

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CV-354

ALI ELGHANNAM, APPELLANT,

v.

EDUCATIONAL TESTING SERVICE, APPELLEE.

Appeal from the Superior Court
of the District of Columbia
(CAB-9834-15)

(Hon. Ronna Lee Beck, Trial Judge)

(Submitted February 9, 2017

Decided July 18, 2017)

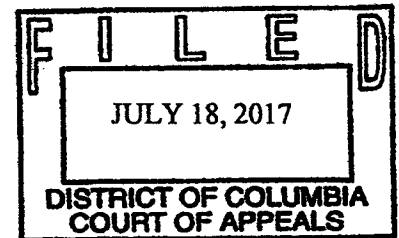
Before GLICKMAN, FISHER, and MCLEESE, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Ali Elghannam sued Educational Testing Service (“ETS”) in Superior Court after it cancelled his scores on the Test of English as a Foreign Language (“TOEFL”) that he took on April 10, 2015, barred him from re-taking the test for a year, and notified the National Association of Boards of Pharmacy (“NABP”) that his April 10 test results had been cancelled. By doing so, Mr. Elghannam alleged that ETS (1) denied him due process in violation of his constitutional rights, (2) breached its contract with him, (3) defamed him, (4) conspired against him, (5) discriminated against him on account of his religion and national origin, and (6) committed a forgery. The trial court dismissed the complaint for failure to state a claim, pursuant to Civil Rule 12 (b)(6).¹ Mr. Elghannam appeals that denial.² Largely for the reasons stated by the trial court in its opinion explaining its decision, we affirm.³

¹ Super. Ct. Civ. R. 12 (b)(6).

² Although Mr. Elghannam noticed his appeal from the trial court’s denial of his motion for reconsideration rather than from the order of dismissal itself,
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I.

Before granting ETS's motion to dismiss, the trial court commendably held a hearing to discuss the motion and clarify the "factual context" of the allegations in Mr. Elghannam's *pro se* complaint. With the benefit of that hearing, the court summarized Mr. Elghannam's claims and the underlying alleged facts as follows.

Every state requires pharmacists to be licensed, and the NABP is a private entity that facilitates the licensing process. The NABP requires applicants whose first language is not English to pass the TOEFL as a condition of obtaining a pharmacist license. The TOEFL is administered by ETS. Appellant, a pharmacist by training, needed to take and pass the TOEFL because his first language is Arabic and he received his schooling in that language.

Before appellant took the test on April 10, 2015, he had sat for the TOEFL on at least fourteen occasions without passing it. His score on those prior tests ranged from 61 to 73 out of a possible 120 points.⁴ But on the April 10, 2015 exam, he received a passing score of 117. However, some weeks later, after ETS had reported appellant's score to the NABP, ETS compared the speaking segment

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appellee has not contended that this alters the legal question before us or limits the scope of our review.

³ Appellant also has appealed the trial court's denial of his motion requesting that his case be assigned to an African-American judge. Appellant has articulated no reason that he should be permitted to choose the race of the judge in his case, other than a vague and conclusory claim of discrimination as the explanation for his misfortunes. As no litigant has such a right, we affirm the court's denial of this motion. *Cf. Powers v. Ohio*, 499 U.S. 400, 404 (1991) ("Although a defendant has no right to a petit jury composed in whole or in part of persons of [the defendant's] own race, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.") (citation and internal quotation marks omitted).

⁴ Appellant asserted in the trial court that these past scores did not accurately reflect his actual performance because he "believes ETS is determined to fail him on the TOEFL test."

of appellant's April 10 TOEFL with the corresponding segments of his previous tests and concluded it was not appellant's voice on April 10 – i.e., that someone other than appellant took that segment of the TOEFL on that date in appellant's stead. ETS therefore cancelled his April 10 score, barred him from taking the TOEFL again until May 2016, and so informed the NABP.⁵

Appellant denied that someone else took the speaking part of the TOEFL for him and asserted that his voice sounded different on April 10 because he had laryngitis. In support of his claims, appellant pointed to the facts that (1) he presented his identification and his photograph was taken just before the exam; (2) the photo shows his nose was bandaged (allegedly corroborating that he was suffering from laryngitis in addition to other illnesses); (3) the several parts of the TOEFL are taken in rapid succession; and (4) his score on the speaking part was consistent with his high scores on the other parts of the test that day. ETS was unmoved and refused to retract its cancellation of appellant's test score or reopen its investigation of the matter. ETS claimed it was not obligated to investigate further in response to appellant's protests because its Information and Registration Bulletin (the "Bulletin," which the parties agree is the contract governing their obligations in connection with the TOEFL) allows it to cancel test scores summarily when it determines, in its sole discretion, that there are issues with a test-taker's identity.

Appellant asserted that ETS never actually did a voice comparison. He alleged that it discriminated against him based on his religion and national origin and conspired with the NABP to prevent him from receiving the pharmacist certificate to which he was entitled after he obtained passing scores on the TOEFL. In addition, he alleged that his NABP certificate eligibility expired before ETS allowed him to take the TOEFL again (i.e., in May 2016), causing him serious professional and personal harm.

⁵ According to an exhibit appended by appellant to his reply to ETS's motion to dismiss, NABP was informed by ETS that "due to inconsistencies in the speaking responses between the current and previous tests ETS was unable to verify that these scores represent[ed] [appellant's] work."

II.

This court reviews *de novo* the trial court's dismissal of the complaint pursuant to Rule 12 (b)(6). In reviewing the complaint, [we] must accept its factual allegations and construe them in a light most favorable to the non-moving party. However, "[f]actual allegations must be enough to raise a right to relief above the speculative level"⁶

To survive a motion to dismiss, a claim must have "facial plausibility," meaning "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."⁷ "Pleadings that 'are no more than conclusions . . . are not entitled to the assumption of truth[]' and are insufficient to sustain a complaint."⁸ "[D]ismissal under Rule 12 (b)(6) is appropriate where the complaint fails to allege the elements of a legally viable claim."⁹

III.

Appellant provided no factual support for his conclusory assertions that ETS deliberately misreported his scores on fourteen previous TOEFLs, discriminated against him on the basis of religion or national origin, conspired with NABP, and never compared voice recordings from his TOEFL exams. The trial court found

⁶ *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1022-23 (D.C. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted)).

⁷ *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 544 (D.C. 2011) (internal quotation marks omitted).

⁸ *Grimes v. District of Columbia*, 89 A.3d 107, 112 (D.C. 2014) (quoting *Potomac Dev. Corp.*, 28 A.3d at 544).

⁹ *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1059-60 (D.C. 2014) (quoting *Chamberlain*, 931 A.2d at 1023).

“no facts to support these beliefs, which are totally lacking in facial plausibility,” and in consequence the court stated it would “not assume these allegations are true in assessing whether [appellant] state[d] a claim.” We agree with the trial court’s assessment of these allegations and we likewise will not accord them the “assumption of truth” in evaluating whether appellant’s complaint stated a viable claim. We turn to consider the individual causes of action that appellant sought to pursue.

A. Due Process Violation

Appellant’s claim that ETS violated his due process rights fails because ETS is not a state actor.¹⁰ Although private action may violate the Due Process Clause under some circumstances,¹¹ multiple courts have held that this is not the case when ETS develops, administers, and scores standardized tests; the fact that ETS reports to state-sanctioned certification organizations, such as NABP, does not create the nexus required to find state action.¹² We therefore conclude that appellant has not stated a legally viable due process claim.

¹⁰ *Harris v. Northbrook Condo. II*, 44 A.3d 293, 298 (D.C. 2012) (“[T]here cannot be a true due process violation without a showing of state action.”).

¹¹ *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (“[W]e say that state action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.”) (internal quotation marks omitted).

