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attorney licensed to practice law in the State of Nebraska and §§ 3-501.1, 3-501.3, 3-501.4, 3-501.7, 3-501.10, and 3-508.4 of the rules of professional conduct and that respondent should be and hereby is suspended from the practice of law for 90 days, effective 30 days after the filing of this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with §§ 7-114 and 7-115 of the Nebraska Revised Statutes and §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

JOHN DOE, APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

788 N.W.2d 264

Filed August 27, 2010. No. S-09-256.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Motions to Dismiss: Immunity.** A trial court may properly address a claim of sovereign immunity under a Neb. Ct. R. Pldg. § 6-1112(b)(6) motion.
4. **Notice: Service of Process.** Although Neb. Rev. Stat. § 25-505.01 (Reissue 2008) does not require service to be sent to the defendant's residence or restrict delivery to the addressee, due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections.
5. **Service of Process: Waiver.** Under Neb. Rev. Stat. § 25-516.01 (Reissue 2008), voluntary appearance of the party is equivalent to service that waives a defense of

insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.

6. **Public Officers and Employees: Service of Process: Claims.** State officials, in their individual capacities, can challenge service while still reserving the right, in their official capacities, to contest a plaintiff's claims on other grounds.
7. **Constitutional Law: Immunity.** The 11th Amendment does not define the scope of the states' sovereign immunity. States also have inherent immunity from suit.
8. **Constitutional Law: Immunity: Waiver.** Under 11th Amendment immunity, a nonconsenting state is generally immune from suit unless the state has waived its immunity or Congress has validly abrogated it.
9. **Constitutional Law: Immunity: Municipal Corporations.** Eleventh Amendment immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state.
10. **Constitutional Law: Immunity: Public Officers and Employees: Declaratory Judgments: Injunction.** Eleventh Amendment immunity does not bar a claim against state officers which seeks only prospective declaratory or injunctive relief for ongoing violations of federal law.
11. **Actions: Immunity.** Under state sovereign immunity, a suit against a state agency is a suit against the state.
12. **Actions: Public Officers and Employees: Immunity.** A court must determine whether actions against individual officials sued in their official capacities are in reality actions against the state and therefore barred by sovereign immunity.
13. ____: ____: ____. An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.
14. ____: ____: ____. Actions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds.
15. **Public Officers and Employees: Immunity.** If the State does not have immunity from suit, state officials sued in their official capacities cannot assert it.
16. **Tort Claims Act: Governmental Subdivisions.** The State Tort Claims Act governs tort claims brought against the Board of Regents of the University of Nebraska and the University of Nebraska Medical Center.
17. **Tort Claims Act: Jurisdiction: Immunity: Waiver.** Once a plaintiff establishes subject matter jurisdiction under the State Tort Claims Act, the defendant may affirmatively plead that the plaintiff has failed to state a cause of action under Neb. Rev. Stat. § 81-8,219 (Reissue 2008) because an exception to the waiver of sovereign immunity applies.
18. **Tort Claims Act: Fraud.** Fraud by concealment is a form of deceit and therefore falls within the ambit of Neb. Rev. Stat. § 81-8,219(4) (Reissue 2008).
19. **Constitutional Law: Immunity.** Although by its terms, the 11th Amendment applies only to suits against a state by citizens of another state, the U.S. Supreme Court has extended the 11th Amendment's applicability to suits by citizens against their own states.

20. ____: ____. For Congress to abrogate a state's 11th Amendment immunity, it must (1) unequivocally intend to do so and (2) act under a valid grant of constitutional authority.
21. ____: ____. Under § 5 of the 14th Amendment, Congress may enact legislation abrogating state sovereign immunity to remedy and prevent violations of that amendment. This authority permits Congress to enact prophylactic legislation that both prevents and deters unconstitutional conduct by prohibiting conduct that is somewhat broader than the conduct forbidden by the amendment.
22. ____: ____. To be classified as remedial, and therefore a valid exercise of its power under § 5 of the 14th Amendment, Congress' legislation abrogating state sovereign immunity must exhibit a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.
23. **Constitutional Law: Immunity: Federal Acts: Discrimination.** Congress has validly abrogated the State's 11th Amendment immunity regarding claims under title II of the Americans with Disabilities Act of 1990 when a plaintiff alleges discrimination in public education.
24. **Actions: Federal Acts: Discrimination.** A plaintiff seeking recovery for a violation under title II of the Americans with Disabilities Act of 1990 must allege the following: (1) The plaintiff has a disability; (2) the plaintiff is otherwise qualified to receive the benefits of a public service, program, or activity; and (3) the defendants excluded the plaintiff from participation in or denied the plaintiff the benefits of such service, program, or activity or otherwise discriminated against the plaintiff because of his or her disability.
25. **Immunity: Federal Acts: Discrimination.** In general, courts should follow the Supreme Court's analytical framework set out in *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006), for determining abrogation of sovereign immunity in claims under title II of the Americans with Disabilities Act of 1990.
26. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
27. ____. A plaintiff asserting the inadequacy of procedural due process must first establish that the government deprived him or her of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause.
28. **Schools and School Districts: Due Process.** For academic dismissals, due process is satisfied if the student was informed of the nature of the faculty's dissatisfaction and the potential for dismissal and if the decision to dismiss was careful and deliberate.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John Doe, pro se.

Amy L. Longo and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ., and MOORE, Judge.

CONNOLLY, J.

I. SUMMARY

John Doe sued the Board of Regents of the University of Nebraska (Board), the University of Nebraska Medical Center (UNMC), and the following UNMC faculty members in each individual's official and individual capacities: John Gollan, M.D., Ph.D.; Carl Smith, M.D.; Sonja Kinney, M.D.; Jeffery Hill, M.D.; David O'Dell, M.D.; Wendy Grant, M.D.; Sharon Stoolman, M.D.; and Michael Spann, M.D. (collectively the UNMC faculty members). Doe seeks damages for fraudulent concealment, alleged violations of his constitutional rights, and breach of contract stemming from his dismissal from UNMC's College of Medicine.

The district court dismissed with prejudice Doe's complaint against the UNMC faculty members in their individual capacities because Doe did not perfect service. The court also dismissed with prejudice Doe's complaint against the Board, UNMC, and the UNMC faculty members in their official capacities. The court found that Doe failed to state a claim for which relief can be granted or that his claims were barred by sovereign immunity. Doe appeals.

We affirm in part and reverse in part. We conclude that the court properly dismissed Doe's claims for fraudulent concealment, violation of his due process rights, and breach of contract. But the court erred in dismissing Doe's claims under title II of the Americans with Disabilities Act of 1990 (ADA)[1] and § 504 of the Rehabilitation Act of 1973 (Rehabilitation Act)[2] against the Board, UNMC, and the UNMC faculty members in their official capacities. We conclude that Congress has validly abrogated 11th Amendment immunity for title II claims of discrimination in public education. And the State now concedes that it waived immunity for claims under the Rehabilitation Act. We also reverse the district court's dismissal of the UNMC

[1] 42 U.S.C. § 12131 et seq. (2006).

[2] 29 U.S.C. § 794(a) (2006).

faculty members, in their individual capacities, and remand the cause for a determination of whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants, in their individual capacities, of the lawsuit.

II. BACKGROUND

1. Doe's Complaint

We glean the following facts from Doe's complaint. Doe suffers from major depressive disorder. He qualifies as an individual with a disability under the ADA and the Rehabilitation Act. During his second year of medical school, UNMC granted Doe a leave of absence from school to receive treatment for depression, insomnia, and anxiety.

In the fall of 2005, Doe returned and began his third year of medical school. During that academic year, he earned a near-failing grade in his pediatrics clerkship and failing grades in his obstetrics and gynecology clerkship and internal medicine clerkship. Doe appealed his obstetrics and gynecology grade, which was upheld by both the obstetrics and gynecology department and UNMC. Doe did not appeal his pediatrics clerkship grade or his internal medicine clerkship grade. He alleges that O'Dell told him that his failure of the "NBME shelf exam," one component of his internal medicine clerkship grade, was not appealable and resulted in an automatic failure of the clerkship. Doe claims that UNMC prevented him from appealing his grade on the internal medicine NBME shelf exam, but that UNMC allowed a medical student who was not disabled to appeal.

