee must establish that her speech addressed a matter of public concern") (emphasis added). Defendants further contend that "it is entirely unclear what adverse action Plaintiff alleges was the result of this statement." ECF No.23 at 10. Mandawala clearly alleges he was failed for voicing his objection to Ms. Jackson's 8 directive to conduct a vascular sonogram.

As to the causal connection between his alleged protected activity and an adverse action, Mandawala alleges Ms. Jackson's retaliation was almost immediate—the following day she wrote to Baptist, demanded Mandawala's immediate removal, and recommended that Baptist fail him. ECF No. 22 at 5, par. 32.

However, Ms. Jackson did not fail Mandawala, Baptist did. Mandawala does not allege temporal proximity between receipt of Ms. Jackson's email and Baptist's decision to fail him. Mandawala alleges Baptist administrators did not tell him he failed the course and would have to retake it until the last day of school. Baptist presented to Mandawala emails from Ms. Forminos and Ms. Jackson in support of its decision to fail him. Construing the amended complaint in the light most favorable to Mandawala and construing all reasonable inferences in his favor, Mandawala does not allege sufficient facts to infer Baptist retaliated against him for his protected speech. For this reason, Mandawala's retaliation claim is dismissed.

Mandawala's procedural due process claim fails as a matter of law. Procedural requirements that attach to academic decisions are "far less stringent" than those that exist when a student challenges a disciplinary decision. Board of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 86 (1978). A dismissal for academic cause entitles a student to an "'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student the opportunity to characterize his conduct and put it in proper context," Horowitz, 435 U.S. at 86 (quoting Goss v. Lopez, 419 U.S. 565, 584 (1975); it does not require a hearing. Ekmark v. Matthews, 524 F. App'x. 62, 64 (5th Cir. 2013) (per curiam).

Construing the facts in the light most favorable to Mandawala he received sufficient process. On the last day of school, Baptist administrators met with Mandawala, informed him he failed the course, explained to him why he failed the course, and told him that he would have to retake the course in order for it to count toward his graduation requirements, which included paying for the

course a second time. ECF No. 22 at 5, par. 34. This process meets the standard courts have found sufficient in similar circumstances. See, e.g., Ekmark, 524 F. App'x. at 64 (holding that medical resident who was notified of reason for his suspension was given adequate process); Davis v. Mann, 882 F.2d 967, 975 (5th Cir. 1989) (holding that dental resident who received an informal hearing "received even more procedural protections than are required by the Fourteenth Amendment"); Wren v. Midwestern State Univ., No. 7:18-cv-00060-O-BP, 2019 U.S. Dist. LEXIS 118143, at *40 (N.D. Tex. June 25, 2019) (dismissing due process claim of nursing student who had been informed of her unsatisfactory performance and, rather than retaking the failed course, she withdrew from the program). Accordingly, Mandawala's due process claim is dismissed.

C. 42 U.S.C. §§ 1983, 1985(2), 1986

Defendants argue this Court does not have subject matter jurisdiction over Mandawala's claims brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986 because these claims are, collectively, an attempt to re-litigate his state court claim. The Court disagrees. Claims brought under federal law are clearly within the jurisdiction of this Court. The allegations set forth in the amended complaint with respect to the sections cited do not reurge the allegations made in the state court petition but make clear Mandawala believes counsel for Baptist and the state court judge engaged in improper ex parte communication.

Defendants further contend that the state court hearing transcript shows Mandawala was given an opportunity to be heard and was afforded due process because Judge Gonzales considered all of the pleadings in the matter, heard the arguments of the parties, and informed Mr. Mandawala that he could appeal her ruling. Defendants also argue that Mandawala cannot state a claim under § 1983, § 1985, or § 1986 because the Defendants are not state actors, Mandawala was not deprived any right conferred by the constitution or federal law, and he has alleged only his subjective belief that

Blaine Holbrook ("Holbrook"), Nicki Elgie ("Elgie"), and Judge Gonzales engaged in a conspiracy.

To state a claim under § 1983, a plaintiff must allege that a "person," while acting under color of state law, deprived him of a right guaranteed under the Constitution or a federal statute. West v. Atkins, 487 U.S. 42, 48 (1988). The employee of a private entity acts under color of state law "when that entity performs a function which is traditionally the exclusive province of the state." Wong v. Stripling, 881 F.2d 200, 202 (5th Cir. 1989). A private party who is alleged to have conspired with or acted in concert with state actors may be acting under color of state law and held liable under § 1983. Priester v. Lowndes Cty., 354 F.3d 414 (5th Cir. 2004), cert. denied, 543 U.S. 829 (2004). A conspiracy is shown where a plaintiff plausibly alleges: (1) an agreement between the private and public defendants to commit an illegal act and (2) a deprivation of constitutional rights. Id.; see also Avdeef v. Royal Bank of Scotland, P.L.C., 616 F. App'x 665, 676 (5th Cir. 2015).

