



1 **II. Screening Requirement**

2 When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and  
3 shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the  
4 action or appeal is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . .  
5 seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). A  
6 claim is frivolous “when the facts alleged arise to the level of the irrational or the wholly incredible,  
7 whether or not there are judicially noticeable facts available to contradict them.” *Denton v. Hernandez*,  
8 504 U.S. 25, 32-33 (1992).

9 **III. Pleading Standards**

10 General rules for pleading complaints are governed by the Federal Rules of Civil Procedure. A  
11 complaint must include a statement affirming the court’s jurisdiction, “a short and plain statement of  
12 the claim showing the pleader is entitled to relief; and . . . a demand for the relief sought, which may  
13 include relief in the alternative or different types of relief. Fed. R. Civ. P. 8(a). The Federal Rules  
14 adopt a flexible pleading policy, and *pro se* pleadings are held to “less stringent standards” than  
15 pleadings by attorneys. *Haines v. Kerner*, 404 U.S. 519, 521-21 (1972).

16 A complaint must state the elements of the plaintiff’s claims in a plain and succinct manner.  
17 *Jones v. Cmty Redevel. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). The purpose of a complaint is to  
18 give the defendant fair notice of the claims against him, and the grounds upon which the complaint  
19 stands. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002). The Supreme Court explained,

20 Rule 8 does not require detailed factual allegations, but it demands more than an  
21 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers  
22 labels and conclusions or a formulaic recitation of the elements of a cause of action will  
not do. Nor does a complaint suffice if it tenders naked assertions devoid of further  
factual enhancement.

23 *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (internal quotation marks and citations omitted).

24 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d  
25 266, 268 (9th Cir. 1982). The Court clarified further,

26 [A] complaint must contain sufficient factual matter, accepted as true, to “state a claim  
27 to relief that is plausible on its face.” [Citation]. A claim has facial plausibility when the  
28 plaintiff pleads factual content that allows the court to draw the reasonable inference  
that the defendant is liable for the misconduct alleged. [Citation]. The plausibility  
standard is not akin to a “probability requirement,” but it asks for more than a sheer

1 possibility that a defendant has acted unlawfully. [Citation]. Where a complaint pleads  
2 facts that are “merely consistent with” a defendant’s liability, it “stops short of the line  
between possibility and plausibility of ‘entitlement to relief.’”

3 *Iqbal*, 556 U.S. at 679 (citations omitted). When factual allegations are well-pled, a court should  
4 assume the truth and determine whether the facts would make the plaintiff entitled to relief; conclusions  
5 in the pleading are not entitled to the same assumption of truth. *Id.* The Court may grant leave to amend  
6 a complaint to the extent deficiencies of the complaint can be cured by amendment. *Lopez v. Smith*,  
7 203 F.3d 1122, 1127-28 (9th Cir. 2000) (en banc).

8 **IV. Factual Allegations**

9 Plaintiff asserts she was enrolled at the University of Phoenix and took classes at its  
10 Bakersfield location. (Doc. 1 at 1.) She alleges that she took a “Portfolio I” course, which was  
11 required to enter the university’s Master’s in Science Counseling/Marriage, Family, and Child  
12 Therapy Program (“the Program”) through which she could obtain a counseling degree. (*Id.* at 1-3.)  
13 Plaintiff asserts she had a meeting after the last session with Silvia White, Program Director, and Ruth  
14 Miles, Facilitator. (*Id.* at 1.) Ms. White and Ms. Miles told Plaintiff she “could not move forward in  
15 the program until [she] completed sixth months of therapy.” (*Id.* at 2.)

16 According to Plaintiff, “[n]othing in the MSC Program Handbook states six months of therapy  
17 to be a prerequisite to acceptance into the program.” (Doc. 1 at 2.) Ms. White and Ms. Miles critiqued  
18 Plaintiff’s oral presentation, stating she “never discussed . . . why [she] was seeking a counseling  
19 degree.” (*Id.*) However, Plaintiff said she “clearly stated that [she] was inspired to help soldiers  
20 because of [her] military background and interactions with wounded soldiers.” (*id.*) Further, Plaintiff  
21 asserts Ms. White and Ms. Miles told her she had been “insensitive to the other students in the class,”  
22 because she showed “graphic images . . . of wounded soldiers with missing limbs.” (*Id.*) Plaintiff  
23 alleges also that during the meeting,

24 Ms. White stated that I had not disclosed why I had been placed in the 692 bldg, a high-  
25 risk barracks facility for suicidal and homicidal soldiers. Both Ms. White and Ms.  
26 Miles persistently prodded me to disclose the reasons for my medical separation from  
the military, and led me to believe that I was in error because I had not disclosed my  
disability (ies) to the class.

27 (*Id.* at 2.)