Doe then began his family medicine clerkship. During that clerkship, Doe notified Hill, chair of UNMC's scholastic evaluation committee, that his mental health was deteriorating and that he needed to seek treatment from his psychologist. Doe alleges that Hill ignored Doe's concerns about his mental health but that Doe saw the psychologist on several different occasions. Hill did, however, require Doe to sign a contract to continue in medical school. Doe refused to sign the contract, and the matter was brought before the evaluation committee.

At a hearing, the evaluation committee presented Doe with a new contract, to which had been added a professionalism clause that provided: "'I understand that any ratings of –2 or below on the professionalism ranking system, coupled with any negative comments concerning professionalism behavior, in any required clerkship or senior elective will be grounds for termination of enrollment.'" Doe signed the contract but claims that the defendants did not require other nondisabled students with similar academic standing to sign a contract containing a professionalism clause.

In the fall of 2006, Doe completed his surgery clerkship. During the clerkship, Doe developed a hernia that required surgery. Doe scheduled the surgery on the day he was required to take the surgical NBME shelf exam. He alleges that the surgery clerkship director, Grant, allowed him to reschedule the examination. That same day, however, Spann required him to see patients. Doe claims that Spann did not require other students to see patients that morning because the students were scheduled to be taking the NBME shelf exam.

Spann also completed an evaluation of Doe, giving him a poor performance evaluation. Doe claims that Grant's negative remarks influenced Spann's evaluation and that Grant provided Spann with privileged and fictitious information regarding Doe. Based on Spann's evaluation, the evaluation committee dismissed Doe from medical school because he violated the professionalism clause. Under the evaluation committee guidelines, Doe appealed his dismissal. The appeals board and the medical school's dean upheld the decision.

Doe claims that the defendants (1) fraudulently concealed information regarding his grades and evaluations, (2) discriminated against him because of his disability, (3) violated his due process rights, and (4) were contractually obligated to allow Doe to review all information used by UNMC in determining his grades and dismissing him.

2. Defendants Move for Dismissal

The defendants moved to dismiss under the following subsections of rule 12(b) of the Nebraska Court Rules of Pleading

in Civil Cases[3]: subsection (1) (lack of jurisdiction), subsection (5) (insufficiency of service), and subsection (6) (failure to state a claim). They asserted that (1) the State Tort Claims Act[4] immunizes the Board, UNMC, and the UNMC faculty members from claims of fraudulent concealment; (2) sovereign immunity immunizes the Board, UNMC, and the UNMC faculty members, in their official capacities, from claims for money damages; (3) the UNMC faculty members, in their individual capacities, have qualified immunity; and (4) none of the parties had been properly served. The record shows, however, that Doe served summons at the Attorney General's office under Neb. Rev. Stat. § 25-510.02(1) (Reissue 2008). And at the hearing on the motion to dismiss, the Board, UNMC, and the UNMC faculty members stated that they were not challenging service on them in their official capacities. But they maintained that Doe did not properly serve summons on the UNMC faculty members in their individual capacities.

3. District Court's Order

The court found that Doe failed to properly serve the UNMC faculty members in their individual capacities. Because 6 months had passed since Doe had filed his complaint, the court dismissed the UNMC faculty members in their individual capacities.[5] The court also dismissed all the claims against the remaining defendants. Regarding his fraudulent concealment claim, the court concluded that the State Tort Claims Act barred suits against the defendants for misrepresentation or deceit claims. But even if that conclusion was incorrect, the court dismissed the claim for two additional reasons. First, Doe failed to allege facts indicating that the defendants' alleged concealment of any records met the criteria of fraudulent misrepresentation. Second, Doe did not claim that any alleged concealment affected his dismissal. Regarding Doe's discrimination claim, the court concluded that the alleged facts did not involve a fundamental right abrogating the State's sovereign

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[3] See Neb. Ct. R. Pldg. § 6-1112(b).

[4] See Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2008).

[5] See Neb. Rev. Stat. § 25-217 (Reissue 2008).

immunity. And, regarding Doe's due process claims, the court concluded that the defendants had qualified immunity. The court also concluded that Doe alleged insufficient facts to show that the defendants had violated a liberty or property interest. The court further concluded that Doe's allegations showed the defendants afforded him due process required for academic dismissal. Finally, the court found that Doe failed to state a breach of contract claim.

III. ASSIGNMENT OF ERROR

Doe assigns, consolidated and restated, that the district court erred in dismissing his complaint.

IV. STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[6] Until now, we have stated that complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.[7] In other cases, we have similarly stated that dismissal under § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[8]

Because the Nebraska Rules of Pleading in Civil Cases are modeled after the Federal Rules of Civil Procedure, we have adopted from federal case law these standards for testing the sufficiency of a plaintiff's complaint.[9] But the U.S. Supreme Court has recently revised the federal standard for determining

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[6] See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

[7] *Id.*

[8] *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

[9] See, *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005); *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

whether a complaint can survive a motion to dismiss for failure to state a claim. So we consider these cases in determining whether to revise our standard also.

In 2007 and 2009 cases, the Supreme Court held that to prevail against a motion to dismiss, a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[10] In *Bell Atlantic Corp. v. Twombly* (*Twombly*),[11] the Court concluded that a plausibility standard is more consistent with Fed. R. Civ. P. 8(a)(2), which requires a pleading to contain "'a short and plain statement of the claim showing that the pleader is entitled to relief.'"[12] And it reasoned that general pleading principles oblige a plaintiff to provide more than labels and conclusions, or a mere recitation of the elements of a claim, because courts are not required to accept as true legal conclusions or conclusory statements. Instead, the allegations must raise the right to relief "above the speculative level."[13]

In *Twombly*, the issue was whether the plaintiffs should be permitted to engage in discovery for facts that might prove the necessary element of their claim: that the defendants had agreed not to compete with each other, in violation of antitrust laws. The plaintiffs specifically alleged that the illegal agreement existed and also alleged circumstantial evidence of an agreement. But the circumstantial evidence—parallel business behavior—was legal conduct unless it stemmed from the defendants' preceding agreement. To prevail, a plaintiff is also required to adduce evidence tending to exclude the possibility of independent action.

The Second Circuit had held that the complaint was sufficient because the defendants' parallel conduct in not competing was just as consistent with collusion as permissible business behavior and because the defendants had not shown that "no

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[10] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

[11] *Twombly, supra* note 10.

[12] *Id.*, 550 U.S. at 556.

[13] *Id.*, 550 U.S. at 555.

set of facts"[14] would permit the plaintiffs to prove collusion. In reversing, the Supreme Court stated that its earlier "'no set of facts'" language had been interpreted to mean that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings."[15] It reasoned that such interpretations permitted conclusory pleadings to survive a motion to dismiss if any possibility existed that the plaintiff would later establish facts to support recovery. The Court concluded that in some cases, this interpretation permitted expensive discovery for groundless claims. Accordingly, the Court held that in antitrust cases, a complaint must allege

> enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a recovery is very remote and unlikely."[16]

Applying these principles, the Court held that the complaint's

> allegation of parallel conduct and a bare assertion of conspiracy [did] not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make [an antitrust] claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.[17]

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[14] *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *reversed, Twombly, supra* note 10.

[15] *Twombly, supra* note 10, 550 U.S. at 561.

[16] See *id.*, 550 U.S. at 556.

[17] *Id.*, 550 U.S. at 556-57.

So, the complaint in *Twombly* was insufficient for two reasons: (1) The allegation of a conspiracy was a legal conclusion not entitled to an assumption of truth; and (2) the complaint's only factual allegation did not support an inference of a preceding agreement even if true. But in a decision issued 2 weeks after *Twombly*, the Court reversed a decision affirming the dismissal of a complaint for conclusory allegations. In *Erickson v. Pardus*,[18] the Court emphasized that

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Specific facts are not necessary*; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'". . . In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.

