NOT FOR PUBLICATION

FILED

MAR 7 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVELYN HOWELL MASSEY, Plaintiff-Appellant, v. BIOLA UNIVERSITY, INC., a California Non-Profit Religious Corporation; DOES, 1 to 10, Inclusive, Defendants-Appellees.	No. 20-56128 D.C. No. 2:19-cv-09626-CJC-JDE MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Submitted March 7, 2022**

Before: D.W. NELSON, FERNANDEZ, and SILVERMAN, Circuit Judges.

Evelyn Howell Massey appeals pro se the district court's order dismissing her discrimination action against Biola University, Inc. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal for failure to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

state a claim. *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 946 (9th Cir. 2020) (citation omitted). We affirm.

Massey failed to state a Title IX claim because her second amended complaint did not allege discrimination on the basis of sex. *See id.* (elements of Title IX claim).

Massey failed to state a Title VI claim because she did not sufficiently allege either that Biola University engaged in race discrimination or that officials with power to take corrective measures were deliberately indifferent to known acts of discrimination. *See Yu v. Idaho State Univ.*, 15 F.4th 1236, 1242 (9th Cir. 2021); *see also United States v. Cty. of Maricopa*, 889 F.3d 648, 652 (9th Cir. 2018).

Massey failed to state a First Amendment or due process claim under 42 U.S.C. § 1983 because Biola University did not act under color of state law. *See Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1013 (9th Cir. 2020) (reasoning that receipt of government funds "is insufficient to convert a private university into a state actor.").

The district court properly declined to exercise supplemental jurisdiction over Massey's state law claims after dismissing all of her federal claims. *See* 28 U.S.C. § 1367(c)(3); *Platt v. Moore*, 15 F.4th 895, 909 (9th Cir. 2021).

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EVELYN HOWELL MASSEY,
Plaintiff,
v.
BIOLA UNIVERSITY, INC., et al.,
Defendants.

No. 2:19-cv-09626-CJC (JDE)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff shall take nothing by this action;

2. Plaintiff's Title IX, Title VI, and First Amendment claims asserted in the operative Second Amended Complaint are dismissed with prejudice; and

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3. Plaintiff's remaining state law claims (Breach of Contract and alleged violations of Cal. Educ. Code § 94367) are dismissed without prejudice to assertion in state court.

Dated: October 20, 2020

CORMAC J. CARNEY

United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EVELYN HOWELL MASSEY,
Plaintiff,
v.
BIOLA UNIVERSITY, INC., et al.,
Defendants.

No. 2:19-cv-09626-CJC (JDE)

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records on file, including the operative Second Amended Complaint (Dkt. 48, "SAC") filed by Plaintiff Evelyn Howell Massey ("Plaintiff"), the Motion to Dismiss the SAC (Dkt. 51, "Motion to Dismiss"), the Motion to Strike Portions of the SAC (Dkt. 50, "Motion to Strike"), and the Errata re the Motion to Dismiss (Dkt. 52) filed by Defendant Biola University, Inc. ("Biola"), Plaintiff's Oppositions to the Motions (Dkt. 62, 63), Biola's Reply Briefs in support of the Motions (Dkt. 65, 66), Plaintiff's "Response" (Dkt. 68), the Report and Recommendation of the assigned Magistrate Judge (Dkt. 70, "Report"), the

Objections to the Report filed by Plaintiff (Dkt. 75), and Biola's Response to Plaintiff's Objections to the Report (Dkt. 77).

The Court has engaged in a de novo review of those portions of the Report to which objections have been made. The Court accepts the findings and recommendation of the magistrate judge.

Therefore, IT IS HEREBY ORDERED that:

1. The Motion to Dismiss (Dkt. 51) is GRANTED as to all claims without leave to amend;
2. The Motion to Strike (Dkt. 54) is deemed moot in light of the ruling above;
3. Plaintiff's Title IX, Title VI, and First Amendment claims are dismissed with prejudice;
4. Plaintiff's state law claims (Breach of Contract and alleged violations of Cal. Educ. Code § 94367) are dismissed without prejudice to assertion in state court; and
5. Judgment shall be entered dismissing this action accordingly.

Dated: October 20, 2020

CORMAC J. CARNEY

United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

EVELYN HOWELL MASSEY,
Plaintiff,
v.
BIOLA UNIVERSITY, INC., et al.,
Defendants.

Case No. 2:19-cv-09626-CJC-JDE

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.
INTRODUCTION

On November 8, 2019, Plaintiff Evelyn Howell Massey ("Plaintiff"), proceeding pro se and in forma pauperis, filed a Complaint against Defendant Biola University, Inc. ("Defendant") and Does 1-10 arising from her allegedly wrongful administrative withdrawal from the university. Dkt. 1. After

Defendant filed a motion to dismiss and motion to strike (Dkt. 14-15), on January 16, 2020, Plaintiff filed a First Amended Complaint. Dkt. 29 ("FAC"). In light of the FAC, the Court denied the motion to dismiss and motion to strike as moot. Dkt. 30.