28 Plaintiff asserts that the Program requires assessment of five areas: professional behavior,

1 counseling skills, oral presentation skills, writing content, and writing mechanics. (Doc. 1 at 3.)  
2 Plaintiff alleges that during the meeting with Ms. White and Ms. Miles, Plaintiff informed the Program  
3 Director and Facilitator that she “met 4/5 of the criteria for acceptance into the program and that only  
4 3/5 was needed.” (*Id.*) Specifically, according to Plaintiff, feedback from Ms. Miles regarding a project  
5 and her class participation demonstrates Plaintiff “met the professional behavior, writing content, and  
6 writing mechanics” requirements.<sup>1</sup> (*Id.* at 4.) Further, Plaintiff alleges that feedback “after the final  
7 test in a role play prove[d] that [she] also met the counseling skills requirement.” (*Id.*) However, Ms.  
8 White responded that “she was failing [Plaintiff] on professionalism.” (*Id.*)

9 Plaintiff alleges that during the meeting, she was told also that she was “not open enough,” “too  
10 guarded,” and failed to “share enough personal information.” (Doc. 1 at 4, internal quotation marks  
11 omitted.) Ms. White and Ms. Miles expressed concern that Plaintiff would “be ‘further damaged’ by  
12 the program,” and stated she “needed to be in intensive therapy for six months.” (*Id.* at 4-5.)

### 13 **V. Discussion and Analysis**

14 Plaintiff asserts Defendants are liable for violations of the Americans with Disabilities Act  
15 (“ADA”) Title II and the Rehabilitation Act (“RA”) for refusing to admit her to the Program. (Doc. 1  
16 at 1.) Both the ADA and RA prohibit discrimination on the basis of disability. The Ninth Circuit  
17 explained that “[t]he ADA applies only to public entities, whereas the RA proscribes discrimination in  
18 all federally-funded programs.” *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

19 Title II of the ADA provides in relevant part: “no qualified individual with a disability shall, by  
20 reason of such disability, be excluded from participation in or be denied the benefits of the services,  
21 programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42  
22 U.S.C. § 12132. To state a cognizable claim for a violation of Title II, a plaintiff allege “(1) she is a  
23 qualified individual with a disability; (2) she was excluded from participation in or otherwise  
24 discriminated against with regard to a public entity’s services, programs, or activities, and (3) such  
25 exclusion or discrimination was by reason of her disability.” *Lovell*, 303 F.3d 1052 (citing *Weinrich v.*

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27 <sup>1</sup> Notably, review of the comments provided by Plaintiff contains critiques of her writing mechanics, because  
28 Plaintiff used run-on sentences and failed to “end [her] paper with a concluding paragraph.” (Doc. 1 at 6.) Although Ms.  
Miles opined Plaintiff’s level of writing was “on track,” she recommended a writing tutorial on sentence structure. (*Id.*)

1 *Los Angeles County Metro. Transp. Autho.*, 114 F.3d 976, 978 (9th Cir. 1997). To state a claim under  
2 the RA, a plaintiff must allege also that the Program “receives federal financial assistance.” *Duvall v.*  
3 *County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). Both the ADA and RA require a plaintiff to  
4 allege intentional discrimination by the defendant. *Lovell*, 303 F.3d 1052; *Duvall*, 260 F.3d at 1138.  
5 To state a claim under the RA, a plaintiff must allege also that the Program “receives federal financial  
6 assistance.” *Duvall*, 260 F.3d at 1135.

7 Here, Plaintiff alleges she has a disability and has been denied participation in the Program.  
8 However, Plaintiff has failed to allege that the denial was *because of* her disability. Indeed, Plaintiff  
9 has alleged that she was told she could not be in the Program for failing professionalism, and for not  
10 satisfying the prerequisites. If this is not the case, she must allege facts that would demonstrate that  
11 these reason were a pretext for the discrimination. Moreover, Plaintiff’s claim for a violation of the RA  
12 fails because she does not allege the Program is funded, at least in part, by the federal government.

### 13 **VI. Conclusion and Order**

14 A plaintiff should be granted leave to amend when the deficiencies of the complaint can be  
15 cured by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). A complaint, or  
16 a portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted  
17 if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the allegations, in  
18 support of the claim or claims that would entitle her to relief. *See Hishon v. King & Spalding*, 467 U.S.  
19 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

20 Because the Court cannot find with certainty that amendment would be futile, or that Plaintiff  
21 is unable to state claims for violations of the ADA and RA, Plaintiff will be given leave to file a First  
22 Amended Complaint. *See Lopez*, 203 F.3d at 1128 (dismissal of a *pro se* complaint for failure to state  
23 a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts that he has  
24 alleged and that an opportunity to amend would be futile); *see also Noll v. Carlson*, 809 F.2d 1446,  
25 1448-49 (9th Cir. 1987).

26 Plaintiff is advised that an amended complaint supersedes the original complaint. *Forsyth v.*  
27 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).  
28 The amended pleading must be “complete in itself without reference to the prior or superseded

1 pleading.” Local Rule 220. Once Plaintiff files a First Amended Complaint, the original pleading no  
2 longer serves any function in the case. The document must bear the docket number assigned this case  
3 and must be labeled “First Amended Complaint.”

4 Based upon the foregoing, **IT IS HEREBY ORDERED:**

- 5 1. Plaintiff’s motion to proceed *in forma pauperis* is **GRANTED**;
- 6 2. Plaintiff’s Complaint is **DISMISSED with leave to amend**;
- 7 3. Within 21 days from the date of service of this order, Plaintiff **SHALL** file a First  
8 Amended Complaint; and
- 9 4. If Plaintiff fails to comply with this order, the action will be dismissed for failure to  
10 obey a court order pursuant to Local Rule 110.

11  
12 IT IS SO ORDERED.

13 Dated: May 19, 2014

14 /s/ Jennifer L. Thurston  
15 UNITED STATES MAGISTRATE JUDGE