In 2009, the Supreme Court held that *Twombly*'s plausibility standard applied to all civil actions. In *Ashcroft v. Iqbal*,[19] the majority explained the plausibility standard as follows:

> 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. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" . . .
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory

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[18] *Erickson v. Pardus*, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (emphasis supplied), citing *Twombly, supra* note 10.

[19] *Iqbal, supra* note 10, 556 U.S. at 678-79 (citations omitted).

> statements, do not suffice. . . . [Fed. R. Civ. P.] 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." . . .
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

In *Iqbal*, the plaintiff alleged that after the September 11, 2001, terrorist attacks, government officials created a policy to detain Muslim men for discriminatory purposes and they knew of and condoned the detainees' mistreatment during detention. The majority concluded that these allegations were bare assertions, amounting to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim."[20] As such, the Court deemed the allegations to be "conclusory and not entitled to be assumed true."[21] The majority also concluded that the complaint's factual allegations were implausible in the light of the more likely explanation

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[20] *Id.*, 556 U.S. at 681.

[21] *Id.*

that the men were held because of their suspected links to the attacks until cleared of terrorist activity.

The majority rejected the argument that its plausibility standard was contrary to notice pleading: "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual content."[22] But the four-justice dissent disagreed with the majority's statement that the allegations were all conclusory. The dissent concluded that the complaint stated a claim of discriminatory conduct assuming that its allegations were true. And it found no principled basis for the majority's disregard of some allegations and acceptance of others.

Some of the Supreme Court's reasoning for its plausibility standard is consistent with what we have previously said in reviewing dismissal orders. Specifically, we have stated that we will accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[23] Also, like its federal counterpart,[24] Neb. Ct. R. Pldg. § 6-1108(a)(2) also requires a complaint to include a short and plain statement of the claim showing that the pleader is entitled to relief. And we share the Supreme Court's concern that the "no set of facts" language could permit some meritless claims to proceed to discovery.

But we are also concerned that lower federal courts have interpreted the Court's plausibility standard as a heightened pleading standard. In some cases decided after *Twombly* and *Iqbal*[25]—frequently, cases requiring the plaintiff to show a defendant's intent or alleged involvement in unlawful conduct—federal courts have required a complaint to contain specific factual allegations of the defendant's claimed misconduct

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[22] *Id.*, 556 U.S. at 686.

[23] See *Kanne v. Visa U.S.A.*, 272 Neb. 489, 723 N.W.2d 293 (2006), citing *Kellogg, supra* note 9.

[24] Fed. R. Civ. P. 8(a)(2).

[25] *Iqbal, supra* note 10.

to survive a motion to dismiss for failure to state a claim.[26] In addition, commentators have found that courts dismiss a higher percentage of civil rights claims and employment discrimination claims when the plausibility standard is cited.[27]

But we do not believe that the Supreme Court intended dismissal to hinge on whether the plaintiff can allege specific facts of a necessary element. In *Twombly*, the Supreme Court specifically stated that it was not requiring "heightened fact pleading of specifics."[28] In *Erickson*,[29] it reiterated that allegations of specific facts are not required and that a judge must accept as true all of the factual allegations contained in the complaint. In practical effect, it appears the plausibility standard mainly comes into play when the plaintiff cannot allege direct evidence of a necessary element at the pleading stage.

We recognize that the Court's decision in *Iqbal* reflects a tension in how different judges might view the same allegations. For example, even the *Iqbal* majority treated what were basically the same allegations both as implausible factual allegations and as a mere recitation of the elements. And we recognize that Congress has attempted to overturn the "*Twombly-Iqbal*" standard—which is perceived as a shift toward fact pleading—and restore the old standard.[30] This

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[26] See, e.g., *In re Travel Agent Com'n Antitrust Litigation*, 583 F.3d 896 (6th Cir. 2009); *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009); *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009); *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009); *Panther Partners Inc. v. Ikanos Communications, Inc.*, 347 Fed. Appx. 617 (2d Cir. 2009); *Lopez v. Beard*, 333 Fed. Appx. 685 (3d Cir. 2009).

[27] See Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011 (2009).

[28] *Twombly, supra* note 10, 550 U.S. at 570.

[29] *Erickson, supra* note 18.

[30] See, 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. Supp. 2010); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

legislation stalled in committee.[31] But we believe that the Court's decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery.

[2] Accordingly, we hold that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[32]

V. ANALYSIS

1. State's Claims of Sovereign Immunity Are Affirmative Defenses

The court dismissed all of Doe's claims against the UNMC faculty members in their individual capacities for insufficient service of process. It also dismissed the following claims against the Board, UNMC, and the UNMC faculty members in their official capacities as barred by the State's sovereign immunity: Doe's fraudulent concealment claim, his discrimination claims under the federal ADA and the Rehabilitation Act, and his due process claims. Alternatively, it concluded that Doe failed to state a claim of fraudulent concealment and was afforded sufficient due process for academic dismissal. It also concluded that Doe failed to state a breach of contract claim.

We have previously concluded that "when a motion to dismiss raises both rule 12(b)(1) [(subject matter jurisdiction)] and [rule 12(b)](6) . . . , the court should consider the rule 12(b)(1) . . . first and should then consider the rule 12(b)(6) . . . only if

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[31] See, H.R. 4115, 155 Cong. Rec. H13351 (daily ed. Nov. 19, 2009); S. 1504, 155 Cong. Rec. S7869 (daily ed. July 22, 2009).

[32] See *Twombly, supra* note 10. See, also, *Morgan v. Hubert*, 335 Fed. Appx. 466 (5th Cir. 2009), citing *In re Southern Scrap Material Co., LLC*, 541 F.3d 584 (5th Cir. 2008).

it determines that it has subject matter jurisdiction."[33] We have also held that when a motion to dismiss raises rule 12(b)(6) and any combination of rule 12(b)(2), (4), and (5), the court should consider dismissal under rule 12(b)(2), (4), and (5) first. And then the court should consider dismissal under rule 12(b)(6) only if it determines that it has personal jurisdiction and that process and service of process were sufficient.[34] Here, the court failed to specify whether it considered the defendants' sovereign immunity claims to fall under the defendants' 12(b)(1) motion or their 12(b)(6) motion.

[3] The defendants contend that the court's conclusion that the State's sovereign immunity barred some of Doe's claims meant that the court lacked subject matter jurisdiction for those claims. But we have interpreted exceptions to the State's waiver of immunity under both the State Tort Claims Act and the Political Subdivisions Tort Claims Act as affirmative defenses that the State must plead and prove.[35] The U.S. Supreme Court has not decided whether 11th Amendment immunity is a jurisdictional issue.[36] But under its current view, states can waive 11th Amendment immunity, and, following the Court's lead in some cases, federal courts often decide the merits of a claim without addressing sovereign immunity.[37] So we conclude that a trial court may properly address a claim of sovereign immunity under a 12(b)(6) motion. We next determine whether the record shows sufficient process and service before considering whether Doe stated claims for which a court could grant relief. The defendants do not dispute that Doe perfected service on the Board, UNMC, and the UNMC faculty members in their official capacities. But they contend that Doe

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[33] *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 600, 694 N.W.2d 625, 629-30 (2005).

[34] *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008).

[35] See *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

[36] See *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998).

[37] See 13 Charles Alan Wright et al., Federal Practice and Procedure § 3524.1 (2008).

did not perfect service on the UNMC faculty members in their individual capacities.

2. Record Fails to Show Whether Doe Properly Served UNMC Faculty Members in Their Individual Capacities

The district court found that Doe had not properly served the UNMC faculty members in their individual capacities. Doe argues that he complied "in all substantial respects" with Neb. Rev. Stat. §§ 25-505.01 and 25-508.01 (Reissue 2008) and that the defendants received actual notice of the lawsuit.[38] He argues that when the defendants have actual notice, a court should liberally construe rules governing service.

