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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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Edward G. Lesofski,
Plaintiff,

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CV 11-840 TUC DCB

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v.

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ORDER

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Jarrold Lash, et al.,
Defendants.

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The Court grants in part the Motion for Summary Judgment and directs the Plaintiff to show cause why the Court should not grant the Motion for Summary Judgment in its entirety. The Court grants the Motion to Dismiss, with leave to amend. The Court grants the Plaintiff an extension of time to serve Defendants and denies the remaining motions.

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Introduction

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Plaintiff filed his Complaint on December 27, 2011. He proceeds *pro se*. Plaintiff filed a First Amended Complaint on January 30, 2012. He alleges he was enrolled as a student in Defendant Arizona School of Acupuncture and Oriental Medicine (ASAOM). He alleges he was denied basic academic accommodations, and Defendant ASAOM lacks any policies to ensure that such accommodations are offered to students. He alleges Defendant ASAOM ignored academic accommodation recommendations for Plaintiff from the University of Arizona's disability access consultant and ignored medically required accommodations. He alleges that Defendant ASAOM billed and graded a class that did not exist, and Defendant Lash was not a qualified instructor and bullied students. He also sues the Accreditation Commission for Acupuncture and Oriental Medicine (Accreditation

1 Commission) for failing to ensure that Defendant ASAOM does not violate federal law. He
2 has named the individual commissioners, including Vice Commissioner Niemiec, and he also
3 alleges claims against her for conduct taken in her role as President of the Phoenix Institute
4 of Herbal Medicine & Acupuncture (PhxHMA) for putting his application on hold there
5 following service of his Complaint on Defendant ASAOM.

6 Plaintiff seeks relief under Title III of the Americans with Disabilities Act of 1990,
7 Section 504 of the Rehabilitation Act, and the Family Educational Rights and Privacy Act
8 (FERPA).

9 On June 7, 2012, prior to the scheduling conference being held in the case and
10 issuance on June 28, 2012, of the Scheduling Order, Defendants ASAOM, Dunn, Epley,
11 Lash, Lightener, and Wagner filed a Motion for Summary Judgment (ASAOM MSJ). On
12 August 8, 2012, Defendant McKenzie filed a Motion to Dismiss the First Amended
13 Complaint. On August 9, 2012, the Plaintiff filed a Motion for Alternate Service and
14 Extension of Time. On June 14, the Court provided Plaintiff with notice that he was required
15 to file a Response to the ASAOM MSJ, supported by evidence, which he did on July 8, 2012.
16 The docket reflects that no discovery has occurred in the case, and Plaintiff has failed to
17 serve the Accreditation Commission Defendants, except for Defendant McKenzie, as
18 follows: Catherine A. Niemiec, Vice Chair, and Commissioners Henry C. Chang, John
19 Cooper, Alex Holland, John Paul Liang, Lee Hullender Rubin, Jim Showrank, Angela Ying
20 Tu (Danzig), Judie G. Wexler, Joseph Changqing Yang, and Jane and John Does 13-25.

21 The Motion for Summary Judgment and Motion for Alternative Service were fully
22 briefed and ready for disposition by the Court, when Plaintiff secured counsel on August 22,
23 2012, and September 17, 2012.¹ After hiring attorneys Mc Daniel and Kunzelman, Plaintiff

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25 ¹Plaintiff attempted to secure Mr. Thomas C. Mc Daniel as “advisory” counsel to
26 appear at any hearings and trial and to make some filings in the case, with Plaintiff also filing
27 motions in the case. Once represented by counsel, “that party cannot thereafter appear or act
28 in that party’s own behalf in the cause, or take any steps therein, unless an order of

1 filed a late Response to the McKenzie Motion to Dismiss, and Defendant McKenzie has
2 objected, pursuant to LRCiv 7.2(i), seeking summary granting of the Motion to Dismiss for
3 failure to timely file the Response.