To state a claim under § 1985(2), a plaintiff must allege a conspiracy to impede, hinder, obstruct, or defeat the due course of justice in a state or territorial court. Section 1985 requires that the conspirators' actions be motivated by an intent to deprive their victim of the equal protection of the laws. "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." Kush v. Rutledge, 460 U.S. 719, 726 (1983) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (emphasis in original)) . To bring § 1985 claim, a plaintiff must allege:(1) the defendants conspired (2) for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and (3) one or more of the conspirators committed some act in furtherance of the

conspiracy; whereby (4) another person is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States; and (5) the action of the conspirators is motivated by a racial animus.

Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 270 n.12 (5th Cir. 2001) (citing Wong v. Stripling, 881 F.2d 200, 202-03 (5th Cir. 1989)).

To state a claim under § 1986, a plaintiff must state a valid claim under § 1985. Section 1986 imposes liability on individuals who have knowledge of a conspiracy under § 1985 but fail to take preventative action. Thus, a § 1986 claim must be predicated upon a valid § 1985 claim. Newberry v. E. Tex. State Univ., 161 F.3d 276, 281 n.3 (5th Cir. 1998).

Read liberally, Mandawala alleges that Defendants Holbrook and Elgie, acting as counsel for Baptist and TENET, failed to serve Mandawala with one or more motions, Holbrook and Elgie presented the motion(s) to Judge Gonzales ex parte, Judge Gonzales took the bench, granted the motions, and dismissed Mandawala's state court case. ECF No. 22, pars. 35-42.

Mandawala's § 1983 claim fails for several reasons. First, as counsel representing Baptist and TENET, the Court cannot find Holbrook and Elgie were state actors acting under color of state law. See Gipson v. Rosenberg, 797 F.2d 224, 225 (5th Cir. 1986) (holding that private attorneys are not state actors), cert. denied, 481 U.S. 1007 (1987). Second, even if Holbrook and Elgie were employees of Baptist or TENET, Mandawala alleges no facts to show that Baptist or TENET is an arm of the state for purposes of 42 U.S.C. § 1983. Therefore, Mandawala fails to state a claim under § 1983 because the allegations do not evince an agreement between Holbrook, Elgie, (private individuals) and Judge Gonzales (a state actor) to commit an illegal act.

As Mandawala does not allege any racial or class-based discriminatory animus, he failed to state § 1985 and § 1986 claims. Additionally, Mandawala was present at the state court hearing and, contrary to the allegation in

his amended complaint, he was allowed to argue the motions pending before Judge Gonzales. As this Court noted in its order on Defendants' first motion to dismiss, "any suggestion of wrongdoing by Judge Gonzales is contradicted by the transcript attached to Mandawala's Complaint. The transcript shows Judge Gonzales considered all of the pleadings in the matter, heard the arguments of the parties, and informed Mandawala that he could appeal her ruling." ECF No. 19 at 6-7 (citing ECF No. 1 at 68-71). Additionally, Judge Gonzales informed Mandawala that the state court did not have jurisdiction over federal claims, stating, "you seem to try to be alleging some federal law complaints, which certainly this court would not have jurisdiction over." ECF No. 1 at 68. Thus, Mandawala's allegation that he was denied due process at the state hearing fails as a matter of law.

For the reasons expressed above, Mandawala has failed to state a claim under 42 U.S.C. § 1983, § 1985(2) or § 1986 and these claims are dismissed.

D. Breach of Contract

Defendants contend the amended complaint does not allege the required elements or the factual support for breach of contract, to wit: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." ECF No. 23 at 13 (quoting Smith Int'l, Inc. v. Egle Group, LLC, 490 F.3d 380, 387 (5th Cir. 2007)).

Defendants contend the amended complaint does not allege the required elements or the factual support for conversion, to wit: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff's rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property. ECF No. 23 at 13 (citing Smith v. Maximum Racing, Inc., 136 S.W.3d 337, 341 (Tex. App.—Austin 2004, no pet.)).