On February 6, 2020, Defendant filed a motion to dismiss the FAC and motion to strike. Dkt. 32-33. On April 10, 2020, the undersigned issued a Report and Recommendation ("R&R"), recommending that the motion to dismiss be granted and the motion to strike be denied as moot. Dkt. 46. On May 13, 2020, the District Judge accepted the R&R, dismissing the FAC with leave to amend. Dkt. 47. Plaintiff was advised in the R&R that if she elected to file an amended complaint and the allegations remained deficient, the undersigned was unlikely to grant or recommend further leave to amend. Dkt. 46 at 20.

Plaintiff filed the operative Second Amended Complaint ("SAC") on June 11, 2020, together with over 350 pages of exhibits. Dkt. 48.[1] The SAC asserts the following claims against Defendant: (1) Breach of Contract; (2) violation of Title IX of the Education Amendments of 1972; (3) violation of Title VI of the Civil Rights Act of 1964; and (4) violations of the First Amendment and Cal. Educ. Code § 94367.[2]

On July 1, 2020, Defendant filed a Motion to Dismiss the SAC under Fed. R. Civ. P. 12(b)(6) on the ground that Plaintiff failed to state facts sufficient to state a claim for relief, together with a request for judicial notice. Dkt. 51 ("Motion"). On the same date, Defendant filed a Motion to Strike under Fed. R. Civ. P. 12(f). Dkt. 50 ("Motion to Strike"). Plaintiff filed Oppositions to the Motion to Strike (Dkt. 62) and Motion (Dkt. 63) on July 30,

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[1] All citations to the exhibits are to the CM/ECF pagination.

[2] Although Plaintiff purports to name ten Doe Defendants, she does not assert any claims against them.

2020, and attached numerous documents to her Opposition to the Motion.[3] Defendant filed Reply briefs on August 6, 2020, together with a second request for judicial notice. Dkt. 65-66. On August 18, 2020, the Court received Plaintiff's "Request for Judicial Notice in Support of Plaintiff's 2nd Amended Complaint and Opposition to Defendants Motion to Dismiss and Strike; Reply." Dkt. 68 ("Request"). This Request was filed in violation of Local Civil Rule 7-10 and as of the hearing date, Defendant had not received a copy. Nonetheless, in an abundance of caution, the Court has considered this additional brief for purposes of determining whether leave to amend should be granted and in light of Defendant's request for judicial notice filed in support of its Reply.

The Court held a telephonic hearing on the Motions on August 20, 2020, at which all parties had an opportunity to address the Motions and the propriety of leave to amend. Although the Court posted a tentative ruling on August 19, 2020, the parties had not reviewed the tentative prior to the hearing. As such, the Court provided an oral tentative ruling at the hearing.

For the following reasons, the undersigned recommends that the Motion be granted, the Motion to Strike be denied as moot, and this action be dismissed without leave to amend.

II.

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[3] The Court declines to strike these exhibits as requested by Defendant as a violation of Local Civil Rule 11-6 (Reply, Dkt. 65 at 1 n.1) as most of the documents were either attached to the SAC or incorporated by reference. As to any additional documents, the Court may not consider such documents in ruling on a Rule 12(b)(6) motion to dismiss, Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss."); see also Sagan v. Apple Comput., Inc., 874 F. Supp. 1072, 1076 n.1 (C.D. Cal. 1994) (explaining that the court's "analysis is limited to the four corners of the complaint"), but has considered such documents in evaluating whether leave to amend should be granted.

SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff alleges between 2014 and 2018, she was a student at Defendant university and had "issues" with several professors, which ultimately resulted in her administrative withdrawal from the university.

A. Allegations Regarding Prof. David Rimoldi

Plaintiff alleges in the Fall Semester of 2015, she began having problems with Prof. David Rimoldi ("Rimoldi"), the facilitator for her spiritual formation course. SAC ¶ 9. As part of Defendant's requirements, Rimoldi "made demands" for Plaintiff to share her personal reactions, feelings, and thoughts after prayer assignments. Plaintiff did not agree with the requirement, and claims she told Rimoldi that her prayers to God were personal and private. Id. She avers that she received "lower points" on her assignments because she refused to comply with this requirement. Id.

B. Allegations Regarding Prof. Kevin Van Lant

Plaintiff alleges during the Spring 2016 Semester, she enrolled in Prof. Kevin Van Lant's ("Van Lant") pastoral care and counseling course. Plaintiff avers Van Lant did not return several of her assignments with evaluation, and she scheduled conferences to discuss her concerns. During these conferences, Plaintiff maintains she "learned" Van Lant had "a personal romantic/sexual interest" in her. SAC ¶ 10.

After she received a B- in this course, which "was a shock" to her as she has a Master of Science Degree in Counseling from La Verne University with a 3.95 GPA, she received approval to retake Van Lant's course, as well as several others. SAC ¶¶ 11-12.

Plaintiff asserts she did not enroll in Van Lant's course in the Fall of 2016; instead, she tried to do an independent study, but other professors were not available. SAC ¶ 12. She claims in September 2016, she gave Van Lant a "very personal confidential (response to his advances) notification," explaining

she would not get involved with him because he was married and confirmed her Christian values and respect for the marriage union he had with his wife. Id. ¶ 13. On October 10, 2016, she emailed Van Lant, informing him that she was not enrolling in his Fall 2016 course. According to Plaintiff, she believed "the problem was resolved." Id.