4 **A. The ASAOM Defendants’ Motion for Summary Judgment.**

5 These Defendants assert that Plaintiff fails to meet the threshold elements for a *prima*
6 *facie* case of discrimination and lacks standing to present the claims. In a case brought for
7 violations of the American with Disabilities Act (ADA) and the Rehabilitation Act of 1973,
8 the Plaintiff must establish he was discriminated against on the basis of a disability, he asked
9 for an accommodation, and the requested accommodation was reasonable. ((Doc. 38: Motion
10 for Summary Judgment at 5 (citing *Johnson v. Gambrinus*, 116 F.3d 1052 (1997).)
11 Defendants argue that Plaintiff’s First Amended Complaint “conspicuously” fails to identify
12 Plaintiff’s disability or the accommodation(s) he requested and an explanation as to why the
13 requested accommodation was reasonable.

14 As to the remaining causes of action asserted in the First Amended Complaint, the
15 Defendants assert there can be no third-party breach of contract claim because Plaintiff fails
16 to identify a contract or any intention by contracting parties to benefit him as a primary party
17 in interest. Plaintiff lacks standing to assert a claim under FERPA because the act does not
18 create a private right of action, and Plaintiff’s theory of negligence *per se* does not make
19 sense.

20 Rule 56(c) provides that “[a] party asserting that a fact cannot be or is genuinely
21 disputed must support the assertion by: (A) citing to particular parts of materials in the record
22 . . . or (B) showing that the materials cited do not establish the absence or presence of a

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24 substitution shall first have been made” LRCiv 83.3(c)(2). Counsel, Erin C.
25 Kunzelman, in Montana will appear *pro hac vice*, for Plaintiff, who resides in Montana, and
26 Mr. Mc Daniel will appear as local counsel. Attorney Kunzelman failed to file a Notice of
27 Appearance for substitution in place of Plaintiff appearing *pro se* but asserts as much in the
response to the McKenzie Motion to Dismiss. (Doc. Doc. 62: Reply at 1.)

1 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
2 fact.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).
3 The opposing party need not establish a material issue of fact conclusively in its favor; it is
4 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
5 parties’ differing versions of the truth at trial.” *First Nat’l Bank of Arizona v. Cities Serv.*
6 *Co.*, 391 U.S. 253, 288-89 (1968).

7 The evidence of the non-movant is “to be believed, and all justifiable inferences are
8 to be drawn in his favor.” *Id.* at 255. But, if the evidence of the non-moving party is merely
9 colorable or is not significantly probative, summary judgment may be granted. *Anderson*,
10 477 U.S. at 248-49. Conclusory allegations, unsupported by factual material, are insufficient
11 to defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
12 1989).

13 The Court will grant summary judgment as a matter of law if on the record before
14 the Court there exists no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a); *see*
15 *also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the
16 initial responsibility of presenting the basis for its motion and identifying those portions of
17 the record, together with affidavits, which it believes demonstrate the absence of a genuine
18 issue of material fact. *Id.* at 323. Then, the burden shifts to the opposing party who must
19 demonstrate the existence of a factual dispute and that the fact in contention is material, i.e.,
20 a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty*
21 *Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is
22 such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 250; *see*
23 *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

24 Motions for summary judgment are not disfavored procedural shortcuts, but rather
25 serve as an integral part of the Federal Rules as a whole, which are designed to secure just,
26 speedy and inexpensive resolution of every action. *Celotex*, 477 U.S. at 327. Accordingly,
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1 the rules governing motions for summary judgment operate in regard to the rights of both the
2 movant and nonmovant to a trial when there exists a genuine issue of material fact to be
3 decided by a jury. At summary judgment, the judge’s function is not to weigh the evidence
4 and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
5 477 U.S. at 249. The inquiry mirrors the standard for a directed verdict: whether the
6 evidence presented reveals a factual disagreement requiring submission to a jury or whether
7 the evidence is so one-sided that one party must prevail as a matter of law. *Id.* at 250-52.

8 **1. The ADA and Rehabilitation Act.**

9 If Defendant ASAOM is a “program ... receiving Federal financial assistance,” it is
10 subject to the Rehabilitation Act of 1973. 29 U.S.C. § 794(a). In addition, as a private school
11 or other place of education, 42 U.S.C. § 12181(7)(J), ASAOM qualifies as a “public
12 accommodation” subject to Title III of the ADA. *See, e.g., Singh v. George Wash. Univ. Sch.*
13 *of Med. & Health Sciences*, 508 F.3d 1097 (D.C.Cir. 2007) (applying Title III to a private
14 medical school); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998)
15 (applying Title III to a private podiatric college).