The amended complaint alleges Mandawala entered into a contract with Baptist by which it promised to provide education sufficient to prepare him to work as a sonography technician in exchange for payment for said education. Mandawala alleges he tendered performance by paying for and participating in the courses. Mandawala alleges that the contract required Mandawala to complete a specific number and certain types of scans to receive his diploma and required Baptist to provide the necessary equipment and instructors for the students to complete the required scans. Baptist allegedly breached the contract when it failed to supply the necessary instructors and therefore, he was unable to complete the required number of scans. Mandawala further alleges Baptist set a core curriculum. Baptist allegedly breached the agreement to provide its promised core curriculum when it changed the core curriculum without giving notice. Mandawala's alleged damages include payment for a course for which he did not receive credit due to Baptist's breach. ECF No. 22, pars. 4-35, 107-119; see also ECF No. 25 at 4.

While the circumstances differ under which courts have found contracts between students and education institutions, contracts have been found to exist. See, e.g., Univ. of Tex. Health Sci. Ctr. v. Babb, 646 S.W.2d 502, 506 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (holding that "a school's catalog constitutes a written contract between the educational institution and the patron, where entrance is under its terms"); Anyadike v. Vernon Coll., No. 7:15-cv-00157-O, 2016 U.S. Dist. LEXIS 191886, at *14-19 (N.D. Tex. Mar. 14, 2016) (finding that the college's student handbook was not a contract); Doe v. Va. Coll., LLC, No. 1:19-CV-23-RP, 2019 U.S. Dist. LEXIS 38972, at *4 (W.D. Tex. Mar. 12, 2019) (enforcing arbitration clause in college enrollment contract). In this case, construing the facts alleged in the light most favorable to Mandawala and upon drawing all reasonable inferences in his favor, Mandawala alleged facts sufficient to state a contract claim. Mandawala's allegations do not support a conversion claim.

Accordingly, the contract claim will proceed and the conversion claim will be dismissed.

E. Defamation

Defendants assert that Mandawala has not alleged facts to support a defamation claim, to wit: that the defendant (1) published a false statement of fact to a third party; (2) the statement was defamatory concerning the plaintiff; (3) the defendant acted negligently regarding the truth of the statement; and (4) in some instances, the plaintiff incurred damages. See Azadpour v. Blue Sky Sports Ctr. Of Keller, 2018 U.S. Dist. LEXIS 149606, at *7 (N.D. Tex. 2018). Additionally, Texas federal district courts require defamation claims to specifically allege "the time and place of the publication." Garrett v. Celanese Corp., 2003 U.S. Dist. LEXIS 14905, No. 3:02-CV-1485-K, 2003 WL 22234917, at *4 (N.D. Tex. 2003), aff'd, 102 Fed. Appx. 387 (2004); Jackson v. Dallas Indep. Sch. Dist., 1998 U.S. Dist. LEXIS 10328, No. CIV. A. 398-CV-1079, 1998 WL 386158, at *5 (N.D. Tex. 1998), aff'd, 232 F.3d 210 (5th Cir. 2000).

The amended complaint references emails sent between Baptist faculty, administrators, and clinical site staff, but does not allege that any statement was published to a third party. The allegation that Ms. Forminos falsely reported to Baptist that a patient complained about Mandawala is troubling. However, to state a claim, Mandawala must allege more than the existence of a potentially defamatory statement. Because this claim lacks the specificity required to state a claim, it will be dismissed.

F. Intentional Infliction of Emotional Distress

Under Texas law, intentional infliction of emotional distress has four elements: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant s actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. Mattix Hill v. Reck, 923 S.W.2d 596, 597 (Tex. 1996) (citing Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex.1993)). The defendant's conduct must have been "so outrageous in character, and so

extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Twyman, 855 S.W.2d at 621; Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 400 (5th Cir. 1996).

Intentional infliction of emotional distress is a "gap-filler" tort that was "judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." Standard Fruit and Vegetable Co. v. Johnson, 985 S.W.2d 62, 68 (Tex. 1998); Hoffmann-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004). This cause of action is "never intended to supplant or duplicate existing statutory or common-law remedies." Toronka v. Cont'l Airlines, Inc., 649 F. Supp. 2d 608, 612-13 (S.D. Tex. 2009) (quoting Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 816 (Tex. 2005)).

Here, Mandawala bases his claim for intentional infliction of emotional distress on the same underlying conduct and facts as the other claims under which he seeks to recover. Mandawala did not allege any additional facts in support of his intentional infliction of emotional distress claim. Thus, upon construing the facts asserted in the complaint in the light most favorable to Mandawala and upon drawing all reasonable inferences in his favor, the Court must conclude Mandawala cannot assert facts to support a claim for intentional infliction of emotional distress.

Even if Mandawala were allowed to re-plead this cause of action, he cannot assert an intentional infliction of emotional distress claim, as it is based on the same underlying conduct as his claims for discrimination. Therefore, Mandawala's intentional infliction of emotional distress claim is dismissed.

CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss (ECF No. 23) is GRANTED IN PART AND DENIED IN PART.

In the Order denying Defendants' first motion to dismiss, this Court provided to Mandawala a statement of the complaint's deficiencies. The Court has read the amended complaint and response to Defendants' current motion to dismiss liberally, affording Mandawala the benefit of any doubt. The Court accepted as true the allegations of material fact in the amended complaint and construed them in the light most favorable to Mandawala. In each instance in which the Court concluded that a claim must be dismissed, it did not find any deficiencies that could be cured by amendment. Thus, dismissal of these claims with prejudice is warranted because Mandawala has previously been granted leave to amend after being apprised of the deficiencies in his pleading.

Accordingly, the following claims are DISMISSED WITH PREJUDICE: Title VI (discrimination based on race or national origin); First Amendment (retaliation); Fourteenth Amendment (due process); 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; Conversion; Defamation; Intentional Infliction of Emotional Distress. The following claims SHALL PROCEED: Title IX (discrimination based on sex); Contract.

The Court's previous Order granted Mandawala leave to amend his complaint to name the proper parties. The amended complaint names Baptist School of Health Professions, TENET, Blaine Holbrook, and Nicki Elgie. Accordingly, the following Defendants are DISMISSED from this lawsuit: North Central Baptist Hospital, St. Luke's Hospital, Baptist Medical Center, Resolute Hospital, Mission Trails Baptist Hospital. The claims that are proceeding do not implicate Defendants Blaine Holbrook and Nicki Elgie. Accordingly, Defendants Blaine Holbrook and Nicki Elgie are DISMISSED from this lawsuit.

It does not appear that TENET has been served. Accordingly, on or before September 30, 2020, Plaintiff Symon Mandawala shall SHOW CAUSE why TENET should not be dismissed from this lawsuit. This matter is set for status conference before the undersigned on October 2, 2020 at 11:00 AM. An order specifying whether

the conference will proceed in person or via Zoom will follow.

It is so ORDERED.

SIGNED this 3rd day of September 2020.

JASON PULLIAM
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-19-CV-01415-JKP-ESC

SYMON MANDAWALA,
Plaintiff,

V.

BAPTIST SCHOOL OF HEALTH PROFESSIONS,
TENET,
Defendants.

ORDER

This matter is before the Court sua sponte. For the reasons set forth in this Court's Order, entered this day, see ECF No. 34 at 17, Northeast Baptist Hospital is DISMISSED from this lawsuit.

It is so ORDERED this 3rd day of September 2020.

JASON PULLIAM
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-19-CV-01415-JKP-ESC

SYMON MANDAWALA,
Plaintiff,

V.

BAPTIST SCHOOL OF HEALTH PROFESSIONS,
ALL COUNTS; AND TENET,
Defendants.

ORDER

In the Memorandum Opinion and Order issued September 3, 2020, the Court directed Plaintiff to show cause on or before September 30, 2020, why TENET should not be dismissed from this action. See ECF No. 34 at 18. As of the date of this Order, Plaintiff has not responded. Accordingly, for the reasons set forth in the above referenced Memorandum Opinion and Order, TENET is DISMISSED from this action.

It is so ORDERED.

SIGNED this 23rd day of November 2020.

JASON PULLIAM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-19-CV-01415-JKP-ESC

SYMON MANDAWALA,
Plaintiff,

V.

BAPTIST SCHOOL OF HEALTH PRO-FESSIONS,ALL COUNTS; NORTH-EAST BAPTIST HOSPITAL, COUNT 1, 2, AND 11; AND BLAIN HOLBROOK, COUNT 4, 5, 6 AND 11,

Defendants.

ORDER

This matter is before the Court on Defendants' Baptist School of Health Professions, Northeast Baptist Hospital, and Blaine Holbrook (collectively, "Defendants") Motion to Dismiss (ECF No. 6) to which Plaintiff Symon Mandawala ("Mandawala") responded (ECF No. 9) and Defendants replied (ECF No. 11); Defendants' Motion to Strike Plaintiff's Amended Complaint (ECF No. 14); and Plaintiff's Motion to Add a Party as a Defendant (ECF No. 17). The motions are ripe for ruling. Having considered all of the parties' filings, plaintiff's complaint, and the applicable legal authorities, the Court denies the motion to dismiss without prejudice, grants the motion to strike, and grants the motion to add a party. If plaintiff desires to pursue this action, he is ORDERED to file an amended complaint no later than thirty (30) days after the date of this Order, remedying the deficiencies discussed below. If plaintiff no longer wishes to pursue this action, he may request a voluntary dismissal of the action pursuant to Federal Rule of Civil Procedure 41(a).

I. LEGAL STANDARDS

When presented with a motion to dismiss under Rule 12(b)(6), a court generally "must assess whether the complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face[.]" United States v. Bollinger Shipyards Inc., 775 F.3d 255, 257 (5th Cir. 2014) (internal citations and quotation marks omitted). When reviewing the complaint, the "court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004) (internal quotation marks omitted) (quoting Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . .; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief. Fed. R. Civ. P. 8(a). "Each allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).

II. PROCEDURAL HISTORY

On January 23, 2018, Mandawala initiated a petition against Baptist School of Health Professions in Bexar County Small Claims Court. ECF No 1 at 35. On September 7, 2018, the petition was dismissed for lack of jurisdiction because damages exceeded $10,000. Id. at 36. Mandawala then filed a petition in Bexar County District Court which was dismissed on October 8, 2019 for failure to state a claim. ECF No. 1 at 70:7-73:3. On October 15, 2019, Mandawala filed a motion for reconsideration of the state court decision. ECF No. 6 at 2. On December 5, 2019, Mandawala filed the above captioned cause of action. ECF

No. 1. Plaintiff's state court motion for reconsideration was denied on December 23, 2019. ECF No. 6 at 2.

III. FACTUAL ALLEGATIONS

Accepted as true and taken in the light most favorable to him, Mandawala alleges the following. Mandawala was an ultrasound technician student at the Baptist School of Health Professions ("Baptist"). Mandawala received poor grades in the practicum sections of the curriculum not because of his ability or skill but because he was allotted insufficient opportunities to conduct scans and because he was tasked with specialized ultrasounds outside the bounds of the curriculum and his training. Mandawala further alleges that when he brought these issues to the attention of Baptist, rather than address the issues, it said that Mandawala's behavior was unprofessional. The staffing shortage meant that Mandawala was not able to complete the number of scans required to pass and Mandawala had to re-take the class, incurring a second class fee. He passed the second class but he was not allowed to graduate due to allegations that his behavior was unprofessional and he had violated hospital policies.

IV. DISCUSSION

A. Counts One and Two: Discrimination Based on Race and Gender Title VI provides, in pertinent part: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To state a claim for discrimination under Title VI, a plaintiff must plausibly allege defendant (1) received federal financial assistance, and (2) intentionally discriminated against him on the basis of race, color, or national origin. Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (emphasizing that a private right of action is available only for intentional discrimination); Kamps v. Baylor Univ., 592 F. App'x 282, 286 (5th Cir. 2014) (noting Title VI prohibits only intentional discrimination).

Title IX provides, in pertinent part: "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Thus, in its most basic formulation, to state a claim for discrimination based on sex under Title IX a plaintiff must plausibly allege the defendant (1) received federal financial assistance, and (2) excluded him from participation in defendant's educational programs because of his sex. Cannon v. Univ. of Chicago, 441 U.S. 677, 680, 717 (1979).

In a private cause of action, the plaintiff must allege that an "appropriate person"—an official authorized to institute corrective measures—had "actual knowledge" of the discrimination and responded with "deliberate indifference." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). "[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." Id. at 290. The failure to respond "must amount to deliberate indifference to discrimination." Id.

In support of his discrimination claims, Mandawala alleges that the reasons given for his poor grades, his having to re-take the class, and his being moved from one clinical site to another were all "pretext to hide the Defendant's discriminatory animus." ECF No. 1 at 24. Mandawala also alleges he was removed from his clinical placement in favor of a female student, alleging, "plaintiff is a black person who was discriminated by instructor Debora who prefers white female students." Id. at 14; ECF No. 9 at 8. Mandawala, however, fails to plead sufficient facts from which the Court could infer that the Defendants named in his Complaint engaged in intentional discrimination based on his race or gender. Mandawala advances his subjective belief that clinical instructor Debra Femines's actions were motivated by discrimination and his

Complaint implies that at one clinical site, he and his male instructor were more compatible than he and his female instructor. However, Mandawala's facts allege only a "sheer possibility" that the named Defendants "acted unlawfully" Iqbal, 556 U.S. at 678.

Mandawala plainly believes that Defendants treated him unfairly. However, Title VI and Title IX proscribe only intentional discrimination. Thus, it is insufficient for plaintiff to allege that he is an African American young man and therefore unfavorable treatment must be based on his race or gender. As presented, Mandawala's Complaint does not allege a claim for relief under Title VI or IX that is plausible on its face. Twombly, 550 U.S. at 570.

B. Count Three[1]

Defendants contend "[i]t is entirely unclear what cause of action Plaintiff is attempting to assert under count three." ECF No. 6 at 6. The Court agrees. Mandawala's response provides no additional clarification. Instead, it places the burden on the Court to discern his claims. See ECF No. 9 at 7 (stating that plaintiff's allegations are not for defendant

[1] Plaintiff styled this count: Violation of Right to Self-determination under 1st and 26th Amendment of the U.S. Constitution. To state a retaliation claim in the context of a Title IX claim, a plaintiff must establish a prima facie case by plausibly alleging: (1) he engaged in a protected activity, (2) the school or its representatives took an adverse action against him, and (3) a causal connection exists between the protected activity and the adverse action. Muslow v. Bd. of Supervisors of La. State Univ., No. 19-11793, 2020 U.S. Dist. LEXIS 65368, at *50 (E.D. La. Apr. 14, 2020) (collecting cases). Causation is plausibly alleged when the plaintiff establishes a defendant knew that the plaintiff "engaged in any protected activity" at the time of the alleged retaliation. Collins v. Jackson Pub. Sch. Dist., 609 F. App'x 792, 795 (5th Cir. 2015) (quoting Watts v. Kroger Co., 170 F.3d 505, 512 (5th Cir. 1999)). Because not all speech is protected by the First Amendment, to allege a plausible claim that his speech was the basis for the school's retaliation, a student must identify the statements he relies on. Judeh v. La. State Univ. Sys., No. 12-1758, 2013 U.S. Dist. LEXIS 55574, at *12 (E.D. La. Apr. 18, 2013). A claim that an educational institution exacted discipline without first affording notice and an opportunity to be heard, requires a plaintiff to allege facts sufficient to show (1) that he was deprived of a liberty or property interest protected by the Due Process Clause, and (2) that he was

to determine; rather, it is thecourt's job "to draw the conclusions if the plaintiff's claims are plausible"). While it is the Court's job to determine if Mandawala has plausibly alleged his claims, a plaintiff must allege a minimum factual and legal basis for each claim from which a court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (internal citation omitted). While this Court has construed Mandawala's pleading liberally, affording him the benefit of any doubt, Mandawala has failed to allege sufficient factual matter for the Court to cognize any claim under Count Three of his Complaint.

C. Count Four: Conspiracy

Mandawala alleges Judge Norma Gonzales and Attorney Holbrook conspired to dismiss his state court petition. The factual basis for Mandawala's claim is that prior to the October 8, 2019 hearing, Attorney Holbrook and Judge Gonzales exchanged documents ex parte. ECF No.1 at 26. In general terms, conspiracy requires (1) an agreement (2) between or among two or more separate persons (3) to do an unlawful act. Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017). As explained above, subjective beliefs and conclusory allegations are insufficient to state a claim. Thus, Mandawala's subjective belief that Attorney Holbrook and Judge Gonzales conspired to dismiss his case is insufficient to state a claim of conspiracy. A plaintiff must support his claims with facts. To avoid dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678.

Mandawala alleges that prior to the state court hearing, which resulted in the dismissal of his state court case, Attorney Holbrook took documents into Judge Gonzales's chambers and Judge Gonzales was carrying the same documents when she took the bench for the hearing. ECF No. 1 at 18.

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deprived of that interest without constitutionally adequate process. Id. at *13.

However, any suggestion of wrongdoing by Judge Gonzales is contradicted by the transcript attachedto Mandawala's Complaint. The transcript shows Judge Gonzales considered all of the pleadings in the matter, heard the arguments of the parties, and informed Mandawala that he could appeal her ruling. Id. at 68-71. Absent facts that establish the elements of a conspiracy, Mandawala fails to state a claim sufficient to survive a motion to dismiss.

D. Counts Five and Six: Depriving Rights Under Color of Law

Plaintiff's complaint appears to allege that Judge Gonzales's comment that a federal claim must be brought in Federal Court violated the Supremacy Clause. ECF No. 1 at 27-28; 69. Mandawala further appears to believe Defendants conceded that Mandawala alleged "a valid, cognizable cause of action in his [state court] petition" and, therefore, Defendants cannot now change course and contend that Mandawala has not stated a claim. ECF No. 9 at 5. Mandawala has mis-read Defendants' answer to his state court petition. In their answer, Defendants denied that Mandawala alleged a valid, cognizable cause of action in his petition, and at the same time, Defendants asserted a defense of contributory negligence. ECF No. 1 at 37. Accordingly, Mandawala failed to allege any cognizable claim in Counts Five and Six of his Complaint.

E. Counts Seven, Eight, and Nine: Breach of Educational Contract

Mandawala's Complaint alleges, and his Response clarifies, that Baptist breached a contract when it failed him based on his inability to complete the requisite number of scans. ECF No. 9 at 7. Mandawala alleges his inability to complete the required scans was due to issues that were not in his control, e.g. scheduling, coordination, staff refusal to allow Mandawala to perform scans. ECF No. 1 at 28-31. Mandawala complains of having to pay to re-take the class when it was not his fault that he did not complete the requirements. Mandawala takes exception to the characterization of his conduct as "unprofessional" because

he believes he was following the directions of the instructors and the program policies. Id. To the extent Mandawala attempts to allege a contract claim, he alleges no facts that show the existence of a valid contract or that on the basis of race Defendants prevented him from making, performing, modifying, or terminating a contract.

In Texas, the elements of a breach of contract action are: "(1) the existence of a valid contract; (2) performance or tender of performance; (3) breach by the defendant; and (4) damages resulting from the breach." Oliphant Fin., LLC v. Galaviz, 299 S.W.3d 829, 834 (Tex. App.—Dallas 2009, no pet.) (citing Hussong v. Schwan's Sales Enters., Inc., 896 S.W.2d 320, 326 (Tex. App.—Houston [1st Dist.] 1995, no writ)). Section 1981 prohibits race discrimination in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(a)-(b). To establish a prima facie case of discrimination under § 1981, "a plaintiff must first establish: (1) he is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute." Dunaway v. Cowboys Nightlife, Inc., 436 F. App'x 386, 390 (5th Cir. 2011) (citing Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 751 (5th Cir. 2001)). Mandawala's allegations are insufficient to meet these standards.

F. Count Ten: Character Damage

Mandawala alleges he was not given notice and an opportunity to be heard when he was accused, found guilty of, and failed for not following policy and for other "misconduct." Mandawala further alleges that after concluding he had violated policy and engaged in misconduct, Baptist did not allow him to graduate. Accordingly, as to Defendant Baptist School of Health Professions, Mandawala has alleged facts sufficient at the motion to dismiss stage to show (1) that he was deprived of a liberty or property interest protected by the Due Process Clause, and (2) that he was deprived of that interest

without constitutionally adequate process. Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 930 (Tex. 1995) (holding the plaintiff had a constitutionally protected liberty interest in his graduate education that must be afforded procedural due process) (citing Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961)).

Mandawala alleges that his character (good name, reputation, honor, integrity) was impugned when he was labeled "unprofessional" and that label was spread throughout the school and the clinical sites via email. Defamation claims must specifically state the time and place of publication as well as identifying the alleged defamatory statement and the speaker. Jackson v. Dall. Indep. Sch. Dist., No. 3:98-CV-1079-D, 1998 U.S. Dist. LEXIS 10328 (N.D. Tex. July 2, 1998). Mandawala's allegations are insufficient to meet this standard.

G. **Count Eleven**: Intentional Infliction of Emotional Distress (IIED)

A plausibly alleged IIED claim establishes that (1) the defendant "acted intentionally or recklessly; (2) its conduct was extreme and outrageous; (3) its actions caused h[im] emotional distress; and (4) the emotional distress was severe." Kroger Tex. Ltd. P'ship v. Suberu, 216 S.W.3d 788, 796 (Tex. 2006). "Extreme and outrageous" is only satisfied if the conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Hersh v. Tatum, 526 S.W.3d 462, 468 (Tex. 2017) (quoting Suberu, 216 S.W.3d at 796 quoting Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993)). See also GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 612-13 (Tex. 1999) (commenting that mere insults, indignities, threats, annoyances and petty oppressions do not rise to the level of extreme and outrageous conduct; the conduct required for an IIED claim must be so severe no reasonable person could be expected to endure it). Mandawala's allegations are insufficient to meet this standard.