Plaintiff alleges that on or about October 14, 2016, she learned Van Lant had given the "personal response letter" and email to his department chairperson. She was "extremely angry" with Van Lant for sharing the letter as she had a goal of becoming a professor at the university. On October 14, 2016, she emailed Van Lant asking if he shared the letter, but did not receive a response. SAC ¶¶ 14-15. She emailed him again the following day, calling him a "Dumb Ass" if he shared the letter and telling him to never "come near [her] again." Id. ¶ 17.

Plaintiff alleges she did not have any further communications with Van Lant from October 15, 2016 to February 2017. SAC ¶ 18. In the Fall of 2016, Van Lant notified Campus Safety that he was concerned about Plaintiff's conduct and was interviewed on November 21, 2016. Id. ¶ 21, Exh. 1, Dkt. 48-1 at 22. On January 30, 2017, Campus Safety sent Plaintiff a "No Contact" letter directing her not to make any direct or indirect contact with Van Lant, though Plaintiff claims she did not receive this letter. Id. ¶ 5, Exh. 1, Dkt. 48-1 at 12-13. She avers that she later received a copy of the letter on October 2, 2018. Id. ¶ 5.

In the Spring of 2017, Plaintiff alleges she enrolled in Van Lant's course because he was the only professor offering the counseling course and she had been unable to secure an independent study. On or about the first day of class, Plaintiff claims she received a notification to meet with Campus Safety. No explanation was provided. At this meeting, Plaintiff was allegedly informed that she was being taken out of Van Lant's course. At the end of the meeting,

she purportedly provided the October 14 and 15, 2016 "emails" to the Chief of Campus Safety, who Plaintiff claims did not attend the meeting. SAC ¶¶ 18-19.

Plaintiff alleges that she again tried to enroll in Van Lant's course in the Fall of 2018. According to Plaintiff, she contacted Associate Provost Pat Pike ("Pike") on April 3, 2018 about retaking Van Lant's course, including Van Lant on the email. SAC ¶ 28. Pike purportedly told Plaintiff in a responsive email the same day that "she was going to handle the retake course problem and she would get back to Plaintiff with an answer." Id. Plaintiff alleges she did not hear anything further from Pike regarding this issue. Id. ¶ 29.

C. Allegations Regarding Prof. Ben Shin

Plaintiff claims during the Fall 2017 Semester, she also had issues with Prof. Ben Shin ("Shin"), who taught a new testament survey course. SAC ¶ 22. During Shin's lectures, he allegedly referred to Plaintiff as an "overachiever," which she claims is demeaning and insulting in the African American culture. Id. ¶ 23.

Plaintiff also alleges she had concerns about Shin's lectures and the lack of clarity with his quizzes, a concern allegedly shared by other students. SAC ¶ 22. When she purportedly tried to schedule conferences with Shin to discuss her concerns, she did not receive a response. When they finally spoke, Plaintiff asserts Shin was "extremely rude" so she hung up on him and later emailed him about his behavior. On November 2, 2017, Shin allegedly filed a report against Plaintiff with Campus Safety. Id. ¶ 24. On November 10, 2017, Plaintiff allegedly had a meeting with Pike, Assistant Dean of Talbot School of Theology Aaron Devine ("Devine"), and a note taker. Id. ¶ 25. Another meeting was allegedly held on December 7, 2017 between Plaintiff, Shin, and Pike to resolve their differences. As a result, Plaintiff claims her relationship with Shin was restored and a positive outcome was reached. Id. ¶ 26.

D. Allegations Regarding Prof. Walter Russell

Plaintiff avers she was "track[ed], stalk[ed], and was physically followed" by Retired Prof. Walter Russell and other Defendant staff members on campus. She claims she reported this behavior to Campus Safety, as well as the La Mirada and Norwalk Sheriff's Departments. SAC ¶ 22.

E. Allegations Regarding Prof. Clay Jones

Plaintiff also describes issues she had with Prof. Clay Jones ("Jones"). She avers Jones wrongfully gave her a failing grade during the Spring 2017 Semester and refused to provide a sample paper as a study guide even though he provided sample guides to train teaching assistants. SAC ¶ 31. Plaintiff "believes" Jones is "a racist/bigot" as he presented PowerPoints on the KKK, which she found to be extremely offensive, failed to provide required office hours, and scheduled weekly pre-class dinners, but would not schedule conferences with Plaintiff. Id. ¶ 30.

F. Disciplinary Proceedings and Administrative Withdrawal

On July 24, 2018, Plaintiff allegedly received an email from Dean Clint Arnold ("Arnold"), accusing her of violating an oral No Contact order from the Chief of Campus Safety in Fall 2016. Plaintiff claims she did not have any communications with the Chief during the Fall 2016 Semester and responded to Arnold's email, including Van Lant on the email. SAC ¶¶ 26, 29.

On August 22, 2018, Arnold initiated disciplinary proceedings against Plaintiff. SAC ¶ 27, Exh. 26, Dkt. 48-4 at 32-34. The disciplinary proceedings were apparently based on issues with the various professors and false allegations made by Gregg Geary regarding misconduct in the library. Id. ¶¶ 27, 29, 32; see also SAC, Exh. 1, Dkt. 48-1 at 10, Exh. 26, Dkt. 48-4 at 37.

Plaintiff claims Arnold appointed Senior Associate Provost Clark Campbell ("Campbell") as an "independent Adjudicator" for the disciplinary proceedings, but asserts he was not independent and had a conflict of interest because he was employed by Defendant and worked with Van Lant and Pike.

SAC ¶ 33. As best the Court can discern, Plaintiff disputes Campbell's claim during the disciplinary proceedings that she was "not accessible to receive his letter (8/2018)" because she received Defendant's other email notifications. Id. Following his investigation, on November 8, 2018, Campbell issued a report, finding Plaintiff violated the No Contact Order and Defendant's Standards of Conduct. As a result, an Administrative Withdrawal was issued, explaining that Plaintiff must immediately cease attending classes and may only have temporary access to the campus to conduct necessary student-related business upon prior written permission from Campus Safety, tuition would be refunded, and her university email account would be closed. Id., Exh. 29, Dkt. 48-5 at 18-22. The report indicated Plaintiff would be eligible to re-apply to Defendant in no sooner than two years, with additional requirements. Id., Dkt. 48-5 at 19.

Plaintiff appealed the decision, but the Administrative Withdrawal decision was upheld. See SAC ¶¶ 6, 36, Exh. 33, Dkt. 48-5 at 37-42. She also alleges she met with Defendant's Provost and General Counsel in "an effort to reach a solution to rescind the Administrative Withdrawal," but these efforts were unsuccessful. Id. ¶ 36. She avers that she also filed complaints with the U.S. Department of Education, the Western Association of Schools and Colleges, the Association of Theological School Commission, and the California Board of Psychology. Id. ¶ 37.

Plaintiff claims that due to Defendant's actions, she lost "tens of thousands of dollars in Federal financial student aid," countless hours of preparation in assignments, resources, books, family sacrifices, and overall educational and academic progress she did not complete, and overall harm to her reputation. The Administrative Withdrawal also delayed her plan to graduate in December 2020 and resulted in the loss and delay of future scheduled career advancement and increased earnings. SAC ¶¶ 34-35.

Plaintiff requests Defendant rescind the Administrative Withdrawal;

reinstate her in good standing; reactivate her student email account; provide administrative assistance and counseling for reenrollment and coordinate courses to finish her graduation requirements; pay her tuition for the remainder of her program; pay for her books, schools supplies, typist cost, transportation, housing, meals, and student conferences; exempt her from required spiritual formation courses; remove certain grades from her transcript; destroy copies of the disciplinary proceedings and "Title IX Claim" against her; pay for an educational trip to Israel; and pay $200,000 in damages. SAC at 46-48.

III.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Dismissal for failure to state a claim may be granted where a claim: (1) lacks a cognizable legal theory; or (2) alleges insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990) (as amended). To survive a Rule 12(b)(6) dismissal, a complaint must allege enough facts to provide both "fair notice" of the particular claim being asserted and "the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 & n.3 (2007) (citation omitted); see also Fed. R. Civ. P. 8(a). While detailed factual allegations are not required, a complaint with "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" and "'naked assertion[s]' devoid of 'further factual enhancement'" would not suffice. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' 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." Id. (internal citation omitted).

In determining whether a complaint states a claim on which relief may

be granted, its allegations of material fact must be taken as true and construed in the light most favorable to the plaintiff. See Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 556 U.S. at 678. Courts need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. See Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003).

Pro se complaints are "to be liberally construed" and are held to a less stringent standard than those drafted by a lawyer. See Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted); Jackson v. Carey, 353 F.3d 750, 757 (9th Cir. 2003). But even "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)). The Court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." Lazy Y Ranch Ltd., 546 F.3d at 588. "When ruling on a motion to dismiss, [the court] may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Colony Cove Props., LLC, v. City of Carson, 640 F.3d 948, 955 (9th Cir. 2011) (citations, footnote, and internal quotation marks omitted). Under the incorporation by reference doctrine, courts also may consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleadings." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (alteration in original) (citation omitted).

Federal Rule of Civil Procedure 12(f) permits a court to "strike from a

pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The purpose of a 12(f) motion to strike is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." See Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). Motions to strike are generally disfavored and "should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation." Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F.Supp.2d 1048, 1057 (N.D. Cal. 2004). "With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party." Id.

IV.

REQUESTS FOR JUDICIAL NOTICE

Plaintiff attached portions of the letter she sent to Van Lant and a Campus Safety report. Defendant requests judicial notice of complete copies of these documents, which Plaintiff has not opposed. While it is not apparent these documents are properly subject to judicial notice (see Fed. R. Evid. 201), the Court has considered them under the incorporation by reference doctrine. See Knievel, 393 F.3d at 1076.

In its Reply brief in support of the Motion, Defendant also requests judicial notice of its Graduate Student Handbook Discipline, Sanctions, Violation of Law Policy, explaining that Plaintiff only attached a portion to the SAC. By filing this request in support of its Reply, Defendant did not provide Plaintiff an opportunity to respond. Plaintiff appears to object to this request for judicial notice in her Request. In any event, the Court finds it unnecessary to consider this document in ruling on the Motion. This request for judicial notice is denied.

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V.

DISCUSSION

A. The SAC Fails to State a Title IX Claim

Plaintiff alleges that Defendant violated Title IX by filing a "Wrongful Title IX claim" against her, "falsely accus[ing]" her of bullying, unlawful harassment, and sexual harassment. Plaintiff asserts that these "false allegations" were considered during the disciplinary proceedings, resulting in the Administrative Withdrawal. See SAC ¶¶ 52-55. She further claims that it was unlawful for Susan Kaneshiro, the Associate Director of Human Resources, who also is the Title IX deputy coordinator, to participate in an investigation of Plaintiff's claims against Defendant faculty. Id. ¶ 56.

Defendant contends that these vague and conclusory allegations fail to meet the dictates of Fed. R. Civ. P. 8 and are insufficient to state a Title IX claim as the SAC does not allege intentional sexual discrimination or that she was treated differently than similarly situated students. Motion at 27-28.

Title IX prohibits educational institutions that receive federal funds from discriminating based on sex. See Schwake v. Az. Bd. of Regents, -- F.3d --, 2020 WL 4343730, at *4 (9th Cir. 2020); Mansourian v. Bd. of Regents of the Univ. of Cal., 816 F. Supp. 2d 869, 916 (E.D. Cal. 2011). In order to state a Title IX claim, the plaintiff must plead: (1) the defendant receives federal funding; (2) the plaintiff was excluded from participation in, denied benefits of, or subjected to discrimination under any education program or activity, and (3) the latter occurred on the basis of sex. Schwake, 2020 WL 4343730, at *4. Title IX "encompass[es] diverse forms of intentional sex discrimination," including barring university discipline where gender is the motivating factor in the decision. Id. (alteration in original) (citation omitted).

Under Fed. R. Civ. P. 8(a), "a plaintiff need only provide 'enough facts to state a claim to relief that is plausible on its face.'" Austin v. Univ. of Oregon, 925 F.3d 1133, 1137 (9th Cir. 2019) (quoting Twombly, 550 U.S. at

570). The plaintiff must allege a minimum factual and legal basis for each claim that is sufficient to give defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. See Twombly, 550 U.S. at 555 & n.3; Brazil v. U.S. Dep't of the Navy, 66 F.3d 193, 199 (9th Cir. 1995); McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

Here, despite multiple attempts to meet this pleading standard and state a Title IX claim, Plaintiff has failed to do so. Again, Plaintiff fails to allege any intentional sex discrimination. Missing from the SAC are "nonconclusory allegations plausibly linking the disciplinary action to discrimination on the basis of sex." Austin, 925 F.3d at 1138. Plaintiff does not allege that the "Title IX claim" resulted from intentional discrimination, let alone identify any connection between this purported claim and her gender. Nor has Plaintiff shown how she was treated differently than similarly situated students. See Esonwune v. Regents of the Univ. of Cal., 2017 WL 4025209, at *5-6 (N.D. Cal. Sept. 13, 2017) (conclusory allegations of discrimination insufficient to plausibly establish a Title IX claim). Indeed, at the hearing on the Motion, Plaintiff conceded this point. She repeatedly explained that she was not alleging discrimination on the basis of sex. This is fatal to her Title IX claim.

Although the Title IX claim must be dismissed on this basis alone, the Court also notes that Plaintiff still has not provided sufficient factual support for her claim that Defendant filed a "Wrongful Title IX claim" against her. The Court previously advised Plaintiff that the nature of this claim was unclear, as it could not discern whether Plaintiff's claim was based on Van Lant's initial complaint, the No Contact Order, or something else. Based on the allegations of the SAC as well as the exhibit referenced, it appears she is referring to something else. Again, however, the nature of the "Wrongful Title IX claim" remains unclear. Plaintiff cites to and attaches a portion of a document entitled, "Adjudicator Policy Map," which apparently was created

by Campbell as part of the disciplinary proceedings. The "Map" includes three columns, entitled (1) "17-18 Talbot Student Handbook," (2) "Action by Student," and (3) "Violation? Yes or No." SAC, Exh. 44, Dkt. 48-7 at 38. Under the first column, it says, "pg. 56, #5 Some behaviors of bullying may also be considered unlawful harassment or discrimination. In compliance with local and national non-discrimination laws and regulations, these actions will be processed according to Title IX: Harassment Policy: See the policy on 'Discrimination & Sexual Harassment.'" Id. The second column recites various allegations regarding Van Lant, and the third column states, "Yes" multiple times. However, it is not evident from the SAC and the attached document whether Plaintiff is alleging that the findings on this chart violated her Title IX rights or whether she challenges a subsequent investigation, as referenced in the first column. At the hearing on the Motions, Plaintiff continued to refer to a Title IX "claim" and "complaint" being filed against her based on false allegations. Plaintiff's vague allegations fail to provide fair notice to Defendant of the basis for her Title IX claim.

After multiple attempts, Plaintiff still has not alleged sufficient facts to plead this claim. The Motion should be granted as to Plaintiff's Title IX claim.

B. The SAC Fails to State a Title VI Claim

Plaintiff alleges Defendant violated Title VI by Jones and Shin "deliberately exclud[ing], den[ying], and discriminat[ing] against her as a student." SAC ¶ 58. As to Jones, Plaintiff includes additional allegations that she was treated differently compared to other students, claiming that Jones discriminated against her because he would not provide her a sample term paper guide, even though he provided guides to prospective teaching assistants, and held weekly pre-class student dinners that were not serving an academic requirement or benefit. Id. ¶ 60. She also reasserts her prior allegations that she was the only person of her "ethnic group" in Jones's resurrection course in the

Spring of 2017, and claims Jones gave her a "wrongful failing grade"; denied her "the benefits of academic graduate advisor time," the opportunity to drop the course, and timely feedback on her assignment in an effort to "undermine[] and purposely sabotage[]" her opportunity to be successful in his course; and presented KKK PowerPoints during his lectures, which were "extremely offensive" to her. Id. As to Shin, Plaintiff reasserts her claim that Shin called her an "[o]verachiever" "due to her racial ethnicity" during his Fall 2017 survey of the new testament course, a term she claims is "demeaning and insulting" in the Black community. Id. ¶ 61. She adds that Shin did not call the Asian or Caucasian students overachievers and claims that his comment, apparently in the context of the disciplinary proceedings, that he "[t]hought that she (Plaintiff) could bully him because he is Asian," demonstrates his "racist concerns regarding Plaintiff." Id. Plaintiff asserts that she notified Pike regarding Jones and Shin; Campbell was aware of the problems; and she emailed Arnold about the problems with Shin. Id. ¶ 62 (citing SAC, Exhs. 18, 26, 27, 47). She also includes new allegations that Defendant engaged in its "Own Misconduct," vaguely asserting "abuse of discretion," "acted arbitrarily and capriciously," and "authorities have acted in bad faith," without any factual support. Id. Instead, Plaintiff cites a 2008 employment discrimination and retaliation action filed by a former professor as evidence of Defendant's "[h]istorical [r]acist/[c]ulture." Id. ¶ 63. At the hearing, Plaintiff appeared to further claim that she was discriminated against during the disciplinary proceedings based on her ethnicity by virtue of Jones's and Shin's conduct.

Defendant contends that Plaintiff's allegations remain insufficient to state a Title VI claim. Defendant argues that the Title VI claim asserts only conclusory allegations without factual support; the SAC does not assert any action by Defendant that was substantially motivated by race; and the conduct at issue is the type of academic issues to which courts give deference to

universities. Motion at 28-29.

The Court agrees with Defendant that Plaintiff's allegations remain insufficient to plausibly state a Title VI claim. Title VI of the Civil Rights Act of 1964 provides, in pertinent part, that "[n]o person in the United States shall, on the ground 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 aid." 42 U.S.C. § 2000d. To state a claim for damages under Title VI, the plaintiff must allege the defendant is: (1) engaging in racial discrimination; and (2) is receiving federal financial assistance. Davison ex rel. Sims v. Santa Barbara High Sch. Dist., 48 F. Supp. 2d 1225, 1229 (C.D. Cal. 1998).

Here, the SAC does not allege any facts showing directly or by reasonable inference that Defendant discriminated against her on the basis of race, color, or national origin. Plaintiff's threadbare allegations and personal belief that Jones's and Shin's actions were racially motivated are purely conclusory and therefore, insufficient to state a plausible claim for relief. See Iqbal, 556 U.S. at 678-79; Thomas v. S.F. Cmty. Coll. Dist., 708 F. App'x 398 (9th Cir. 2017); Joseph v. Boise State Univ., 667 F. App'x 241 (9th Cir. 2016).

Further, as previously explained, Defendant's liability is limited to its own misconduct. See Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999) (recipient of federal funds may be liable in damages under Title IX only for its own misconduct); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277, 286, 290 (1998) (plaintiff may not recover damages in Title IX action against a school district for a teacher's sexual harassment of a student "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct," and noting that Title VI is parallel to Title IX and operates in the same manner); United States v. Cty.

of Maricopa, 889 F.3d 648, 652 & n.2 (9th Cir. 2018) (explaining the Supreme Court has "interpreted Title IX consistently with Title VI" and has held that an entity's liability as to Title VI is limited to the entity's own misconduct (citation omitted)). While an entity may not be held vicariously liable on a respondeat superior theory, it can be held liable under Title VI if an official with power to take corrective action is "deliberately indifferent to known acts" of discrimination. Cty. of Maricopa, 889 F.3d at 652 (quoting Davis, 526 U.S. at 641). An entity also may be held liable for acts of discrimination that result from its own official policy. Id.

Plaintiff claims that she notified various officials of the "problems" with Jones and Shin. In support of this contention, she cites to documents attached to the SAC, only one of which even remotely suggests that she notified an official with power to take corrective action of the issues asserted in the SAC. Even then, it appears she merely made the unsubstantiated assertion – again without any support – that Jones was "racist." SAC, Exh. 47 at 48-8 at 1-6. In particular, Plaintiff purportedly sent a letter to Pike, appealing a request to withdraw from Jones's class, in which, she claims, among other things, Jones was biased against her because he recommended that she change "Christ" to "Jesus" when he reviewed a draft of her writing assignment, which apparently was inconsistent with his use of "Christ" in his syllabus. She claims, "I was the only African American in his classroom. However, I would hope being an Apologetic Christian, Dr. Jones is not a racist! I do not believe he wanted to help me!" Id. at Dkt. 48-8 at 4-5. Even assuming that Pike had the power to take corrective action to address this issue, this bald accusation was insufficient to alert Defendant to the possibility that Jones engaged in racial discrimination. The only other reference in the cited exhibits to plausibly suggest Plaintiff notified an official with authority to address the alleged discrimination was a finding in the Administrative Withdrawal decision that

she "accus[ed] several professors of racism with no rational basis to do so." Id. at Dkt. 48-8 at 8. However, Plaintiff does not provide any facts explaining what information she provided, if any, let alone that she notified Campbell of the allegations in the SAC. The allegations of the SAC coupled with the documents attached to the SAC are insufficient to show that Defendant had actual notice of the alleged discriminatory conduct and was deliberately indifferent to the discrimination. See Gebser, 524 U.S. at 290.

In support of her claim that Defendant violated Title VI, Plaintiff also contends that Defendant has a history of racist culture, citing to an employment discrimination case from 2008, allegedly showing Defendant's "racist culture has impacted faculty and students of color." SAC ¶ 63. This case does not support Plaintiff's allegation of racial discrimination. First, it involves alleged conduct that occurred almost fourteen years ago and related to employment discrimination and retaliation. Second, this case was resolved in Defendant's favor. The trial court granted Defendant's motion for summary judgment, which was affirmed on appeal. See Alexander v. Biola Univ., 2010 WL 2584974 (Cal. Ct. App. June 29, 2010). Plaintiff's citation to this 2008 case is insufficient to show Defendant had a policy of racial discrimination.

The Motion should be granted as to Plaintiff's Title VI claim.

C. The SAC Fails to State a Section 1983 Claim

Plaintiff alleges that Defendant violated her First Amendment rights when: Shin filed a Campus Safety complaint against her after she expressed her opinion during his class; Devine stated that she "went from class to class expressing that she was not happy about her grades" and reported that she filed two complaints against Van Lant with the sheriff's department; Van Lant stated that she "would take an opposing view on almost all the topics discussed"; Pike reported that Plaintiff stated she would "hold [Defendant] responsible for not providing the opportunity for [her] to respond to these false

charges regarding [her] as a student (used for disciplinary proceedings)"; and Rimoldi penalized her answers to the prayer projects. SAC ¶ 67-70.

The Court previously dismissed Plaintiff's Section 1983 claims finding that the allegations in the FAC were insufficient to support a plausible claim that Defendant acted under "color of state law." In its Motion, Defendant contends that Plaintiff still has not alleged the necessary state action to assert a First Amendment claim. Defendant reasserts that it is not a state actor; it is a California non-profit religious corporation. Motion at 29-30.

Section 1983 of Title 42 of the United States Code provides a cause of action for violations of constitutional or other federal rights committed by persons acting under color of state law. See Crowley v. Nev. ex rel. Nev. Sec'y of State, 678 F.3d 730, 734 (9th Cir. 2012). "[Section] 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Id. (alteration in original) (quoting Graham v. Connor, 490 U.S. 386, 393-94 (1989)). To state a claim, the plaintiff must allege the defendant, acting under color of state law, caused a deprivation of the plaintiff's federal rights. See West v. Atkins, 487 U.S. 42, 48 (1988). "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful . . . .'" Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) (quoting Blum v. Yaretsky, 457 U.S. 991, 1002 (1982)); see also Ouzts v. Md. Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974) (en banc) (purely private conduct, no matter how wrongful, is not covered under § 1983). There is no right to be free from the infliction of constitutional deprivations by private actors. See Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996); see also Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991) (as amended) ("[P]rivate parties are not generally acting under color of state law, and we have stated that '[c]onclusionary allegations, unsupported by facts, [will be] rejected as

insufficient to state a claim under the Civil Rights Act.'" (citation omitted)).

Private conduct is not generally considered governmental action unless "something more" is present. See Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999). Courts have applied certain tests to identify whether there is "something more," including the public function test, the joint action test, the governmental compulsion test, and the governmental nexus test. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982); see also Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th Cir. 2003). "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights." United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540 (9th Cir. 1989).

Plaintiff's SAC fails to correct the defect previously identified. The allegations in the SAC remain insufficient to support a claim that Defendant acted under color of state law. Plaintiff alleges in the SAC that Defendant violated her First Amendment right to freedom of speech, "supported by the authority of Cal. Educ. Code Sec. 94367, free expression provision." Citing to Cal. Educ. Code § 94367, Plaintiff alleges that "California prohibits private colleges from making or enforcing any rule that would subject a student to disciplinary action for engaging in expression (on or off campus) that would be protected by the First Amendment or the California Constitution's free expression provision." SAC ¶¶ 65-66.

"[Cal.] Education Code section 94367 et seq., prohibits private universities from disciplining students for speech that would be protected by the First Amendment if made off campus." Yu v. Univ. of La Verne, 196 Cal. App. 4th 779, 788-89 (2011) (alteration and citation omitted). "[I]t creates statutory free speech rights for students of private postsecondary educational institutions"; it does not, however, create or expand constitutional rights. Id. at 790. While Cal. Educ. Code § 94367 may create a statutory free speech right

under California law, an individual's free speech rights under the federal Constitution are not infringed unless there is state action. See Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972). As such, a private school is not subject to constitutional scrutiny for violation of the First Amendment unless the school's action "can fairly be seen as state action." Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 814-816 (9th Cir. 2010).

The Court agrees with Defendant that Plaintiff has not shown state action in the present context. Accordingly, Plaintiff has not sufficiently stated a First Amendment claim and the Motion should be granted as to Plaintiff's First Amendment claim.

Finally, to the extent Plaintiff seeks to pursue a due process claim, such claim would fail for the same reason. In discussing her Title IX claim during the hearing on the Motions, Plaintiff explained that she was seeking to challenge the administrative proceedings that resulted in the Title IX claim against her, in which she would have an opportunity to refute the purportedly false allegations against her. Liberally construing this argument for purposes of considering leave to amend, Plaintiff may be attempting to assert a due process claim. However, for the same reason her First Amendment claim fails, Plaintiff cannot pursue a due process claim under Section 1983 because Defendant is a private actor and attendance at a private school is not a cognizable liberty or property interest under the Due Process Clause. See Shanks v. Dressel, 540 F.3d 1082, 1090-91 (9th Cir. 2008) (in order to state a procedural due process claim, "the plaintiff must establish the existence of (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process. The Due Process Clause forbids the governmental deprivation of substantive rights without constitutionally adequate procedure." (internal quotation marks and citation omitted)); Nunez

v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) ("To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property."); see also, e.g., Vartanian v. State Bar of Cal., 794 F. App'x 597, 601 (9th Cir. 2019) (plaintiff did not state a due process violation because he had no cognizable liberty or property interest in either practicing the profession of his choice or attending a private law school), pet. for cert. filed (June 23, 2020) (No. 19-1403).

D. Further Leave to Amend Would be Futile

A pro se litigant must ordinarily be given leave to amend unless it is absolutely clear that deficiencies in a complaint cannot be cured by further amendment. Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per curiam). If after careful consideration, it is clear that a complaint cannot be cured by amendment, the Court may dismiss without leave to amend. Cato v. United States, 70 F.3d 1103, 1105-06 (9th Cir. 1995); see also, e.g., Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1088 (9th Cir. 2002) (holding that "there is no need to prolong the litigation by permitting further amendment" where an amendment would not cure the "basic flaw" in the pleading); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002) (holding that "[b]ecause any amendment would be futile, there was no need to prolong the litigation by permitting further amendment").

Plaintiff was previously advised of the deficiencies in her allegations and provided multiple opportunities to amend to correct those deficiencies. Plaintiff's SAC remains deficient on multiple grounds, including on the basis of legal defects that cannot be remedied by amendment. The Court also considered Plaintiff's arguments in her Opposition and Request, documents attached to the Opposition, and the arguments at the hearing in determining whether leave to amend should be granted. Plaintiff was provided an opportunity at the hearing on the Motions to identify any additional facts that

would support her federal claims for relief. Although Plaintiff requested leave to file a third amended complaint, Plaintiff did not identify any additional facts beyond those already identified and considered that would be sufficient to state a federal claim for relief. The Court finds that the deficiencies of the SAC cannot be cured by further amendment. As such, the Court recommends that the Motion be granted without further leave to amend. See, e.g., Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008) (leave to amend appropriately denied when amendment would be futile); Ismail v. Cty. of Orange, 917 F. Supp. 2d 1060, 1066 (C.D. Cal. 2012) ("[A] district court's discretion over amendments is especially broad where the court has already given a plaintiff one or more opportunities to amend his complaint." (quoting DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 n.3 (9th Cir. 1987))).

E. The Court Should Decline Supplemental Jurisdiction Over Plaintiff's State Law Claims

When a federal court has dismissed all claims over which it has original jurisdiction, it may, at its discretion, decline to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3); Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639-40 (2009). As a matter of comity, in light of the recommended dismissal of the federal claims, the Court should decline to hear the remaining exclusively state law claims in the SAC and dismiss those claims without prejudice.[4]

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[4] In light of the Court's recommendation, it is unnecessary to address the remaining contentions in the Motion.

VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) granting Defendant's Motion to Dismiss (Dkt. 51) without leave to amend; (3) denying Defendant's Motion to Strike (Dkt. 50) as moot in light of the above; (4) dismissing Plaintiff's Title IX, Title VI, and First Amendment claims with prejudice; (5) dismissing Plaintiff's state law claims (Breach of Contract and Cal. Educ. Code § 94367 claims)[5] without prejudice; and (6) directing that Judgment be entered dismissing this action accordingly.

Dated: August 21, 2020

JOHN D. EARLY
United States Magistrate Judge

[5] Because it is unclear from the SAC whether Plaintiff seeks to pursue a separate claim under Cal. Educ. Code § 94367, the Court references this claim in an abundance of caution.

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