16 The Rehabilitation Act prohibits federal grantees from excluding, denying benefits
17 to, or discriminating against any “otherwise qualified individual ... solely by reason of her
18 or his disability.” 29 U.S.C. § 794(a). Title III of the ADA provides, “No individual shall be
19 discriminated against on the basis of disability in the full and equal enjoyment of the goods,
20 services, facilities, privileges, advantages, or accommodations of any place of public
21 accommodation.” 42 U.S.C. § 12182(a). The ADA defines “discrimination” as including “a
22 failure to make reasonable modifications” that are “necessary” to provide a disabled
23 individual with such full and equal enjoyment, “unless the entity can demonstrate that
24 making such modifications would fundamentally alter the nature of such goods, services,
25 facilities, privileges, advantages, or accommodations.” *Id.* § 12182(b)(2)(A)(ii).

1 With his Response, the Plaintiff attached a “Declaration” from Tim Blee, the
2 Department Chair at ASAOM and one of Plaintiff’s instructors. He asserts the Plaintiff had
3 a “service dog” with him at all times; exhibited classic PTSD and ADD symptoms, especially
4 related to test-taking, which Blee recognized based on his personal experience over many
5 years of teaching students with such conditions; Blee made certain accommodations in his
6 class for Plaintiff by providing a quiet, secluded space for Plaintiff to take tests; Blee
7 informed other administrators of these accommodations and that with them the Plaintiff was
8 able to successfully take and pass the tests, and Blee met with resistance to the idea that other
9 instructors should make the same or similar accommodations for the Plaintiff. (Doc. 47:
10 Response, Ex. 47-1 at Blee Declaration.)

11 Plaintiff failed to tender his VA medical records to confirm his PTSD/ADD
12 diagnosis or to tender records from the University of Arizona records, Disability Resource
13 Center, which he asserts were sent to Defendants explaining the types of reasonable
14 accommodations that might assist the Plaintiff. He also failed to establish that due to his
15 disability he has an impairment that substantially limits any of his life activities. (Doc. 53:
16 Reply at 4-5.)

17 Defendants make much of the requirement that an impairment may not be transitory,
18 i.e., lasting or expected to last six months or less, and that the “Declarations” “merely suggest
19 that he had trouble taking tests.” *Id.* at 4 (citing 42 U.S.C.A. § 12101(3)(B)). This is
20 disingenuous because “learning” “concentrating” and “thinking” are considered major life
21 activities. *See* 42 U.S.C. § 12102 (listing “major life activities” as including, but not limited
22 to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking,
23 standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking,
24 communicating, and working”), *see also Singh v. George Washington University School of*
25 *Medicine and Health Sciences*, 508 F.3d 1097, 1104 -1105 (D.C. 2007) (recognizing that
26 test-taking *per se* is not a major life activity, but test-taking difficulties can obviously play
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1 a role in the “individualized assessment,” required by *Toyota Motor Mfg. v. Williams*, 534
2 U.S. 184, 199 (2002) of whether the limitation in the major life activity of learning is
3 substantial). “The key obviously is the extent to which the impairment restricts the major life
4 activity.” *Knapp v. Nw. Univ.*, 101 F.3d 473, 481 (7th Cir. 1996).

5 Given the Blee Declaration, the Court concludes that the Plaintiff may have failed
6 to provide his medical records and other evidentiary support to establish that he is disabled
7 and substantially impaired in a major life activity, and failed to identify necessary
8 accommodations, because he appeared *pro se*,² and not because the evidence of his disability
9 does not exist. Plaintiff is now represented by counsel and the Court affords him one more
10 chance to properly support these alleged facts with evidence. Fed. R. Civ. P. 56(e)(1),

11 Should Plaintiff’s disability claim survive, the Court finds merit to the Plaintiff’s
12 request to conduct discovery before responding to Defendants’ Motion for Summary
13 Judgment on the Intentional Infliction of Emotional Distress claim. Fed. R. Civ. P. 56(d).

14 As to the breach of contract claim, Defendants assert the Plaintiff has acknowledged
15 he has no evidence to support it, and they “reserve the right to request attorney fees related
16 to the claim.” (Reply at 6.) Plaintiff has asserted that he does not have copies of the
17 contracts governing his claims because Defendants have not responded to his discovery
18 requests. This is not, as Defendants suggest, the same as admitting he has alleged meritless
19 claims. Because ASAOM is a private school, any contracts governing ASAOM’s receipt of
20 federal financial assistance, directly or indirectly through student loans, are relevant.
21 Because ASAOM is a private school, its contract with Plaintiff is relevant.