¹² *Tolleson v. Educ. Testing Serv.*, 832 F. Supp. 158, 160-63 (D.S.C. 1992); *Johnson v. Educ. Testing Serv.*, 754 F.2d 20, 23-25 (1st Cir. 1985) (citing cases); *see Yaeger v. Educ. Testing Serv.*, 551 N.Y.S.2d 574, 577 (App. Div. 1990) (per curiam) (rejecting a due process claim where there “is no evidence . . . that ETS’ conduct constituted state action so as to implicate either federal or state due process considerations”); *Stewart v. Hannon*, 469 F. Supp. 1142, 1147 (N.D. Ill. 1979) (finding that ETS was not a state actor even though it contracted with the Chicago Board of Education to develop and grade the written portion of a test for prospective school principals); *K.D. v. Educ. Testing Serv.*, 386 N.Y.S.2d 747, 752 (Sup. Ct. 1976) (rejecting a Fourteenth Amendment claim in connection with

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B. Breach of Contract

Appellant did not identify with specificity the provision of the Bulletin that he claims ETS breached, but it appears he was invoking the “Invalid Scores” provision. This provision states that “ETS may *also* cancel scores if, in its judgment, there is substantial evidence that the scores are invalid for any *other* reason.” (Emphasis added.) In that circumstance, the Bulletin provides, ETS will notify “the test taker in writing about its concerns, give[] the test taker an opportunity to submit information that addresses those concerns, consider[] any such information submitted, and offer[] the test taker a choice of options[,]” which could include “voluntary score cancellation or arbitration[.]” This is what appellant claims ETS failed to do.

However, a different provision of the Bulletin applies where, as here, ETS cancels a score because it has evidence of fraudulent activity going to the test taker’s identity. The “Identification (ID) Discrepancies” provision states:

ETS may decline to score your test or may hold or cancel your scores . . . if ETS has evidence that you . . . did not take the entire test yourself. . . . ETS may also cancel scores, ban the test taker from future testing, and notify score recipients of the cancellation if fraudulent activity is detected after scores have been reported.

Unlike the “Invalid Scores” provision, this provision imposes no obligation on ETS to give the test taker an opportunity to rebut the evidence of fraud, or other options, and it leaves the evaluation of evidence of fraud in the sole discretion of ETS. Apart from his assertion that ETS never actually performed a voice comparison in his case, which is too conclusory to be accepted as true for present

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ETS’s administration of the LSAT because “the 14th Amendment is applicable only to state action and not private action and hence is not relevant here”); *see also* *Langston v. ACT*, 890 F.2d 380, 386 (11th Cir. 1989).

purposes, appellant alleged no breach of this provision and he therefore failed to state a viable claim of contractual breach.¹³

C. Defamation, Discrimination, Forgery, and Conspiracy

Appellant claimed that by informing the NABP of its cancellation of his TOEFL score, ETS committed the tort of defamation.¹⁴ Even if appellant had pleaded sufficient facts for each element of such a claim (which he did not), he agreed in the above-referenced “Identification (ID) Discrepancies” provision of his contract that ETS could “notify score recipients of the cancellation if fraudulent activity” was detected. “A person who consents to the publication of comments about himself has no cause of action for defamation.”¹⁵

Appellant’s claim of discrimination based on religion and/or national origin fails because, as stated above, his allegations of discrimination are too conclusory

¹³ Instead, appellant has argued that the Bulletin is an unconscionable contract. We perceive no legal merit in this argument because the terms to which appellant objects are not unreasonably unfair. *See Urban Invs., Inc. v. Branham*, 464 A.2d 93, 100 (D.C. 1983) (per curiam) (“Without a prima facie showing that the contract itself or any item of it affronts the sense of decency, it is difficult to grant rescission on the grounds of unconscionability.”) (citation and internal quotation marks omitted). We agree with the trial court’s determination that “[c]ertainly as applied to the factual context of this case, the provision[] in ETS’s contract that entitle[s] ETS in its sole discretion to cancel [appellant]’s score if ETS had evidence that [appellant] did not take the entire test himself was not unconscionable.”