Because Doe has sued the UNMC faculty members in their individual capacities, § 25-508.01 governs service upon them. Section 25-508.01(1) provides that "[a]n individual party . . . may be served by personal, residence, or certified mail service." Here, the record lacks evidence that Doe served the UNMC faculty members personally or at their residences. Instead, he served them individually by sending the complaint, by certified mail, to the risk management office at UNMC. Section 25-505.01 governs service by certified mail. Section 25-505.01(c)(i) requires that service of summons be made "within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery."

[4] Unlike many state statutes that permit certified mail service, § 25-505.01 does not require service to be sent to the defendant's residence or restrict delivery to the addressee.[39] But due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections.[40] As stated, the district court made no findings regarding service,

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[38] Brief for appellant at 30.

[39] See, John P. Lenich, Nebraska Civil Procedure § 10:9 (2008); 62B Am. Jur. 2d *Process* § 211 (2005).

[40] See *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (2008).

and we cannot determine from the record whether sending the summons to UNMC's risk management office was reasonably calculated to notify each defendant that he or she had been sued in his or her individual capacity.

[5] Doe further argues, however, that through their attorney, the defendants, on August 5, 2008, all made voluntary appearances at a hearing regarding their motion to dismiss. And under Neb. Rev. Stat. § 25-516.01 (Reissue 2008), voluntary appearance of the party is equivalent to service[41] that waives a defense of insufficient service or process if the party requests general relief from the court on an issue other than sufficiency of service or process, or personal jurisdiction.[42]

[6] But the defendants affirmatively pled insufficiency of service of process under rule 12(b)(5) and voluntarily appeared in their individual capacities only to object to the sufficiency of process. While they also moved to dismiss Doe's complaint under other subsections of rule 12(b), the defendants, in their official capacities, did not waive a defense or objection by joining one or more other 12(b) defenses or objections in a responsive motion.[43] In sum, state officials, in their individual capacities, can challenge service while still reserving the right, in their official capacities, to contest a plaintiff's claims on other grounds. So, the only issue regarding individual service is whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants in their individual capacities. We conclude that this question presents an issue of fact, and we remand the cause for that determination.

3. Sovereign Immunity Principles

As noted, the district court found that Doe's claims against the Board, UNMC, and the UNMC faculty members in their official capacities were barred by sovereign immunity or that

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[41] See § 25-516.01(1). See, also, *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

[42] See § 25-516.01(2). See, also, *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[43] See § 6-1112(b).

he failed to state a cause of action in law or equity. We will address each of Doe's claims individually. But we first pause to explain the applicable sovereign immunity principles.

[7] Regarding Doe's discrimination claims under the ADA and the Rehabilitation Act, federal law governs whether a defendant is entitled to 11th Amendment immunity.[44] But "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."[45] States also have inherent immunity from suit as "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."[46]

[8-10] Under 11th Amendment immunity, a nonconsenting state is generally immune from suit unless the state has waived its immunity or Congress has validly abrogated it.[47] But 11th Amendment immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[48] And 11th Amendment immunity does not bar a claim against state officers which seeks only prospective declaratory or injunctive relief for ongoing violations of federal law.[49]

[11-13] Under state sovereign immunity, we have held that a suit against a state agency is a suit against the state.[50] And we have held the Board and the University of Nebraska are state agencies.[51] In reviewing actions against state employees, we have similarly held that a court must determine whether actions

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[44] See 13 Wright et al., *supra* note 37, § 3524.2 (citing cases).

[45] *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

[46] *Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

[47] See, *id.*; 13 Wright et al., *supra* note 37, § 3524.

[48] *Alden, supra* note 46, 527 U.S. at 756.

[49] See, *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002); *Alden, supra* note 46.

[50] *In re Interest of Krystal P. et al.*, 251 Neb. 320, 557 N.W.2d 26 (1996).

[51] *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

against individual officials sued in their official capacities are in reality actions against the state and therefore barred by sovereign immunity.[52] In addressing this issue, we have stated that an action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity.[53] We have further stated that suits which seek to compel affirmative action on the part of a state official are barred by sovereign immunity, but that if a suit simply seeks to restrain the state official from performing affirmative acts, it is not within the rule of immunity.[54]

We recognize that the "'affirmative action'" test, which we adopted in 1995,[55] has been criticized as easily manipulated to limit "the ability of citizens to vindicate their rights."[56] But in the light of the cases we cited and the facts of the 1995 case in which we adopted the test, we believe that we meant that sovereign immunity bars suits to compel affirmative actions that require a state official to expend public funds. In recent cases interpreting the standard, we have not interpreted "affirmative action" to include suits to compel state officers to take an action required by law when that action would not require them to expend public funds.[57]

[14] So we hold that actions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds. As the Supreme Court has consistently stated, "'when the action is in essence one for the recovery of money from the state, the state

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[52] See *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[53] *Id.*

[54] *Id.*

[55] See *County of Lancaster v. State*, 247 Neb. 723, 728, 529 N.W.2d 791, 794 (1995).

[56] Lenich, *supra* note 39, § 20:10 at 732-33.

[57] See *County of Lancaster, supra* note 55. Compare *State ex rel. Steinke, supra* note 52.

is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'"[58]

[15] Finally, "[t]he only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, [as an] entity, may possess, such as the Eleventh Amendment."[59] So if the State does not have immunity from suit, state officials sued in their official capacities cannot assert it.[60] And, obviously, if the district court correctly determined that Doe failed to state a cause of action, we need not consider a sovereign immunity defense.

4. Fraudulent Concealment

Doe's first claim raises allegations of fraudulent concealment. Doe argues that under the Board's bylaws, Kinney and Smith had a duty to disclose any evaluations or material used by the obstetrics and gynecology department to determine his grade. He argues that Kinney and Smith had knowledge of material facts; they concealed or suppressed those facts with the intent to mislead him; they misled him; and he suffered damages.

The Board, UNMC, and the UNMC faculty members, in their official capacities, contend that because the State has not waived immunity for misrepresentation claims, they are immune from suit.

[16-18] As we know, the State Tort Claims Act[61] governs tort claims brought against the Board and UNMC. Under that act, the State has waived its sovereign immunity for many tort claims, but it also lists exceptions to the waiver.[62] Once a plaintiff establishes subject matter jurisdiction under the State Tort Claims Act, the defendant may affirmatively plead

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[58] *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997).

[59] *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

[60] See *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996).

[61] See §§ 81-8,209 through 81-8,235.

[62] See § 81-8,219.

that the plaintiff has failed to state a cause of action under § 81-8,219 because an exception to the waiver of sovereign immunity applies.[63] Under § 81-8,219(4), one of the listed exceptions is for claims "arising out of . . . misrepresentation [or] deceit." And we have stated that "[f]raud by concealment is a form of deceit" and therefore falls within the ambit of § 81-8,219(4).[64]

Here, Doe alleges that the defendants fraudulently concealed information from him to his detriment. The exception in § 81-8,219(4) bars this claim against the Board and UNMC for fraudulent concealment. Further, under his fraudulent concealment claim, Doe sought money damages, not to compel state officials to do an act they were lawfully required to do. Thus, his claim against the UNMC faculty members in their official capacities is also barred.

5. Discrimination Because of Disability

(a) Americans with Disabilities Act

Doe alleges that he qualifies as an individual with a disability under the ADA. He claims that under title II of the ADA, the defendants failed to accommodate his disability and treated him differently from nondisabled students. The Board and UNMC argue that the State's sovereign immunity under the 11th Amendment bars Doe's claim under title II of the ADA. They argue that Doe has alleged no title II violation involving a fundamental right and, so, that they are immune from suit under the 11th Amendment.