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24 ²The Court did provide notice to the Plaintiff that he needed to site to specific
25 admissible portions of the record supporting his position, but in this case because there has
26 been no discovery, there is no record. Plaintiff, instead, needed to compile an admissible
27 evidentiary record in support of his Response. (Doc. 43: Order (citing *Rand v. Rowland*, 154
28 F.3d 952, 962 (9th Cir. 1998) (*en banc*)).

1 allege a *prima facie* case of disability discrimination under the ADA or the Rehabilitation
2 Act. Most importantly, Defendant McKenzie asserts that as a matter of law the Title III
3 claim fails as against him, acting in his capacity as the Chair of the Accreditation Committee,
4 because the ADA only extends to those individuals or entities which own, lease, or operate
5 the place of public accommodation at issue. (Doc. 55: Motion to Dismiss at 4 (citing 42
6 U.S.C.A. 12182(a)).

7 Defendant McKenzie's assertion that Plaintiff fails to allege a *prima facie* case of
8 disability discrimination fails for the same reasons and to the same extent as Defendants
9 ASAOM's Motion for Summary Judgment fails.

10 The First Amended Complaint alleges that Defendant McKenzie (Chairman) and
11 others are commissioners and management of Defendant Accreditation Commission. (Doc.
12 15: First Amended Complaint at 9 ¶ 40.) Defendant McKenzie and the other commissioners
13 failed to provide reasonable oversight further discriminating against the Plaintiff. *Id.* at 10
14 ¶ 43. Defendant McKenzie and the other commissioners, and Defendant Accreditation
15 Commission intentionally discriminated against the Plaintiff by failing to require appropriate
16 training for administrators at schools accredited by the Accreditation Commission and failed
17 to require reasonable accommodations to be included in the accreditation standards. *Id.* at
18 12 ¶ 50. The Accreditation Commission Defendants, including Defendant McKenzie knew
19 ASAOM lacked policies and procedures for disabled students. *Id.* at 14 ¶ 58.

20 Defendant McKenzie is correct that the Ninth Circuit has held that "individual
21 defendants cannot be held personally liable for violations of the ADA." *Walsh v. Nev. Dep't*
22 *of Human Resources*, 471 F.3d 1033, 1038 (9th Cir. 2006). The ADA prohibits any private
23 entity that owns, leases (or leases to) or operates a place of public accommodation and
24 "private entity" means a person or entity other than a public entity, *Emerson v. Thiel*
25 *College*, 296 F.3d 184, 189 (3rd Cir. 2002) (citing 42 U.S.C. § 12182(a), 28 C.F.R. §
26 36.201(a), 36.104). The term "operate" has its ordinary meaning and has been construed to

1 include “to control or direct the functioning of” and “to conduct the affairs of” the institution.
2 *Id.* (citing *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995), *see also*
3 *Lentini v. California Center for the Arts*, 370 F.3d 837, 849-850 (9th Cir. 2004) (finding no
4 individual liability under Title III of the ADA). Similarly, individuals are not liable under
5 Rehabilitation Act *Id.*

6 In a late Response to the Motion to Dismiss, the Plaintiff asserts the following:

7 Defendant Arizona School of Acupuncture and Oriental Medicine operates
8 under the direct authority of Defendant Accreditation Commission For
9 Acupuncture and Oriental Medicine. Defendant Accreditation Commission
10 For Acupuncture and Oriental Medicine operates under contract with the
11 U.S. Department of Education.

12 The accreditation provided by Defendant Accreditation Commission For
13 Acupuncture and Oriental Medicine provides Defendant Arizona
14 School of Acupuncture and Oriental Medicine to operate collecting federal
15 funds from Arizona School of Acupuncture and Oriental Medicine by Defendant Accreditation Commission For
16 Acupuncture and Oriental Medicine with funds received from federal funds.

17 Defendant Accreditation Commission For Acupuncture and Oriental
18 Medicine receives its funding from its member schools. Member schools
19 seek accreditation to allow federal student aid and funding under the U.S.
20 Veterans Administration’s veterans benefit program. Member schools pay
21 their dues with funds received from federal funding. It is this receipt of
22 federal monies which allows Defendant Accreditation Commission For
23 Acupuncture and Oriental Medicine to operate and brings its actions under
24 the requirements of Section 504 of the Rehabilitation Act.

25 Defendant Accreditation Commission For Acupuncture and Oriental
26 Medicine is a member based organization. Defendant Accreditation
27 Commission For Acupuncture and Oriental Medicine controls schools
28 obtaining federal funding through a contract with the U.S Department of
Education. As the gatekeeper for federal funding who also indirectly
receives its operating funds from federal funding, Defendant Accreditation
Commission For Acupuncture and Oriental Medicine is subject to Section
504 of the Rehabilitation Act of 1973.

Defendant McKenzie is chairman of the commission which runs and
controls Defendant Accreditation Commission For Acupuncture and
Oriental Medicine.

(Doc. 62: Response at 5-6.

Plaintiff does not sue Defendant McKenzie, individually, under the ADA. The Court
notes that Title III of the ADA provides only injunctive relief, *Wander v Kaus*, 304 F.3d 856,

1 858 (9th Cir. 2002), and the injunctive relief sought by the Plaintiff is against the
2 Accreditation Commission to provide proper oversight for compliance with the ADA and the
3 Rehabilitation Act and forbid accreditation where there is noncompliance with the ADA and
4 Rehabilitation Act.

5 The Court will afford the Plaintiff, who has now secured counsel, a second
6 opportunity to amend the complaint to allege the claims against the Accreditation
7 Commission as asserted in the Response.

8 **Conclusion**

9 Furthermore, the Plaintiff may take this opportunity to amend the First Amended
10 Complaint to reflect the rulings of the Court in this Order, and to make any other corrections
11 or additions to properly state claims against properly named Defendants. The Court will
12 afford the Plaintiff an extension of time to serve the Second Amended Complaint. As to the
13 Title III ADA claim, the Defendants will be the entities ASAOM and the Accreditation
14 Commission, and not the individual commissioners. There is no need to sue each
15 commissioner, acting in his official capacity, to bind the Accreditation Commission by any
16 injunction, if issued for the Plaintiff. In the event some alternative form of service is deemed
17 necessary to affect service on the Accreditation Commission, the Plaintiff should propose
18 such alternative service and seek leave of the Court.

19 The Court denies Defendant McKenzie's Motion for Summary Disposition, pursuant
20 to LRCiv 7.2(i), because the Plaintiff's Response was six days late, and finds Defendant
21 McKenzie's motion for an extension of time to file a reply on the merits to the Motion to
22 Dismiss is moot.

23 Repeatedly, Defendant McKenzie either objects to the Plaintiff's requests to extend
24 time for service of the unserved Defendants, dismissal of the unserved Defendants, or asks
25 the Court to dismiss the claims against him because Plaintiff has failed to serve any other
26 Accreditation Commission Defendants. Plaintiff has filed a Motion to Strike the Defendant's
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1 motion for an extension of time to file a reply in support of the merits of his Motion to
2 Dismiss, wherein Plaintiff objects to Defendant McKenzie’s repeated attempts to raise
3 arguments on behalf of unserved Defendants. The Court denies the Motion for Extension
4 of Time, therefore, the Motion to Strike is moot. The Court will not hear arguments from
5 Defendant McKenzie on behalf of unserved Defendants unless and until, Defendant
6 McKenzie’s attorneys file a Notice of Appearance on behalf of such defendants.

7 This case was filed on December 27, 2011. Plaintiff has appeared *pro se*. His claims
8 have been inartfully pled, but the Court cannot find on the current record that they are legally
9 meritless. And, a *pro se* litigant should be given an opportunity to amend the complaint to
10 overcome a deficiency unless it is clear that no amendment can cure the defect. *See eg.*,
11 *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir. 1970); *Noll v. Carlson*, 809 F.2d 1446, 1448
12 (9th Cir. 1987); *Lopez v. Smith*, 203 F.3d 1122, 1129-1131 (9th Cir. 2000). The Court finds
13 that the First Amended Complaint can be amended to cure its deficiencies. This Court
14 prefers to dispose of cases pending before it on their merits, *In re Eisen*, 31 F.3d 1447, 1451
15 (9th Cir. 1994), *Ferdick v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992), as compared to
16 dismissing a case in response to some procedural pitfall, especially while Plaintiff was
17 proceeding *pro se* and in the face of some evidence that the unserved Defendants have
18 avoided service.

19 As to the Second Amended Complaint, Plaintiff should take care to comply with
20 Rule 12(b)(6). All factual allegations will be taken as true and construed in the light most
21 favorable to the nonmoving party, *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th
22 Cir. 1994), and all reasonable inferences will be drawn in favor of that party as well.
23 *Jacobsen v. Hughes Aircraft*, 105 F.3d 1288, 1296 (9th Cir. 1997). Plaintiff must, however,
24 allege facts to state a claim that is “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550
25 U.S. 544, 570 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009). Requiring Plaintiff
26 to allege facts which plausibly support and are not merely consistent with his claims reflects
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1 Rule 8(a)(2)'s threshold requirement that the “plain statement” possess enough heft to
2 “sho[w] that the pleader is entitled to relief.” *Twombly* at 546, 544-557, 570, *Iqbal* at 675,
3 678-684. All parties, including *pro se* litigants, are bound by the rules of this Court, which
4 include the Federal Rules of Civil Procedure and the Rules of Practice of the United States
5 District Court for the District of Arizona (Local Rules). *Carter v. Comm’r*, 784 F.2d 1006,
6 1008 (9th Cir. 1986), *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 2011). The Court expects full
7 compliance by the parties, especially the Federal Rules of Civil Procedure governing service
8 and dispositive motions and Local Rule 7.2(i).

9 **Accordingly,**

10 **IT IS ORDERED** that the ASAOM Motion for Summary Judgment (Doc. 38) is
11 GRANTED in part as to the FERPA claim and the negligence *per se* claim. The Court orders
12 the Plaintiff to SHOW CAUSE why the Motion for Summary Judgment should not be
13 granted in its entirety by filing within 21 days from the filing date of this Order evidence of
14 the type discussed in this Order to support his assertions that he has been diagnosed with a
15 disability, which substantially limits a major life activity (learning, concentrating or thinking)
16 and the necessary accommodations requested by the Plaintiff. Thereafter, the Court will
17 grant or deny the Motion for Summary Judgment in its remaining part, which challenged the
18 Plaintiff’s ability to present a *prima facie* case of discrimination under the ADA.

19 **IT IS FURTHER ORDERED** that in the event the Court grants ASAOM’s Motion
20 for Summary Judgment in its entirety, the case shall be dismissed in its entirety.

21 **IT IS FURTHER ORDERED** that the Motion for Hearing or Conference (Doc. 40)
22 is DENIED.

23 **IT IS FURTHER ORDERED** that Defendant McKenzie’s Motion to Dismiss,
24 pursuant to Fed. R. Civ. P.12(b)(6) (Doc. 55) is GRANTED, with leave to amend the First
25 Amended Complaint.

1 **IT IS FURTHER ORDERED** that within 21 days of the filing date of this Order,
2 the Plaintiff shall file a Second Amended Complaint to cure the deficiencies discussed
3 herein.

4 **IT IS FURTHER ORDERED** that the Plaintiff's Motion for an Extension of time
5 to serve Defendants (Doc. 56) is GRANTED for 30 days from the filing date of the Second
6 Amended Complaint.

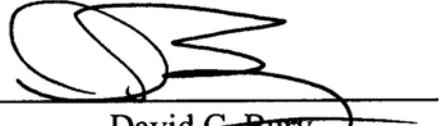
7 **IT IS FURTHER ORDERED** that Defendant McKenzie's Motion for Summary
8 Disposition of the Motion to Dismiss, pursuant to LRCiv 7.2(i) (Doc. 61), is DENIED.

9 **IT IS FURTHER ORDERED** that Defendant McKenzie's Motion for Extension
10 of Time to File a Reply to the Motion to Dismiss (Doc. 65) is DENIED as moot.

11 **IT IS FURTHER ORDERED** that the Plaintiff's Motion to Strike the Motion for
12 Extension of Time to File a Reply to the Motion to Dismiss (Doc. 66) is DENIED as moot.

13 DATED this 3rd day of October, 2012.

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David C. Bury
United States District Judge