¹⁴ *See Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009) (“In order to state a claim of defamation, ‘plaintiff must allege and prove four elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant’s fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.’”) (quoting *Opauugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)).

¹⁵ *Farrington v. Bureau of Nat’l Affairs, Inc.*, 596 A.2d 58, 59 (D.C. 1991).

and lacking in factual support to state a viable claim. Appellant's forgery claim also fails, not only because his allegations are too conclusory, but because "[n]o private cause of action for forgery . . . exists in the District of Columbia."¹⁶

Finally, in addition to being too conclusory, appellant's claim of a conspiracy between ETS and NABP is not legally viable because "[c]ivil conspiracy depends on performance of some underlying tortious act.' It is thus 'not independently actionable [in the District of Columbia]; rather, it is a means for establishing vicarious liability for the underlying tort.'"¹⁷ Because appellant did not sufficiently plead an underlying tortious act, his conspiracy claim fails.¹⁸

D. Failure to Find Counsel for Appellant

Finally, appellant claims the trial court erred in dismissing his complaint because it had stated that it "would see if some lawyers were interested [in coming] into this case to represent [appellant]." The court explained, however, that after a "hearing to discuss the appropriateness of the court possibly assisting [appellant] in seeking pro bono assistance from a law firm," the court "decided against doing so[.]" presumably because it concluded appellant had failed to plead sufficient facts to support any of his claims. Appellant has not shown that he relied to his detriment on the court's offer of assistance in obtaining counsel. As a civil litigant

¹⁶ *Hunter v. District of Columbia*, 384 F. Supp. 2d 257, 260 (D.D.C. 2005).

¹⁷ *Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000) (quoting *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983)).

¹⁸ Although he did not include it in his complaint, appellant also has claimed, and has argued in his brief on appeal, that ETS is liable to him for negligence in reporting his TOEFL scores inaccurately. To the extent this negligence claim is based on ETS's alleged breach of its contractual duties to appellant, the negligence claim appears to be "an impermissible re-characterization of [his] breach of contract claim." *Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1070 (D.C. 2008) (internal quotation marks omitted). More fundamentally, the negligence claim fails because the allegation of score misreporting on which it is based is too conclusory to pass muster, as explained above.

has a right to court-appointed counsel only in limited circumstances not present here,¹⁹ the trial court had no obligation to provide assistance in finding counsel for appellant in this case. Appellant has not demonstrated error entitling him to relief.²⁰

IV.

For the reasons set forth above, the judgment of the Superior Court dismissing appellant's complaint and its denials of his motions for reconsideration and for assignment of his case to an African-American judge are hereby affirmed.

ENTERED BY DIRECTION OF THE COURT:


JULIO A. CASTILLO
Clerk of the Court

¹⁹ See, e.g., *Turner v. Rogers*, 564 U.S. 431, 442-43 (2011) (noting that there is “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty”) (internal quotation marks omitted).

²⁰ See *Padou v. District of Columbia*, 998 A.2d 286, 292 (D.C. 2010) (“In cases where a party is a *pro se* litigant, the general principle is that such a litigant can expect no special treatment from the court.”) (internal quotation marks and brackets omitted).

(No. 16-CV-354)

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APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ALI ELGHANNAM,	)	CASE NO. 2015 CA 9834 B
	)	
Plaintiff(s),	)	CALENDAR 8
	)	
vs	)	JUDGE RONNA LEE BECK
	)	
EDUCATIONAL TESTING SERVICES,	)	
	)	
Defendant(s).	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Before the court is the Motion to Dismiss of Defendant Educational Testing Service ("ETS"); Plaintiff's opposition, along with a supplement to the opposition, Defendant's reply and Plaintiff's surreply. Plaintiff is *pro se*.

