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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CARMEN DOLORES PEREZ,)	Case No.: 1:14-cv-00605 - AWI - JLT
Plaintiff,)	ORDER DISMISSING PLAINTIFF’S FIRST
v.)	COMPLAINT WITH LEAVE TO AMEND
APOLLO EDUCATION GROUP, INC., et al.,)	
Defendants.)	

Carmen Dolores Perez (“Plaintiff”) seeks to proceed *pro se* and *in forma pauperis* with an action against Apollo Education Group, Inc., doing business as the University of Phoenix, and the MSC/MFCT Counseling Department located at University of Phoenix. (Doc. 6 at 1.) For the following reasons, Plaintiff’s First Amended Complaint is **DISMISSED** with leave to amend.¹

I. Screening Requirement

When a plaintiff proceeds *in forma pauperis*, the Court is required to review the complaint, and shall dismiss the case at any time if the Court determines that the action is “frivolous, malicious or fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. 1915(e)(2). The Court must screen the First Amended

¹ Plaintiff initiated this litigation by filing her complaint on April 25, 2014. (Doc. 1) However, before the Court could screen that complaint for cognizable claims, Plaintiff filed her First Amended Complaint. (Doc. 6) Thus, the first amended complaint is the operative complaint for purposes of this screening.

1 Complaint because an amended complaint supersedes the previously filed complaint. *See Forsyth v.*
2 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

3 **III. Pleading Standards**

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

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

14 Rule 8 does not require detailed factual allegations, but it demands more than an
15 unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers
16 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.

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

18 Conclusory and vague allegations do not support a cause of action. *Ivey v. Board of Regents*, 673 F.2d
19 266, 268 (9th Cir. 1982). The Court clarified further,

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

25 *Iqbal*, 556 U.S. at 679 (citations omitted). When factual allegations are well-pled, a court should
26 assume the truth and determine whether the facts would make the plaintiff entitled to relief; conclusions
27 in the pleading are not entitled to the same assumption of truth. *Id.*

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1 **IV. Factual Allegations**

2 Plaintiff asserts she was enrolled at the University of Phoenix and taking classes at its
3 Bakersfield location. (*See* Doc. 6 at 1-2.) She alleges that she took a “Portfolio I” course, which was
4 required to enter the university’s Masters in Science Counseling/Marriage, Family, and Child Therapy
5 Program (“the Program”) through which she could obtain a counseling degree. (*Id.* at 2.) Plaintiff
6 alleges that admittance into the Program “requires a Bachelor’s Degree with at least a 2.5 GPA” and
7 positive evaluations in at least two of the following areas: professional behavior, counseling skills, oral
8 presentation skills, writing content, and writing mechanics. (*Id.* at 2, 6, 10.)

9 The Portfolio I course was “a credit/no credit class,” which required the students to make an
10 oral presentation. (Doc. 6 at 3, 8.) Plaintiff alleges that during the presentation, she mentioned being
11 “placed in the 692 bldg, a high-risk barracks facility for suicidal and homicidal soldiers... in order to
12 make [her] point about why [she] wanted to help soldiers.” (*Id.* at 4.) In addition, she showed images
13 “of wounded warriors with missing limbs (who had received medical attention).” (*Id.* at 9.) Plaintiff
14 asserts Ruth Miles, Program Facilitator, gave the following “final comment” after her presentation:

15 Ultimately the instructors of the course will make a decision based on a variety of factors.
16 Usually I just give full credit to note that you effectively passed the portion of this course.
17 However, in this case I deducted points to draw attention to some significant concerns
18 during the presentation. The presentation was 26 minutes long, which was almost twice
19 the maximum length it was meant to be. I know you mentioned prior to the presentation
20 that you were concerned you might be all over the place with your points. As long as the
21 points are clear and you are able to connect them, then the variation is fine. However, in
22 this case we often found the points to be unclear, the direction of the presentation to be
23 confusing and the overall ideas to feel disconnected from one another. I do love your
24 passion in general, and this is a strength of yours when you speak. It is also great to
25 move around, which you did. However, be careful that you are not pacing. At times you
began pacing, thinking out loud, and seemed to lose track of engaging the audience. You
had some very impacting pictures, but you were not always sure about the purpose or
points behind them. Also, always forewarn an audience if you are showing any kind of
graphic pictures, even if they are mild compared to others. That is something I have
learned the hard way from my own experience. Again, you are a wonderfully creative
and passionate woman with interesting experiences. The presentation though needed a
lot more organization and structure, as well as clear and concise points.

26 (Doc. 6 at 8-9.) Plaintiff asserts that after reading Ms. Miles’ comments, she told other students she
27 “had already been denied entrance into the program.” (*Id.* at 5.) Plaintiff alleges the other students
28 reminded her “that nobody had ever been denied entrance into the program.” (*Id.*)

1 Plaintiff alleges she attended her final evaluation meeting with Ms. Miles and Silvia White, the
2 Program director, on March 4, 2014. (Doc. 6 at 5.) Plaintiff asserts that during her conversation with
3 Ms. Miles and Ms. White, she was told that she “was insensitive to the other students in the class
4 because [she] showed graphic images.” (*Id.* at 9.) In addition, Plaintiff was told that she “was not
5 ‘open enough, that [she] was too ‘guarded’ and did not ‘share enough personal information’ about
6 [herself] in the class.” (*Id.* at 11.) Plaintiff alleges she informed Ms. White and Ms. Miles that she
7 “met 4/5 of the criteria for acceptance into the program and that only 3/5 was needed.” (*Id.* at 7,
8 emphasis omitted.) Specifically, according to Plaintiff, feedback from Ms. Miles regarding a project
9 and her class participation demonstrates Plaintiff “met the professional behavior, writing content, and
10 writing mechanics” requirements.² (*Id.* at 11.) Plaintiff alleges feedback “after the final test in a role
11 play prove[d] that [she] also met the counseling skills requirement.” (*Id.*) However, Ms. White
12 informed Plaintiff that she failed “professionalism,” “which must be passed in order to pass any/all of
13 the areas.” (*Id.*) Further, Plaintiff asserts Ms. White and Ms. Miles said she “could not move forward
14 in the program until [she] completed sixth months of therapy.” (*Id.* at 2.)