Title II of the ADA prohibits discrimination against a qualified individual with a disability, in the participation or receipt of public services, programs, or activities, because of the disability.[65] It also requires state schools and universities to make reasonable modifications to their rules, policies, or practices to accommodate a disabled student's participation in state

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[63] See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

[64] *Security Inv. Co. v. State*, 231 Neb. 536, 550, 437 N.W.2d 439, 448 (1989). See, also, 37 Am. Jur. 2d *Fraud and Deceit* § 1 (2001).

[65] See 42 U.S.C. § 12132.

educational programs.[66] By incorporating the remedies available under the federal Rehabilitation Act, title II of the ADA also authorizes private suits against public entities to enforce its provisions.[67]

[19] But the 11th Amendment generally bars claims against a state or state officials sued in their official capacities. It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although by its terms, the 11th Amendment applies only to suits against a state by citizens of another state, the U.S. Supreme Court has extended the 11th Amendment's applicability to suits by citizens against their own states.[68] So whether Doe can sue the State depends upon whether Congress has validly abrogated the State's 11th Amendment immunity under the ADA.

[20] For Congress to abrogate a state's 11th Amendment immunity, it must (1) unequivocally intend to do so and (2) act under a valid grant of constitutional authority.[69] Regarding the first element, we have recognized that Congress has unequivocally expressed its intent to abrogate immunity under the ADA.[70]

[21,22] The second element—whether Congress had the power to abrogate state immunity—depends on whether Congress exceeded the scope of its enforcement power under § 5 of the 14th Amendment. Under § 5, Congress may enact legislation abrogating state sovereign immunity to remedy and prevent violations of that amendment.[71] This authority

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[66] See, *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), citing 42 U.S.C. § 12131(2); *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006).

[67] See, 42 U.S.C. § 12133; *Lane, supra* note 66.

[68] *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

[69] *Id.*

[70] *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006). See, also, *Garrett, supra* note 68.

[71] See, e.g., *Lane, supra* note 66.

permits Congress to enact "'prophylactic'" legislation that both prevents and deters unconstitutional conduct by prohibiting conduct that is somewhat broader than the conduct forbidden by the amendment.[72] But Congress' enforcement power under § 5 is limited to remedial legislation.[73] It cannot use its § 5 authority to substantively redefine the 14th Amendment right at issue.[74] To be classified as remedial, and therefore a valid exercise of its § 5 power, Congress' legislation must exhibit a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[75]

We have stated that the congruence and proportionality test has two parts.[76] The first looks to the legislative history and what specific injury Congress is attempting to address.[77] The second requires the statutory remedy to be congruent and proportional to the injury identified in the congressional findings.[78] But federal appellate courts have characterized the test as requiring a three-part inquiry: (1) Identify the constitutional right at issue; (2) determine whether there was a history of unconstitutional discrimination to support Congress' prophylactic legislation; and (3) determine whether the rights and remedies created by the statute are congruent and proportional to the constitutional rights it purports to enforce and Congress' record of constitutional violations.[79]

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[72] See *id.*, 541 U.S. at 518.

[73] *Keef, supra* note 70, citing *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

[74] See, *Lane, supra* note 66; *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003), quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

[75] *Keef, supra* note 70, 271 Neb. at 743, 716 N.W.2d at 63.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] See, e.g., *Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007), citing *Garrett, supra* note 68; *Ass'n for Disabled Americans v. Fla. Intern. Univ.*, 405 F.3d 954 (11th Cir. 2005).

Before 2004, the Court had stated that when the discrimination targeted by Congress is subject only to rational basis review, the legislation must be in response to an identified, widespread pattern of the states' unconstitutional conduct, i.e., irrational reliance on Congress' prohibited criteria.[80] But when the alleged discrimination is subject to heightened scrutiny, it is "easier for Congress to show a pattern of state constitutional violations."[81]

For example, in *Board of Trustees of Univ. of Ala. v. Garrett*,[82] the Court concluded that under title I of the ADA, Congress' abrogation of states' immunity failed the congruence and proportionality test. Title I prohibits employment discrimination against a qualified individual with a disability. The Court stated that the first step was to identify the constitutional right at issue. Because the Court had concluded that state action on the basis of disability is not subject to heightened review, the constitutional right at issue was the right to be free from irrational employment discrimination based on disabilities.

But the Court concluded that Congress had failed to "identify a pattern of irrational state discrimination in employment against the disabled."[83] The Court further noted that Congress had not mentioned a pattern of state employment discrimination in the ADA's legislative findings.[84] In a footnote, it stated that most of the anecdotes submitted to Congress' task force "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which are areas addressed in Titles II and III of the ADA."[85] And even if the legislative record had been sufficient to show a pattern of state violations, the Court concluded, the legislation was not narrow enough and would unnecessarily cause hardships

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[80] See *Hibbs, supra* note 74.

[81] *Id.*, 538 U.S. at 736.

[82] See *Garrett, supra* note 68.

[83] *Id.*, 531 U.S. at 368.

[84] *Garrett, supra* note 68.

[85] *Id.*, 531 U.S. at 371 n.7.

for businesses. In *Kimel v. Florida Bd. of Regents*,[86] the Court applied similar reasoning in concluding that Congress had not validly abrogated sovereign immunity against age discrimination suits.

But in 2004, under title II of the ADA, the Court in *Tennessee v. Lane*[87] reached a different result in addressing Congress' abrogation of states' immunity. There, the plaintiffs, who were wheelchair-dependent paraplegics, were denied physical access to, and the services of, the state court system because of their disability. The Court found title II was intended to prohibit irrational disability discrimination. But the Court stated that unlike title I, title II was intended to enforce a variety of other constitutional guarantees, violations of which were subject to heightened review. It concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights."[88]

The Court rejected the dissent's position that "a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves."[89] It stated that "evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry."[90] Because title II was aimed at the enforcement of basic rights that invoked heightened scrutiny, the Court compared the rights at issue in *Lane* to those in an earlier case in which it reviewed legislation aimed at sex discrimination in the workplace.[91] As noted, the Court had stated that it would consider broader evidence of discrimination for legislation that prohibits discrimination invoking heightened scrutiny.

In *Lane*, the Court considered a history of statutes, cases, and anecdotes, collected by Congress' task force, dealing with

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[86] See *Kimel, supra* note 74.

[87] See *Lane, supra* note 66.

[88] *Id.*, 541 U.S. at 524.

[89] *Id.*, 541 U.S. at 527 n.16.

[90] *Id.*, 541 U.S. at 528 n.16.

[91] See *Hibbs, supra* note 74.

access to judicial services and public services generally. But much of the evidence was unrelated to access to courts. The Court also considered evidence that showed disability discrimination in public services and programs such as "the penal system, public education, and voting."[92] Finally, the Court stated that Congress' legislative findings in the ADA had found persistent discrimination against persons with disabilities

> "in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." . . . This finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that *inadequate provision of public services* and access to public facilities was an appropriate subject for prophylactic legislation.[93]

In sum, for determining whether the congressional record was sufficient to support prophylactic legislation, the Court treated discrimination subject to rational basis review the same as discrimination subject to heightened review because Congress intended the legislation to address "systematic deprivations of fundamental rights."[94]

But in considering whether the legislation was an appropriate response to a pattern of unequal treatment, the Court explicitly limited its reasoning and holding to whether "Congress had the power under § 5 to enforce the constitutional right of access to the courts."[95] In a footnote, it stated, "Because this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only [the] prohibition on irrational discrimination."[96] It held that "Title II, as it applies to the class of cases implicating

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[92] *Lane, supra* note 66, 541 U.S. at 525.

[93] *Id.*, 541 U.S. at 529 (emphasis omitted) (emphasis supplied). See, also, 42 U.S.C. § 12101(a)(3) (2006).

[94] *Lane, supra* note 66, 541 U.S. at 524.

[95] *Id.*, 541 U.S. at 531.

[96] *Id.*, 541 U.S. at 532 n.20.

the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[97] Accordingly, some courts, including this court, limited *Lane*'s holding to situations involving access to the courts.[98]

We addressed 11th Amendment immunity against a title II claim in *Keef v. State*.[99] There, handicapped parking permitholders brought a claim against the State, alleging that the State's $3 charge for a handicapped parking placard violated title II of the ADA.[100] In analyzing *Lane*, we held that Congress did not validly abrogate 11th Amendment immunity as it applies to suits for damages involving parking placard fees. We concluded that "[t]he holding in *Lane* was limited by the Court to when a fundamental right, such as access to the courts, is at issue."[101] Furthermore, in addressing the congruence and proportionality test, we determined that

> abrogating 11th Amendment immunity under the ADA to invalidate a fee for a parking placard is not congruent to the specific findings of Congress, which were concerned with denial of fundamental rights in providing public services. Nor is the remedy proportional to those findings when the fee appears to be a modest cost-recovery measure and there is no evidence of animus toward the class.[102]

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[97] *Id.*, 541 U.S. at 533-34.

[98] See, *Lane, supra* note 66; *Keef, supra* note 70. See, also, *Bill M. ex rel William M. v. Nebraska Dept. H.H.S.*, 408 F.3d 1096 (8th Cir. 2005) (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999)), *vacated sub nom. United States v. Nebraska Dept. of HHS Finance and Support*, 547 U.S. 1067, 126 S. Ct. 1826, 164 L. Ed. 2d 514 (2006); *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005), *vacated* 412 F.3d 500; *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), *vacated and superseded* 449 F.3d 1149 (11th Cir. 2006).

[99] See *Keef, supra* note 70.

[100] *Id.*

[101] *Id.* at 746, 716 N.W.2d at 65.

[102] *Id.* at 747-48, 716 N.W.2d at 66.

Although we recognized the U.S. Supreme Court's 2006 decision in *United States v. Georgia*,[103] we rejected the appellants' argument that this decision broadly abrogated sovereign immunity for title II claims. In *Georgia*, the Court held that Congress validly abrogated sovereign immunity regarding an inmate's title II claims to the extent that the claims also violated the 14th Amendment. And it remanded for the lower court to determine whether Congress validly abrogated sovereign immunity for his title II claims that did not independently violate the 14th Amendment.

In *Keef*, we did not read *Georgia* as requiring us to consider abrogation of sovereign immunity beyond title II claims involving fundamental rights. But we now conclude that the Supreme Court has signaled to lower courts that *Lane* allows Congress a broader scope of enforcement power for abrogating sovereign immunity. Although we did not recognize its actions when *Keef* was decided, the Court had signaled a broader application of *Lane* by vacating several title II decisions and remanding for reconsideration in the light of *Lane*.[104] Most notably on point, in one of those vacated decisions, the Sixth Circuit had concluded that sovereign immunity barred a student's title II claim that university officials had not reasonably accommodated her disability so that she could complete her master's

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[103] *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006).

[104] See, *Klingler v. Director, Dept. of Revenue, State of Mo.*, 545 U.S. 1111, 125 S. Ct. 2899, 162 L. Ed. 2d 291 (2005), *vacating* 366 F.3d 614 (8th Cir. 2004); *Columbia River Correctional Institute et al. v. Phiffer*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004), *vacating* 63 Fed. Appx. 335 (9th Cir. 2003); *Parr v. Middle Tennessee State University et al.*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004), *vacating Parr v. Middle Tennessee State University*, 63 Fed. Appx. 874 (6th Cir. 2003); *Rendon et al. v. Florida Department of Highway Safety and Motor Vehicles et al.*, 541 U.S. 1059, 124 S. Ct. 2387, 158 L. Ed. 2d 960 (2004), *vacating State v. Rendon*, 832 So. 2d 141 (Fla. App. 2002); *Spencer v. Easter et al.*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L. Ed. 2d 960 (2004), *vacating U.S. v. Spencer*, 63 Fed. Appx. 160 (4th Cir. 2003); *Spencer v. Easter*, 109 Fed. Appx. 571 (4th Cir. 2004).

degree program.[105] We agree with the defendants that the right to education is not a fundamental right.[106] But we conclude that the Supreme Court's remands for reconsideration in light of *Lane* require us to consider whether Congress nonetheless validly abrogated sovereign immunity for ADA claims even if the violation does not directly infringe upon a claimant's fundamental right.

Moreover, since *Lane*, four federal appellate courts have considered Congress' abrogation of sovereign immunity for title II claims of irrational disability discrimination in public education. Each court concluded that Congress has validly abrogated sovereign immunity for such claims.[107]

The First and Third Circuits explicitly recognized that because there is no fundamental right to education and individuals with disabilities are not a suspect class, the claimants failed to show that the challenged conduct violated the 14th Amendment under a rational basis review.[108] But in determining whether title II was justified as a response to a pattern of discrimination, three circuit courts have stated that the Court in *Lane* broadly looked at the history of disability discrimination as a whole and conclusively settled that "Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services."[109]

In contrast, the First Circuit believed that the better approach was to focus on the category of state conduct at issue. But it

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[105] See *Parr v. Middle Tennessee State University, supra* note 104, 63 Fed. Appx. 874 (6th Cir. 2003).

[106] See, generally, *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007). See, also, *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *Catlin v. Sobol*, 93 F.3d 1112 (2d Cir. 1996).

[107] See, *Bowers, supra* note 79; *Toledo, supra* note 66; *Constantine v. Rectors, George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Ass'n for Disabled Americans, supra* note 79.

[108] See, *Bowers, supra* note 79; *Toledo, supra* note 66.

[109] *Constantine, supra* note 107, 411 F.3d at 487. Accord, *Bowers, supra* note 79; *Ass'n for Disabled Americans, supra* note 79.

concluded that because *Lane* considered a broad class of disability discrimination, it should similarly consider Congress' abrogation as a response to discrimination in public education generally.[110] It also determined that under *Lane*, the appropriate sources for determining whether there is a history of widespread constitutional violations are state statutes, court decisions, and examples from the ADA's legislative history. Reviewing those sources, the court concluded that despite the enactment of the Rehabilitation Act, "the thirty years preceding the enactment of the ADA evidence a widespread pattern of states unconstitutionally excluding disabled children from public education and irrationally discriminating against disabled students within schools."[111]

These cases illustrate that under *Lane*, courts need not determine whether Congress identified a wide pattern of states' irrationally discriminating against disabled students in public education. Instead, judicial decisions, statutes, and personal anecdotes collected by Congress' task force[112] indicating a general history of discrimination in public education are sufficient to support Congress' prophylactic legislation.

The final issue under *Lane* is whether Title II creates rights and remedies that are congruent and proportional to the constitutional rights it purports to enforce and Congress' record of constitutional violations.[113] This question must be answered as applied to a pattern of unequal treatment in public education. In deciding whether Congress' response is congruent and proportional, federal courts have generally asked what title II requires and prohibits, what potential harm it prevents, and how its requirements are ameliorated by its limitations.

Federal courts have stated that title II requires public schools and universities to (1) make reasonable modifications to their rules, policies, and practices to ensure that students with

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[110] See *Toledo, supra* note 66.

[111] *Id.*, 454 F.3d at 38-39.

[112] See *Garrett, supra* note 68, appendix C.

[113] See, e.g., *Bowers, supra* note 79; *Ass'n for Disabled Americans, supra* note 79.

disabilities can participate; and (2) remove accessibility barriers.[114] They have weighed these requirements against the potential harms that the ADA prevents.

Federal courts cite the important role education plays in exercising fundamental rights such as voting and participating in public programs and services.[115] But they are also concerned about the potential for hard-to-detect irrational disability discrimination in public education:

> In light of the long history of state discrimination against students with disabilities, Congress reasonably concluded that there was a substantial risk for future discrimination. Title II's prophylactic remedy acts to detect and prevent discrimination against disabled students that could otherwise go undiscovered and unremedied. By prohibiting insubstantial reasons for denying accommodation to the disabled, Title II prevents invidious discrimination and unconstitutional treatment in the actions of state officials exercising discretionary powers over disabled students.[116]

Moreover, following *Lane*, federal courts have consistently concluded that title II is a narrow remedy for discrimination in education when they considered important limitations on states' duties to accommodate disabled students.[117] First, title II protects only qualified individuals with disabilities.[118] Second, "[s]tates retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability."[119] Third, schools and universities cannot be required "'to undertake measures that would impose an undue financial or administrative burden, threaten historic

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[114] See, *Toledo, supra* note 66; *Constantine, supra* note 107.

[115] See, *Toledo, supra* note 66; *Ass'n for Disabled Americans, supra* note 79.

[116] *Ass'n for Disabled Americans, supra* note 79, 405 F.3d at 959.

[117] See, *Bowers, supra* note 79; *Toledo, supra* note 66; *Constantine, supra* note 107; *Ass'n for Disabled Americans, supra* note 79.

[118] See, *Bowers, supra* note 79; *Constantine, supra* note 107.

[119] *Ass'n for Disabled Americans, supra* note 79, 405 F.3d at 959. Accord, *Bowers, supra* note 79; *Constantine, supra* note 107.

preservation interests, or effect a fundamental alteration in the nature of the service.'"[120] Finally, title II "does not require public schools and universities to accommodate disabled students if the accommodation would substantially alter their programs or lower academic standards, and courts give due deference to the judgment of education officials on these matters."[121]

In sum, federal courts have weighed the limitations on the reasonable accommodation requirement against (1) the important role that education plays in exercising fundamental rights, such as voting and participating in public programs and services; and (2) the potential for future discrimination. They have concluded that title II's prophylactic measures are justified and reasonably targeted to prevent "the persistent pattern of exclusion and irrational treatment of disabled students in public education, coupled with the gravity of the harm worked by such discrimination."[122]

[23] Because of the Supreme Court's evolving jurisprudence on this issue, we agree with these federal courts that Congress has validly abrogated the State's 11th Amendment immunity regarding title II claims under the ADA when a plaintiff alleges discrimination in public education. We conclude that the district court erred in dismissing Doe's title II claim against the Board, UNMC, and the UNMC faculty members for this reason.

(i) Doe's Allegations Were Sufficient to State a Title II Claim

Because the court determined that Doe's claim was barred by the State's 11th Amendment sovereign immunity, it did not consider whether Doe stated a valid title II claim. The defendants argue that he did not. We disagree.

Remember, to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient factual matter,

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[120] *Toledo, supra* note 66, 454 F.3d at 39, quoting *Lane, supra* note 66. Accord, *Bowers, supra* note 79; *Constantine, supra* note 107.

[121] *Toledo, supra* note 66, 454 F.3d at 40. Accord, *Ass'n for Disabled Americans, supra* note 79; *Constantine, supra* note 107.

[122] *Toledo, supra* note 66, 454 F.3d at 40. Accord *Ass'n for Disabled Americans, supra* note 79.

accepted as true, to state a claim to relief that is plausible on its face. In making this determination, we accept all factual allegations in the complaint as true and give the plaintiff the benefit of all reasonable inferences.

[24] A plaintiff seeking recovery for a title II violation under the ADA must allege the following: (1) The plaintiff has a disability; (2) the plaintiff is otherwise qualified to receive the benefits of a public service, program, or activity; and (3) the defendants excluded the plaintiff from participation in or denied the plaintiff the benefits of such service, program, or activity or otherwise discriminated against the plaintiff because of his or her disability.[123] A plaintiff is "qualified" if he or she is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[124]

Doe alleged that he suffers from major depressive disorder that interfered with one or more major life functions. He did not specifically allege that he sought an accommodation or that an accommodation would have allowed him to successfully complete medical school. But he did allege that he talked to Hill about the deterioration of his mental condition and that he requested psychiatric treatment during his family medicine clerkship. These allegations are sufficient to plausibly show the "reasonable accommodation" element of his claim: i.e., that his treatment was a reasonable accommodation which, if honored, would have permitted him to successfully complete medical school. And he has alleged that on other occasions also, he was treated differently from other students. He specifically claimed that these allegations showed that he was discriminated against because of his disability. Accepting his allegations as true and giving him the benefit of all reasonable inferences, we conclude that his allegations were sufficient to state a title II claim.

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[123] See *Constantine, supra* note 107. Accord *Bowers, supra* note 79.

[124] 42 U.S.C. § 12131(2).

[25] We note that our analysis has been shaped by our response to the district court's order. In general, however, courts should follow the Supreme Court's analytical framework set out in *Georgia* for determining abrogation of sovereign immunity in title II claims under the ADA.[125] There, the Court remanded for the lower courts to determine three things in the following order:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.[126]

For some claims, this framework will avoid unnecessary abrogation analysis. Under *Georgia*, if a plaintiff alleges irrational disability discrimination but not failure to make reasonable accommodations, Congress has unquestionably abrogated sovereign immunity for claims that allege conduct prohibited by the 14th Amendment.

(b) Rehabilitation Act

Doe alleged that the defendants violated § 504 of the Rehabilitation Act. It provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability . . . be denied the benefits of, or be subjected to discrimination under[,] any program or activity receiving Federal financial assistance . . . ."[127] Section 504 applies to postgraduate education programs that receive or benefit from Federal financial assistance.[128] The defendants concede that the district court incorrectly determined that they have immunity under § 504 of the Rehabilitation Act.[129] But

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[125] See *Georgia, supra* note 103.

[126] *Id.*, 546 U.S. at 159.

[127] 29 U.S.C. § 794(a).

[128] See *id.*

[129] See *Doe v. Nebraska*, 345 F.3d 593 (8th Cir. 2003).

they contend that Doe has not stated a valid claim under the Rehabilitation Act.

Section 504 does not require an educational institution to lower its standards for a professional degree, for example, by eliminating or substantially modifying its clinical training requirements.[130] "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[131] To avoid dismissal of his complaint, Doe must allege that he was disabled, otherwise qualified, and dismissed solely because of his disability.[132]

Doe alleges that he has been diagnosed with major depressive disorder, chronic and recurrent, in acute exacerbation. He alleges that he suffers from substantial limitations that include learning, thinking, concentrating, and sleeping. He further alleges that his condition makes him an "individual with a disability" as defined by the Rehabilitation Act.[133] So, as pled in his complaint, Doe appears to meet the first condition.

Doe does not specifically allege that despite his disability he was otherwise qualified to continue in medical school or that he was dismissed solely because of his disability. But, as previously mentioned, Doe alleged that he requested psychiatric treatment during his family medicine clerkship. Giving him the benefit of all inferences, his allegations, as a whole, are sufficient to plausibly support the "otherwise qualified" element of his claim: i.e., that had his request been honored, he would have successfully completed medical school. Doe also alleges that after he informed his professors of his disability, he received discriminatory evaluations. Furthermore, he also alleges that he was dismissed because of the discriminatory evaluations and, as such, that he was dismissed because of his disability. Again, giving Doe the benefit of all reasonable

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[130] See *Falcone v. University of Minn.*, 388 F.3d 656 (8th Cir. 2004).

[131] *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979). See, also, 45 C.F.R. § 84.44(a) (2009).

[132] See, *Falcone, supra* note 130; *Jeseritz v. Potter*, 282 F.3d 542 (8th Cir. 2002).

[133] 29 U.S.C. § 794(a). See, also, *Constantine, supra* note 107.

inferences, we conclude that these allegations are sufficient to plausibly support a claim that he was dismissed solely because of his disability.

6. Due Process Violations

Doe's third and fourth claims allege that the defendants violated his substantive and procedural due process rights. Because of the principles of sovereign immunity involved, we will address separately Doe's claims against the Board, UNMC, and the UNMC faculty members in their official capacities.

(a) Board and UNMC

The Board and UNMC contend that because they are agencies of the State, both 11th Amendment immunity and state sovereign immunity bar suit against them by private citizens for any kind of relief.

As discussed, whether the Board and UNMC have 11th Amendment immunity depends upon whether they are arms of the State. Federal courts generally consider state universities arms of the state,[134] and the Eighth Circuit has specifically held that the University of Nebraska and its instrumentalities are arms of the State for purposes of the 11th Amendment.[135] And the Board and UNMC are state agencies entitled to state sovereign immunity.[136] We conclude that the district court properly dismissed Doe's due process claims against the Board and UNMC.

(b) UNMC Faculty Members in Their Official Capacities

The 11th Amendment does not bar Doe's due process claims against state officials for prospective injunctive relief.[137] And state sovereign immunity does not bar an action against state officials to compel them to perform an action they are lawfully

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[134] See 13 Wright et al., *supra* note 37, § 3524.2.

[135] See *Becker v. University of Nebraska at Omaha*, 191 F.3d 904 (8th Cir. 1999).

[136] See *Catania, supra* note 51.

[137] See, *Verizon Md. Inc., supra* note 49; *Alden, supra* note 46.

required to do if that action would not require them to expend public funds. Doe argues that as a medical student, he had both a liberty and a property interest in completing his medical education, and that the defendants deprived him of those interests. He further argues that the defendants denied him the opportunity to be heard on all issues involving his dismissal from medical school.

[26] Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.[138] Whether a student who is subject to academic dismissal has a cause of action for the violation of his or her right to substantive due process remains an open question.[139] The U.S. Supreme Court has not held that pursuit of a postsecondary medical school education rises to a constitutionally protected interest.[140] Nor has it held that postsecondary education rises to a fundamental right.[141] In *San Antonio School District v. Rodriguez*,[142] the Court expressly declined the invitation to hold that education is a fundamental right under the Due Process Clause. The Court stated that education is "not among the rights afforded explicit protection" under the Constitution and that it could not "find any basis for saying it is implicitly so protected."[143]

Assuming that Doe has a liberty interest in his medical school education, the interest is not fundamental.[144] So, Doe has to show the UNMC faculty members acted arbitrarily or capriciously. He must show that the UNMC faculty members had no rational basis for their decision or that they dismissed him because of bad faith or ill will unrelated to academic

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[138] See *Rodriguez, supra* note 106.

[139] See *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985).

[140] *Id.*; *Galdikas v. Fagan*, 342 F.3d 684 (7th Cir. 2003), *abrogated on other grounds, Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004).

[141] See *Rodriguez, supra* note 106.

[142] *Id.*

[143] *Id.*, 411 U.S. at 35.

[144] *Id.*

performance.[145] "In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance."[146]

Here, Doe's complaint shows that he earned a near-failing grade in one clerkship and failed two other clerkships. The evaluation committee informed him that it was concerned about his academic performance and his ability to conduct himself in a professional manner. He was required to sign a contract informing him of the evaluation committee's concerns, and because he violated the terms of the contract, he was dismissed. We cannot say that his dismissal lacked a rational basis.

[27] But Doe also alleges that the defendants violated his right to procedural due process. Specifically, he alleges that the defendants violated his procedural due process rights during the proceedings that led to his dismissal. A plaintiff asserting the inadequacy of procedural due process must first establish that the government deprived him or her of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause.[147] As stated before, if Doe's dismissal did deprive him of a liberty interest, we conclude that the defendants provided him with as much process as the 14th Amendment requires.

The U.S. Supreme Court has considered the quantum of due process owed by a state-run university to a dismissed medical student.[148] The Court distinguished between dismissals from educational institutions based on an "[a]cademic" rationale and those that may properly be characterized as "disciplinary."[149] The Court held that the dismissal of the medical student in

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[145] *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978); *Schuler v. University of Minnesota*, 788 F.2d 510 (8th Cir. 1986).

[146] *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 258, 329 N.W.2d 87, 92 (1983).

[147] *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

[148] *Horowitz, supra* note 145.

[149] *Id.*, 435 U.S. at 89.

Board of Curators, Univ. of Mo. v. Horowitz[150] was "academic" rather than "disciplinary." The dismissal "rested on the academic judgment of school officials that [the student] did not have the necessary clinical ability to perform adequately as a medical doctor."[151] The Court further noted that an academic dismissal involves "a school's determination of whether a student will make a good medical doctor."[152] It stated that the school's consideration of a student's personal attributes may permissibly factor into this "academic" decision.[153]

We conclude that Doe's dismissal falls within the ambit of an academic dismissal. Doe acknowledged that he received a marginal grade in his pediatrics clerkship and failing grades in his obstetrics and gynecological clerkship and internal medicine clerkship. He also acknowledges that he received poor professionalism marks from one of his surgery clerkship professors. He does, however, allege that the professionalism evaluation was discriminatory and made in bad faith using information Doe provided to his professors about his disability. But Doe was clearly aware of the defendants' dissatisfaction with his academic performance, and he was given numerous opportunities to discuss these issues with the defendants. He was also aware of the professionalism clause of the academic contract that he signed to remain in medical school and aware that he could be dismissed from medical school if a professor gave him an unsatisfactory professionalism grade.

[28] As in *Horowitz*, this represents an academic judgment by school officials, officials that have expertise in evaluating whether Doe possessed the attributes necessary to adequately perform his clinical duties as a medical student.[154] In short, the record showed academic justification for Doe's dismissal. And, as discussed by the Court in *Horowitz*, procedural due process does not require a hearing, either before or after a dismissal

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[150] *Id.*, 435 U.S. at 89-90.

[151] *Id.*

[152] *Id.*, 435 U.S. at 91 n.6.

[153] *Id.*

[154] See *Horowitz, supra* note 145.

decision. For academic dismissals, due process is satisfied if the student was informed of the nature of the faculty's dissatisfaction and the potential for dismissal and if the decision to dismiss was careful and deliberate.[155]

Here, Doe plainly received adequate procedural due process. The UNMC faculty members allowed him to appeal his grades, and he was made aware of all the conditions in the academic contract that he signed, specifically the professionalism clause. He also received a postdismissal hearing before an academic committee and a subsequent administrative appeal. The district court properly dismissed Doe's claims of substantive and procedural due process violations against the UNMC faculty members in their official capacities.

7. Breach of Contract

In Doe's final claim, he alleged breach of contract. He did not, however, identify or provide the district court with a contract outlining the obligation breached. He alleges only that the Board's bylaws, which he claims provide an appeal procedure for academic evaluations, created an implicit contract between him and the Board, UNMC, and the UNMC faculty members in their official capacities. And, he claims, the defendants breached the alleged contract by not following the procedure and by discriminating against him based on his disability.

Even though Doe frames his claim as a breach of contract claim, he does not articulate a theory for breach of contract separate from his due process claims. He claims, generally, that the UNMC faculty members failed to follow a set procedure for grade appeals. But Doe admits that he appealed some of his grades and that he appealed his dismissal to the appeals board and to the dean of the medical school. So clearly, the defendants provided him the opportunity to discuss his concerns and appeal his dismissal. To the extent that his contract claim does not differ from his due process claim, it is also without merit. And because Doe has failed to point to an identifiable contractual promise that the defendants did not honor, he has not alleged a contract claim that plausibly entitles him to relief.

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[155] *Id.*

The district court did not err in dismissing Doe's breach of contract claim.

VI. CONCLUSION

We conclude that the district court erred in dismissing Doe's lawsuit against the UNMC faculty members in their individual capacities without determining whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants, in their individual capacities, of the lawsuit.

Regarding the remaining defendants—the Board, UNMC, and the UNMC faculty members in their official capacities—we conclude that Doe's claims of fraudulent concealment, violations of his due process rights, and breach of contract fail to state a claim for relief that is plausible on its face. But regarding his claims under the ADA and the Rehabilitation Act, we find that the district court erred in dismissing the claims against the Board, UNMC, and the UNMC faculty members in their official capacities.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, v. NORTH PLATTE NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

788 N.W.2d 252

Filed August 27, 2010. No. S-09-727.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing a dismissal order, an appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.