I. BACKGROUND

The causes of action that Plaintiff alleged in his complaint and the factual underpinnings of the Complaint were not clear. Consequently, the court convened a hearing on February 24, 2016, at which the parties agreed to the following as part of the factual context to this case.

1. Every state requires pharmacists to be licensed.
2. The National Association of Boards of Pharmacy ("NABP"), a private entity, plays some critical role in licensure throughout the country.
3. Foreign pharmacists must take the TOEFL exam to test their English proficiency, administered only through the Educational Testing Service, to obtain licensure.

4. Plaintiff previously had taken the TOEFL exam on numerous occasions. The scores reported by ETS included the following:¹

Test Date	Reading	Listening	Speaking	Writing	Total
3/22/2013	12	14	18	17	61
4/12/2013	15	13	17	21	66
6/8/2013	15	13	22	20	70
7/26/2013	13	21	22	17	73
8/16/2013	14	12	19	19	64
10/11/2013	15	12	18	17	62
11/22/2013	12	16	18	17	63
12/8/2013	11	15	18	19	63
1/17/2014	11	17	20	13	61
2/22/2014	14	15	19	21	69
3/22/2014	14	14	20	19	67
4/25/2014	16	17	19	18	70
12/13/2014	12	20	20	18	70
3/6/2015	16	13	17	18	64
4/10/2015	30	30	28	29	117

5. Plaintiff's picture was taken at the time of the April 10, 2015 test ("the April 10 test"). He took the test and received passing scores.
6. Thereafter ETS states it compared the speaking portion of his test with the speaking portion of previous tests and concluded the voice on the April 10 test was inconsistent with Plaintiff's voice on previous tests.
7. Based on this inconsistency, ETS canceled Plaintiff's score from the April 10 test; barred him from taking the test until May 2016, and notified the NABP that Plaintiff's test scores were cancelled.

¹ The tests are referenced in the Complaint, but the specific scores themselves are not. Nonetheless, the court has considered the scores in ruling on the motion to dismiss because at the February 24, 2016, hearing, Plaintiff stated he did not dispute the test dates and reported scores and agreed the court could rely on them. Plaintiff's only qualifier was that the scores do not accurately reflect his performance: He stated he believes ETS is determined to fail him on the TOEFL test.

8. Plaintiff disputes that someone else took the speaking part of the test; claims he had laryngitis at the time of the April 10 test accounting for the voice discrepancy; that his photo was taken at the test center; that the different parts of the test are taken in rapid succession; that the photo shows him with a bandage on his nose that was associated with his illness and laryngitis; and that consistent with his speaking score, he scored well on the other parts of the test.
9. ETS's position is that it has sole discretion to determine if someone else took the speaking part of the test instead of Plaintiff; that when ETS determined it had evidence that someone else took a part of the test, it had no obligation to investigate Plaintiff's claim that someone else did not take the speaking part of the test in his place because his scores were not cancelled pursuant to the part of the Information and Registration Bulletin that imposes such a requirement; and that ETS did no investigation in response to Plaintiff's protests subsequent to ETS cancelling the test scores.
10. The parties both agree that ETS's Information and Registration Bulletin ("the Bulletin"), Exhibit A to ETS's reply, which is referenced in the Complaint and attached to motions papers filed by each of the parties is the contract in this case.²

II. STANDARD FOR MOTION TO DISMISS

Dismissal under Rule 12(b)(6) is warranted "where the complaint fails to allege the elements of a legally viable claim." *Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) (quoting *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007); citing *Potomac Dev. Co. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011)). In deciding a Rule 12(b)(6) motion this court must accept "all of the allegations in the complaint as true" and "construe all facts and inferences in favor of the

² The court also convened the hearing to discuss the appropriateness of the court possibly assisting Plaintiff in seeking *pro bono* assistance from a law firm and to discuss the possibility of mediating, rather than litigating, this dispute. With respect to mediating the dispute at the onset of the litigation, Plaintiff made it clear he is unwilling to retake the TOEFL test to validate the April 10 scores that are dramatically inconsistent with Plaintiff's scores on over a dozen prior tests, including a test Plaintiff took a month earlier. That position, combined with Plaintiff's contention that ETS is out to get him and conspiring to fail him on the TOEFL test, made early mediation impractical. Although Defendant stated it did not object to the court intervening directly to assist Plaintiff in obtaining *pro bono* legal assistance, following the hearing the court decided against doing so.

plaintiff." *Id.* (quoting *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C. 2008)).

Nevertheless, to survive a motion to dismiss a claim must have facial plausibility, that is, "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Potomac*, 28 A.3d at 544 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). Conclusory pleadings are not entitled to an assumption of truth and will not sustain a complaint. *Grimes v. District of Columbia*, 89 A.3d 107, 112 (D.C. 2014) (internal citations omitted). Neither will "formulaic recitation[s] of the elements of a cause of action." *Logan v. Lasalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1019 (D.C. 2013) (quoting *(Michael Patrick) Murray v. Motorola, Inc.*, 982 A.2d 764, 783 n.32 (D.C. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

The court may consider documents that are attached to the motion and referenced in the complaint in making its determination on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *Bertram v. WFI Stadium, Inc.*, 41 A.3d 1239, 1242 n.3 (D.C. 2012).

III. ANALYSIS

A. Plaintiff's Allegations That Are Without Any Alleged Factual Support Will Not Be Considered in Evaluating the Motion to Dismiss.

In determining whether Plaintiff has stated a claim, and recognizing that all facts and inferences should be construed in Plaintiff's favor in doing so, it is important to note that many allegations by Plaintiff are devoid of any factual basis. For example, assertions made by Plaintiff in the complaint and at the hearing on February 24, 2016, included the following: 1) that ETS is out to get him and thus Plaintiff's scores reported by ETS on the more than a dozen TOEFL tests that he has taken are inaccurate and do

not reflect Plaintiff's performance on the tests; 2) that ETS falsely stated it compared Plaintiff's voice on the speaking part of the test on April 10, 2015, with the speaking part of earlier tests after Plaintiff achieved test scores on April 10, 2015, that were substantially greater than test scores he had achieved in more than a dozen earlier tests, including a test in the previous month; 3) that ETS falsely stated it has Plaintiff's prior tests; and 4) that ETS conspired with NABP to cancel Plaintiff's scores.

Plaintiff states no facts to support these beliefs, which are totally lacking in facial plausibility as a result. Consequently, the court will not assume these allegations are true in assessing whether Plaintiff states a claim.³

B. Plaintiff Fails to State a Claim for Violation of Due Process Because ETS is not a State Actor.

In the absence of state action, there cannot be a claim for violation of due process. *Harris v. Northbrook Condo. II*, 44 A. 3d 293, 298 (D.C. 2012). As Defendant has documented, numerous courts have held that ETS is not a state actor when it develops, administers, and scores standardized tests. Defendant's Motion to Dismiss at 4-5. Where, as here, states rely on NABP, which in turn requires applicants to take Defendant's TOEFL exam, applicants may have some claim against state licensing authorities if they contract with private entities whose process is insufficient. But no due process claim lies against a private company such as ETS for its testing policies in this case.

³ The cases cited by the parties, including Plaintiff, indicate that ETS routinely compares scores from earlier tests when confronted with a substantial disparity in someone's test scores. Consequently, the bald statements that ETS did not do the voice comparison it contends it did or that ETS does not have a prior test or tests of Plaintiff with which to do such a comparison are suspect in the absence of factual allegations that support them.

C. Plaintiff Fails to State a Claim for Breach of Contract

In his Complaint Plaintiff does not state what part of the contract he alleges was breached and does not set forth a breach of contract claim. In the Complaint in combination with Plaintiff's papers in opposition of ETS's motion, Plaintiff maintains it was: wrong for ETS to cancel his April 10 test score; contrary to the contract for ETS to fail to give him written notice ahead of time before cancelling the score; and an unconscionable provision, which the court should not enforce, for ETS to reserve the right to cancel the score based on evidence that ETS concluded showed that Plaintiff did not himself take the entire test.⁴

1. Based on the facts the parties agreed provide the context for this litigation and the contract that the parties agree controls, Plaintiff fails to state a claim that ETS breached the contract when it cancelled Plaintiff's scores.

Plaintiff had taken TOEFL more than a dozen times before he took the April 10 test. His scores for the April 10 test were substantially higher in all respects than all of his earlier scores. ETS advised Plaintiff that it compared his voice in the current and previous tests and identified inconsistencies that caused ETS to doubt that the April 10 test represented his work.

The Bulletin states the following in a section headed ETS Score Cancellation Policies:

⁴ At the end of his Complaint, Plaintiff expresses his position about unconscionability in more vivid language:

Also if we believed that ETS has the right to come simply and smoothly by cold blood to cut the necks through an illegal behavior via forcing you to sign an illegal contract or will refuse you to sit for the exam, then ETS breached its adhesion contract (A Slave Contract); then alleged that it has a right to cancel the result of the Exam, 37 days after delarting [sic] the score. . . So, ETS in USA and ISIS in the Middle East cut the necks simply and smoothly under illegal behavior, by cold blood, but both of them believe they act in good faith. (Emphasis omitted.)

ETS and the TOEFL program strive to report scores that accurately reflect the performance and independent work of every test taker. ETS standards in this regard have these primary goals: giving all test takers an equal opportunity to demonstrate their abilities, and preventing any test taker from gaining an unfair advantage over others. These standards are of the utmost importance to ETS and to those who rely on the validity of ETS test scores. ETS reserves the right to cancel any test score when, in its sole judgment, there is substantial evidence that the score is invalid.

Bulletin at 19.

Moreover, the Bulletin provides in a section labeled "Identification (ID) Discrepancies" that "ETS may . . . cancel your scores . . . if ETS has evidence that you . . . did not take the entire test yourself." The section also provides that "ETS will . . . cancel scores, ban the test taker from future testing, and notify score recipients of the cancellation if fraudulent activity is detected after scores have been reported." Bulletin at 21.

It was this section on which ETS relied when it notified Plaintiff by letter "[W]e have identified inconsistencies in the voices in the speaking responses between your current and previous tests. Therefore, we are unable to verify that these scores represent your work." Compl. Ex. 1. And it was this section on which ETS relied when it notified NAPB that it was cancelling Plaintiff's scores.

Plaintiff offers no factual basis for his allegation that ETS never compared the voice on the April 10 test with the voice on earlier tests Plaintiff took when he obtained far lower scores. Instead, Plaintiff attempts to explain the difference in his voice on the

April 10 test by contending he had laryngitis, which he claims is corroborated by the bandage on his nose at the time he took the test.⁵

Under the contract, ETS had sole discretion to cancel the scores if it had evidence that Plaintiff did not take the entire test itself. ETS had such evidence. Plaintiff's Complaint does not state a claim for breach of contract.

2. Under the contract, ETS was not obligated to notify Plaintiff in advance of cancelling his scores.

There is a section of the Bulletin that applies to certain circumstances in which scores are invalid, *other than* Identification Discrepancies and Plagiarism, such as "unusual answer patterns". Pursuant to that section, ETS notifies the test taker in writing about its concerns before cancelling scores. Plaintiff contends in his opposition papers (although not in his Complaint) that ETS breached the contract by not complying with that section of the Bulletin. But that is not the provision upon which ETS relied in cancelling Plaintiff's scores, and by alleging in his motions papers that ETS failed to comply with procedures related to that provision, Plaintiff has not stated a claim for breach of contract.

3. The contract was not unconscionable.

Assuming the Bulletin was a contract of adhesion, the contract is not unconscionable and therefore the provisions to which Plaintiff objects are not

⁵ Plaintiff also seems to be saying that ETS can't be right that someone else took the speaking part of the test because his picture was taken when he entered the test center; the speaking part of the test is taken in rapid succession with the other parts of the test, and his high test scores on the other parts of the test are consistent with the speaking part of the test. But, those facts don't necessarily disprove ETS's doubts, supported by evidence, about the validity of Plaintiff's test scores. Plaintiff acknowledges that his voice on the April 10 test was different from earlier tests, because of laryngitis according to him. It certainly is conceivable that someone who resembles Plaintiff and who is fluent in English signed up to take the TOEFL test on April 10 under some name other than Plaintiff's; switched places with Plaintiff; took the entire test for Plaintiff; and received far higher scores on every part of the test than Plaintiff had ever received.

unenforceable unless the contract terms are unreasonably unfair to one of the parties. *Urban Invest., Inc. v. Branham*, 464 A.2d 93 (D.C. 1983). Courts have indicated that “unreasonably unfair” terms are terms that affront the sense of decency, *Id.* at fn. 8, or that shock the judicial conscience, *White v. Four Seasons Hotels and Resorts*, 999 F. Supp. 2d 250, 260 (D.D.C. 2013).

As ETS's reply sets forth at pages 4-5, courts have recognized the importance of allowing ETS to assure itself of the validity of applicants' scores. Certainly as applied to the factual context of this case, the provision in ETS's contract that entitled ETS in its sole discretion to cancel Plaintiff's score if ETS had evidence that Plaintiff did not take the entire test himself was not unconscionable.

D. Plaintiff Fails to State a Cause of Action for Defamation

In his Complaint Plaintiff states that ETS's decision was a reckless and irresponsible violation of Plaintiff's due process rights “as well as defamation”. Later in the Complaint, Plaintiff states that “What makes ETS' conduct more egregious is that it communicated its so called findings to the National Association of Boards of Pharmacy.”

Under D.C. law, to state a claim of defamation, “plaintiff must allege and prove four elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm” *Solers, Inc. v. Doe*, 977 A.2d 941, 948 (D.C. 2009).

Plaintiff did not meet these requirements in his Complaint. Even if he did, in his contract with ETS, Plaintiff consented to “notifying score recipients if fraudulent activity is detected after scores have been reported” Bulletin at 21. Plaintiff also consented to ETS sharing with any authorized user of TOEFL test scores “any and all information in its possession about a test taker and the terms and conditions of test taking” including “details of any test security investigation.” Bulletin at 22. The contract between ETS and Plaintiff authorized ETS to notify NAPB, a score recipient, about the cancellation of and problems with Plaintiff’s scores.

A person who consents to the publication of comments about him has no cause of action for defamation, even if the content of the communication could otherwise be characterized as defamatory. *Farrington v. Bureau of Nat. Affairs, Inc.*, 596 A. 2d 58, 59 (D.C. 1991). Because Plaintiff by contract consented to ETS notifying NAPB about the cancellation of the scores and the details of any test screening investigation, Plaintiff has not stated a cause of action for defamation.

E. The Complaint Fails to State a Cause of Action for Conspiracy

Plaintiff’s conspiracy allegations in his complaint are rambling and difficult to comprehend. In any event, Civil conspiracy is not actionable in the District of Columbia. It is a means for establishing vicarious liability for an underlying tort. *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A. 2d 724 (D.C. 2000).

IV. CONCLUSION

For the foregoing reasons, it is **1st** day of **March, 2016**, hereby

ORDERED that Defendant's Motion to Dismiss is **GRANTED**, and Plaintiff's Complaint is **DISMISSED** in its entirety.

Ronna Lee Beck

Judge Ronna Lee Beck
(Signed in Chambers)

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from this filing is
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