H. Leave to Amend

With the exception of his due process claim, the Court finds Mandawala's Complaint fails to set forth a minimal factual basis for each claim that is sufficient to give each defendant fair notice of what plaintiff's claims are and the grounds upon which they rest. Since plaintiff is a pro se litigant, the Court must construe the allegations of the Complaint liberally and must afford plaintiff the benefit of any doubt. That said, a plaintiff's complaint must be adequate to meet the minimal requirement of Rule 8 that a pleading set forth sufficient factual allegations to allow each defendant to discern what he or she is being sued for. Twombly, 550 U.S. at 555 ("[f]actual allegations must be enough to raise a right to relief above the speculative level"). In addition, the Supreme Court has held that, while a plaintiff need not plead the legal basis for a claim, the plaintiff must allege "simply, concisely, and directly events" that are sufficient to inform the defendants of the "factual basis" of each claim. Johnson v. City of Shelby, Miss., 574 U.S. 10, 12 (2014) (per curiam) (citing Fed. R. Civ. P. 8(a)(2)-(3), (d)(1), (e)).

Thus, the Court grants Mandawala leave to amend his Complaint. Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002). Mandawala is admonished that each allegation must be simple, concise, and direct as required by Fed. R. Civ. P. 8(d)(1) and the amended complaint must be complete in and of itself without reference to the original Complaint or any other pleading. If Mandawala fails to timely file an amended complaint or fails to remedy the deficiencies of this pleading as discussed herein, the Court will dismiss this action with prejudice.[2]

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[2] "Ordinarily, 'a pro se litigant should be offered an opportunity to amend his complaint before it is dismissed.' . . . Granting leave to amend, however, is not required if the plaintiff has already pleaded [his] 'best case.' A plaintiff has pleaded [his] best case after [he] is apprised of the insufficiency of [his] complaint." Wiggins v. La. State Univ.-Health Care Servs. Div., 710 F. App'x 625, 627 (5th Cir. 2017) (per curiam) (quoting Brewster v. Dretke, 587 F.3d 764, 767-68 (5th Cir. 2009); citations and internal quotation marks omitted).

V. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss (ECF No. 6) is DENIED without prejudice; Defendants' Motion to Strike Plaintiff's Amended Complaint (ECF No. 14) is GRANTED as Plaintiff is permitted only to file an amended complaint that remedies the deficiencies of this pleading; and Plaintiff's Motion to Add a Party as a Defendant (ECF No. 17) is GRANTED to the extent that Plaintiff may add or remove defendants as appropriate in the amended complaint permitted herein. If Plaintiff desires to pursue this action, he is ORDERED to file an amended complaint no later than thirty (30) days after the date of this Order, remedying the deficiencies discussed above.

It is so ORDERED.

SIGNED this 30th day of April 2020.

JASON PULLIAM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-19-CV-01415-JKP-ESC

SYMON MANDAWALA,
Plaintiff,

V.

BAPTIST SCHOOL OF HEALTH PRO-FESSIONS, ALL COUNTS; NORTH-EAST BAPTIST HOSPITAL, COUNT 1, 2, AND 11; AND BLAIN HOLBROOK, COUNT 4, 5, 6 AND 11,

Defendants.

ORDER

On this date, the Court considered the status of this action and concludes that mediation is in the best interests of the parties and judicial economy. The Court further concludes the parties will benefit by the appointment of counsel to represent Plaintiff for the purpose of mediation. Accordingly, the Court enters the following orders:

The Court ORDERS the parties to mediate this case and to complete mediation on or before March 31, 2021. Any joint motion for mediation before a United States Magistrate Judge must be filed on or before February 1, 2021.

Mediation is a mandatory but non-binding settlement conference wherein the parties attempt to resolve their differences with the assistance of a third-party facilitator. All proceedings in a mediation session are confidential and protected from discovery. No subpoenas, summons, citations, or other process shall be served at or near the location of any mediation session, upon any person

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-19-CV-01415-JKP-ESC

SYMON MANDAWALA,
Plaintiff,

V.

BAPTIST SCHOOL OF HEALTH PRO-FESSIONS, ALL COUNTS;
Defendants.

ADVISORY TO THE COURT OF DEFENDANT BAPTIST SCHOOL OF HEALTH PROFESSIONS

Pursuant to the Court's request at the December 8, 2020 status conference, Defendant hereby advises the Court that it is agreeable to an early mediation. Defendant reached out Plaintiff (pro se) to ascertain his position. Plaintiff's response is attached at Exhibit A.

Respectfully submitted,

/s/ Nicki K. Elgie
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Additional material from this filing is available in the Clerk's Office.