15 **V. Discussion and Analysis**

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

21 Title II of the ADA provides in relevant part: “no qualified individual with a disability shall, by
22 reason of such disability, be excluded from participation in or be denied the benefits of the services,
23 programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42
24 U.S.C. § 12132. To state a cognizable claim for a violation of Title II, a plaintiff allege “(1) she is a

26 ² Notably, review of the comments provided by Plaintiff contains critiques of her writing mechanics, because
27 Plaintiff used run-on sentences and failed to “end [her] paper with a concluding paragraph.” (Doc. 6 at 11.) Although Ms.
28 Miles opined Plaintiff’s level of writing was “on track,” she recommended a writing tutorial on sentence structure. (*Id.* at 13.)

1 qualified individual with a disability; (2) she was excluded from participation in or otherwise
2 discriminated against with regard to a public entity’s services, programs, or activities, and (3) such
3 exclusion or discrimination was by reason of her disability.” *Lovell*, 303 F.3d 1052 (citing *Weinrich v.*
4 *Los Angeles County Metro. Transp. Autho.*, 114 F.3d 976, 978 (9th Cir. 1997). To state a claim under
5 the RA, a plaintiff must allege also that the Program “receives federal financial assistance.” *Duvall v.*
6 *County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). Both the ADA and RA require a plaintiff to
7 allege intentional discrimination by the defendant. *Lovell*, 303 F.3d 1052; *Duvall*, 260 F.3d at 1138.
8 To state a claim under the RA, a plaintiff must allege also that the Program “receives federal financial
9 assistance.” *Duvall*, 260 F.3d at 1135.

10 Here, Plaintiff alleges she has a disability and has been denied participation in the Program.
11 Although Plaintiff concludes the refusal to grant admittance into the Program was *because of* her
12 disability, she failed to allege facts that support the conclusion. Rather, the facts alleged demonstrate
13 that Ms. Miles critiqued Plaintiff’s writing skills and recommended a writing tutorial. (*See* Doc. 6 at
14 13.) In addition, Ms. Miles found Plaintiff’s oral presentation skills lacking because Plaintiff’s points
15 were “unclear, the direction of the presentation [was] confusing, and the overall ideas ... [felt]
16 disconnected from one another.” (*Id.* at 8.) Further, Ms. Miles observed that Plaintiff “seemed to lose
17 track of engaging the audience” and failed to be “clear about the purpose or points” behind the images
18 shown. (*Id.* at 9.) Finally, Ms. Miles noted Plaintiff’s presentation was “almost twice the maximum
19 length it was meant to be.” (*Id.* at 8.) Ultimately, Plaintiff has alleged that she was told she could not
20 be in the Program for failing professionalism and not satisfying the prerequisites.

21 Though Plaintiff alleges the school officials required her to complete six months of counseling
22 before she’d be permitted to advance in the program (Doc. 6 at 2), there are insufficient facts alleged to
23 demonstrate that this requirement was unique to her or that the requirement was imposed in a
24 discriminatory manner. Thus, Plaintiff has not alleged facts that support a conclusion that the
25 underlying intent for the school’s determination that she would not advance in the program was to
26 discriminate against her based upon her disability.

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1 **VI. Conclusion and Order**

2 A plaintiff should be granted leave to amend when the deficiencies of the complaint can be
3 cured by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc). A complaint, or
4 a portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted
5 if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the allegations, in
6 support of the claim or claims that would entitle her to relief. *See Hishon v. King & Spalding*, 467 U.S.
7 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

8 Because the Court cannot find with certainty that amendment would be futile, or that Plaintiff
9 is unable to state claims for violations of the ADA and RA, Plaintiff will be given leave to file a
10 Second Amended Complaint. *Lopez v. Smith*, 203 F.3d 1122, 1127-28 (9th Cir. 2000) (dismissal of a
11 *pro se* complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot
12 prevail on the facts that he has alleged and that an opportunity to amend would be futile); *see also Noll*
13 *v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

14 The Second Amended Complaint must comply with the requirement of Rule 8 of the Federal
15 Rules of Civil Procedure, and given the defendants fair notice of Plaintiff's claims. Plaintiff is advised
16 that legal conclusions in the pleading are not entitled to an assumption of truth, but rather must have
17 factual support. *Iqbal*, 556 U.S. at 679.

18 Plaintiff is reminded that an amended complaint supersedes the original complaint. *Forsyth v.*
19 *Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).
20 The amended pleading must be "complete in itself without reference to the prior or superseded
21 pleading." Local Rule 220. Once Plaintiff files a Second Amended Complaint, the other pleadings no
22 longer serves any function in the case. The document must bear the docket number assigned this case
23 and must be labeled "Second Amended Complaint."

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

- 25 1. Plaintiff's First Amended Complaint is **DISMISSED with leave to amend;**
- 26 2. Within 21 days from the date of service of this order, Plaintiff **SHALL** file a Second
27 Amended Complaint; and

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3. If Plaintiff fails to comply with this order, the action will be dismissed for failure to obey a court order pursuant to Local Rule 110.

IT IS SO ORDERED.

Dated: June 18, 2014

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE