STATE OF NEW YORK
COURT OF APPEALS

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ALLEN C. DAWSON,

Petitioner-Appellant,

-vs.-

NEW YORK UNIVERSITY,

Respondent-Respondent.

----------X

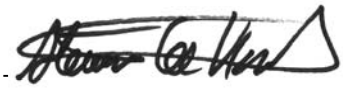
NOTICE OF MOTION

Index No.: 162361/2015

PLEASE TAKE NOTICE that upon the annexed motion and upon all papers and prior proceedings in this action Petitioner-Appellant by its attorneys the Stewart Lee Karlin Law Group, P.C. will move this Court at the Courthouse of the Court of Appeals located at 20 Eagle Street, Albany, New York, on the 30th day of August 2021 for an order granting leave to appeal to this Court from a final Decision and Order of the Appellate Division: First Department.

Dated: New York, New York
August 10, 2021

STEWART LEE KARLIN
LAW GROUP, P.C.



STEWART LEE KARLIN, Esq.
Attorney for Appellant
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To: **William Miller, AGC**
Office of General Counsel
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PRELIMINARY STATEMENT

Petitioner-Appellant ALLEN DAWSON (hereinafter referred as "Petitioner or "Mr. Dawson") through his attorneys, respectfully submits this Memorandum of Law in support of its motion for an order granting leave to appeal to this Court. Appellant brought this present action against NEW YORK UNIVERSITY, (hereinafter referred collectively as “Respondent” or "NYU") based on proceeding brought under Title VI of the Civil Rights Act of 1964, 42 USC' 2000(d), et seq. alleging that Petitioner's dismissal from NYU was due to his race and retaliation. Petitioner made a Cross-Motion to Dismiss based on the four-month statute of limitations. More specifically, The Supreme Court dismissed the claim as barred by the statute of limitations, as only the four-month statute of limitation applies due to the holding that the claim must be brought as an Article 78 proceeding.

The Appellate Division, First Department affirmed the lower Court's decision, specifically holding that the proceeding must be brought under Article 78 and that the four-month statute of limitations was applicable, not the three-year statute of limitations.

Leave to appeal is warranted because the Appellate Division, First Department, erred in affirming the lower Court's decision and its affirmance conflicts with a recent United States Court of Appeals precedent that holds that the

3-year statute of limitations is applicable and is not barred by Article 78.

The relevant section of the Court of Appeals' rule of procedure governing motions for permission to appeal in civil cases, 22 NYCRR § 500.22, requires Petitioner to show that his motion raises "issues [that] are novel or of public importance, present[s] a conflict with prior decisions of this Court, or involve[s] a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4).

The issue raised is novel and will provide statewide clarification. Leave to appeal to this Court is also necessary to provide clear, uniform guidance regarding the statute of limitations. The decision also clearly conflicts with United States Court of Appeals for the Second Circuit. For these reasons, leave to appeal to the Court of Appeals should be granted.

STATEMENT OF PROCEDURAL HISTORY

This proceeding was initially brought in the Supreme Court of the State of New York, alleging race discrimination and retaliation in connection with Petitioner dismissal from NYU. This appeal below was taken from the Decision and Order duly entered on January 20, 2017 and served with Notices of Entry of Order on or about January 23, 2017 and January 31, 2017 of the Honorable Justice Manuel J. Mendez, Supreme Court, New York County granting Defendant's motion to dismiss

and denying Petitioner's motion to amend the complaint(5-15) The Supreme Court dismissed the claim as barred by the statute of limitations, holding the four-month statute of limitation for a claim made by a student against a University is applicable. Thus, holding that the claim must be brought as an Article 78 proceeding within the four-month statute of limitations. Thereafter, Petitioner duly filed a notice of appeal on February 15, 2017 and an appeal was taken to the Appellate Division, First Department from the Decision and Order duly entered on January 20, 2017 and served with Notices of Entry of Order on or about January 23, 2017 and January 31, 2017 of the Honorable Justice Manuel J. Mendez, Supreme Court, New York County, granting Defendant's motion to dismiss. The Appellate Division, First Department affirmed the dismissal based on the statute of limitations. The Notice of Entry of the Appellate Division order was served on June 12, 2018 via first class mail. (See Exhibit "A"). Thereafter, Petitioner moved at the Appellate Division First Department for leave to appeal to the Court of Appeals that was denied on October 18, 2018. Thereafter, Petitioner served NYU with a Notice of Entry of the Order on August 9, 2021 This motion for leave is being brought within 30 days of service of the Appellant Division's denial of the Motion for Leave to Appeal to the Court of Appeals (The Decision with Notice of Entry and Affidavit of Service as Exhibit "A")

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this proposed appeal and motion pursuant CPLR §5602 (a) (1) because this action originated in the Supreme Court; and the Appellate Division, First Department affirmed the Supreme Court's holding. The order from which an appeal is sought finally determined the action and is not appealable as of right. Subsequently, a Motion for Leave to Appeal was made at the First Department. Thus, Petitioner makes the instant motion to have the right to appeal such decision as this Court is the appropriate forum with proper appellate jurisdiction.

TIMELINESS OF THE MOTION

The motion for an order granting leave to appeal to this Court is timely pursuant Rule 500.22(b). This Court has jurisdiction over this proposed appeal and motion pursuant CPLR '5602 (a) (1) because this action originated in the Supreme Court; and the Appellate Division, First Department affirmed the Supreme Court's holding. The order from which an appeal is sought finally determined the action and is not appealable as of right. See the Appellate Division Decision, annexed hereto as Exh. A.

Thus, Petitioner makes the instant motion to have the right to appeal such decision as this Court is the appropriate forum with proper appellate jurisdiction.

The Notice of Entry of the Appellate Division order was served on June 12, 2018 via first class mail. (See Exhibit "A"). Thereafter, on July 11, 2018 Petitioner moved before the Appellate Division for leave to appeal to the Court of Appeals that was denied on October 18, 2018. Thereafter, Petitioner served NYU with a Notice of Entry of October 18, 2018 order denying leave to appeal on August 9, 2021. (Exhibit "A")

This motion for leave to appeal to the Court of Appeals is being filed within thirty days of the service of the Notice of Entry. Accordingly, this motion is timely. See CPLR 5513 (b).

STATEMENT OF QUESTION PRESENTED

1. Did the Appellate Division, First Department, err in affirming the Decision and Order of the Supreme Court, New York County which dismissed Petitioner's race and retaliation claim pursuant to Title VI of the Civil Rights Act of 1964 when the United States Court of Appeals has clearly stated that a three-year statute of limitations is applicable.

- The answer should be in the affirmative.

DISCLOSURE STATEMENT

Pursuant to Rules 500.1 (f) and 500.13 (a) of the New York Court of Appeals Rules of Practice, Petitioner states that it is not a corporation and there exist no

parents, subsidiaries or other affiliates named as Petitioner in this action.

FACTUAL STATEMENT

1. Background

A. The Initial Complaint

Mr. Allen Dawson was duly enrolled in NYU for a Bachelor's degree. Defendant NYU is a private college located in New York County, NY and is a recipient of federal, state and local government grants, loans. (18[1])

Mr. Dawson duly enrolled in NYU in the School of Professional Studies program in 2009. Subsequently in 2013, Mr. Dawson was assaulted by a student (Adam Martyn). Mr. Martyn hit Mr. Dawson on his body and in his eye. Mr. Martin, during the assault, was screaming at Mr. Dawson "Nigger and Fagot." (18). As a result of the incident, Mr. Martyn was arrested and plead guilty to third degree assault. However, Mr. Martyn was not dismissed by NYU despite the egregious racial nature of the incident. The incident was public and was embarrassing for NYU. (19).

Subsequently, on or about May 7, 2013, Petitioner was advised that he had made a misrepresentation on his application for enrollment at NYU by checking the box on the application "no" as whether he was convicted of a crime. (19). Mr.

1 This refers to the page number in the Record on Appeal

Dawson had initially thought he had made a mistake by not remembering a thirteen-year-old conviction and also thinking that a misdemeanor did not have to be disclosed (Mr. Dawson at that time had no clear recollection of the application question and how he answered it). However, upon review of the application obtained through the Veterans Administration Investigative Unit, Mr. Dawson discovered that his application had been tampered with and that he had not checked the box "no." (19).

As a result of the alleged misrepresentation that NYU was claiming, Mr. Dawson was suddenly and unexpectedly dismissed from the program on May 30, 2013 during his senior year. Mr. Dawson was close to receiving his Bachelor's degree (an interdisciplinary degree). (19)

Mr. Dawson is an African American and as such, is a member of a protected class. Mr. Dawson's dismissal from NYU was due to his race. Upon information and belief, African Americans were treated differently, was a pretext for race discrimination and that it was improper for NYU to use a thirteen-year-old misdemeanor conviction to dismiss Mr. Dawson from the program. (20)

Mr. Dawson commenced the action pursuant to Title VI, 42 USC §2000(d), et seq. Title VI prohibits discrimination on the basis of an individual's race in programs and activities receiving federal financial assistance. Mr. Dawson alleges

that he was dismissed from NYU due to his race. He had crossed moved to amend the complaint, which was denied. (5-9)

B. The Proposed Amended Complaint

The proposed amended complaint alleged the following additional relevant facts. As a result of the incident, Petitioner suffered permanent damage and has a permanent scar on his retina; he also suffered permanent injury to the middle finger on his left hand in addition to black eyes. Mr. Martyn was arrested and plead guilty to third-degree assault. Moreover, Mr. Martyn was compelled by the Court to attend therapy for anger management. Nevertheless, he was allowed to continue to attend NYU and in spite of the egregious nature of his offense, was allowed to remain enrolled accommodated with private tutoring or on a one-on-one class instruction. Although Petitioner submitted various written complaints to NYU and NYU was on notice of all these discriminatory and retaliatory events, NYU did not properly investigate the matter. In addition, even though Mr. Martyn pleaded guilty to third-degree assault, he was allowed to continue at NYU. Specifically, Mr. Martyn was not dismissed by NYU despite the egregious racial nature of the incident. The incident was public and was embarrassing for Petitioner and for NYU. (43-47)

Shortly after, on or about May 07, 2013, Petitioner was advised that he had made a misrepresentation on his application for enrollment at NYU by checking the

box on the application "no" as whether he was convicted of a crime. (43-47)

This accusation was retaliatory. NYU was subjected Petitioner to microscopic scrutiny due to his race and it was looking for something to use as a pretext to expel him from the university. In fact, NYU did not previously inquire anything regarding Petitioner's admission documents until shortly after he was the victim of the racial attack at the school campus, which was shortly before Petitioner was to graduate. Petitioner had initially thought he had made a mistake by not remembering a thirteen year old conviction and also thinking that a misdemeanor did not have to be disclosed (Petitioner at that time had no clear recollection of the application question and how he answered it). Petitioner requested a copy of his application multiple times to double check his answer but Defendant NYU refused to provide it to him. Petitioner had to contact the Veterans Administration (VA) for help, and after the matter was sent the Veteran's Administration Investigative Unit, Petitioner discovered that his application had been tampered with and that Petitioner had not check the box Ano" but that someone else had checked it. Thus, Petitioner did not make a misrepresentation in his admissions application as NYU states. (43-47)

As a result of the alleged misrepresentation that NYU was claiming, Petitioner was suddenly and unexpectedly dismissed from the program on May 30, 2013 during

his senior year and shortly before his graduation. Petitioner was close to receiving his Bachelor's Degree, an interdisciplinary degree in Communications with a cross minor(s) in History & Psychology from the NYU College of Arts and Sciences. Upon information and belief, non-African American students are treated differently at NYU, and the university does not search their admission documents without any reason shortly before graduation as Defendant NYU did with Petitioner. The random investigation conducted by NYU as well as the harsh punishment of dismissing Petitioner shortly before graduation, is not implemented to non-African American students. (43-47)

Petitioner was treated differently from other students who are not African American because NYU had not taken such disciplinary action against other students, including Defendant Martyn (Caucasian), who, despite physically assaulting Petitioner, pleading guilty to a crime and calling Petitioner a "nigger" was not dismissed from NYU. Martyn (Caucasian) also violated multiple University policies and was not dismissed. Thus, NYU's decision to dismiss Petitioner was motivated by discrimination due to his race and retaliation. (43-47)

ARGUMENT

POINT I

LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED BECAUSE THE ISSUE OF LAW IS OF STATEWIDE IMPORTANCE AND INVOLVES THE UNIFORM APPLICATION OF THE STATUTE OF LIMITATIONS.

A. To Hold That the Four Statute of Limitations Applies Contrary to Binding Federal Case Law Would Present an Irreconcilable Dichotomy Where In Federal Court Statute Of Limitations For Title VI claim would be Three Years and if filed in State Court Would be Four Months.

Review by the Court of Appeals is warranted where the question presented for review is novel or of public importance, involves a conflict with prior decisions of the Court of Appeals, or where there is a conflict among the various Departments of the Appellate Division. See 22 N.Y.C.R.R. 500.22 (b) (4). The issue of law presented in this action satisfy several of these criteria.

The applicable statute of limitations is three years as this claim was properly brought pursuant to Title VI and federal law preempts state law under the Supremacy Clause. Mr. Dawson duly enrolled in NYU in the School of Professional Studies program in 2009. Subsequently, in 2013, Mr. Dawson was assaulted by a student (Adam Martyn). Mr. Martyn hit Mr. Dawson on his body and in his eye. Mr. Martin, during the assault, was screaming at Mr. Dawson "Nigger and Fagot." (18). As a result of the incident, Mr. Martyn was arrested and plead guilty to third-degree

assault. However, Mr. Martyn was not dismissed by NYU despite the egregious racial nature of the incident. The incident was public and was embarrassing for NYU. (19).

Subsequently, on or about May 7, 2013, Petitioner was advised that he had made a misrepresentation on his application for enrollment at NYU by checking the box on the application "no" as whether he was convicted of a crime. (19). Petitioner had initially thought he had made a mistake by not remembering a thirteen-year-old conviction and also thinking that a misdemeanor did not have to be disclosed (Petitioner at that time had no clear recollection of the application question and how he answered it). However, upon review of the application obtained through the Veterans Administration Investigative Unit, Petitioner discovered that his application had been tampered with and that Petitioner had not checked the box "no." (19).

As a result of the alleged misrepresentation that NYU was claiming, Petitioner was suddenly and unexpectedly dismissed from the program on May 30, 2013 during his senior year. Petitioner was close to receiving his Bachelor's Degree (an interdisciplinary degree). (19) Petitioner is an African-American and as such, is a member of a protected class. Petitioner's dismissal from NYU was due to Petitioner's race. Upon information and belief, African-Americans were treated differently,

was a pretext for race discrimination and that it was improper for NYU to use a thirteen-year-old misdemeanor conviction to dismiss Petitioner from the program. (20)

Under Title VI of the Civil Rights Act of 1964, 42 USC §2000(d), et seq. ("Title VI") a Petitioner in New York has three years to bring a lawsuit. Specifically, in New York, Title VI claims are subjected to three-year statute of limitations and accrue when a Petitioner knows or has reason to know of the injury which forms the basis of his action. See Romer v. Leary, 425 F.2d 186, 187 (2d Cir. 1970); Mussington v. St. Kukes Roosevelt Hosp. Ctr., 824 F. Supp. 427, n 4 (SDNY 1993) (stating limitations period of Title VI actions). Therefore, Petitioner here had three years to bring a cause of action under Title VI, in which the time started running on May 30, 2013, at the earliest, which is the day when he learned for the first time that he was being dismissed from the program. Thus, because Petitioner filed this action on December 02, 2015, well within the three years limitations, the within action is timely.

Here, it is clear that Petitioner is claiming his dismissal was motivated by race and retaliation only. Under the doctrine of preemption, based on the Supremacy Clause, federal law preempts state law, even when the laws conflict. (Article VI, U.S. Constitution). Petitioner's Federal Law claim, herein Title VI, preempts state

law and thus Petitioner can maintain a federal plenary action challenging his dismissal from NYU. There are no state laws asserted in the amended complaint. The within case is timely and should not be dismissed based on the statute of limitations as both the original complaint and the proposed amended complaint travel solely based on a NY. Institute of Technology - College of Osteopathic Medicine, 931 F.3d 59 (2019)

The Petitioner respectfully requests that permission to the Court of Appeals be granted. Therefore, permission should be granted because this case involves serious issues of jurisprudence pertaining to the statute of limitations regarding academic dismissals based on race under federal law (Title VI and other federal civil rights statutes) and has statewide implications. The statute of limitations regarding academic dismissals based on race (gender and disability) under the federal law needs to be settled. A line of cases in the Federal Court holds that the statute of limitations is three years under Title VI, Title IX and 42 USC 1981. A student needs to know the applicable statute of limitations in connection with a dismissal related to a federal claim. The question that should be certified is whether the statute of limitations for a student challenging his dismissal from a college or university based on race and retaliation under federal law under Title VI has a 4-month statute of limitations or a three-year statute of limitations.

B. The issue presented is of Statewide Importance

The issue presented is of statewide importance. The issue raised herein will not only affect this proceeding but will potentially affect every action brought under federal civil rights statutes, including Title VI, Title VI, IX, 1981, and the ADA. This Court should review the issue to establish a uniform rule of law that will provide clear guidance to litigants and courts on the applicable statute of limitations. Further, besides the Appellate Division First Department ruling conflicting with the law, it is critical to have a clear, unambiguous statute of limitation regarding federal civil rights law in State Court. To hold that the four statute of limitations applies contrary to federal law would present an irreconcilable dichotomy wherein the Federal Court statute of limitations for a Title VI claim would be three years. However, the same claim filed in State Court would be four months.

The Court needs to establish a clear and uniform application of the law pertaining to Title VI claims and other federal civil rights statutes such as Title IX and the ADA. Such clarification is vital so the Courts below can apply the proper standard when deciding civil rights cases for students.

For the foregoing reasons, this Court should grant the motion to leave to appeal in the Court of Appeals.

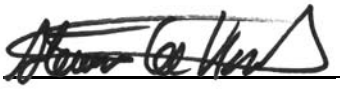
CONCLUSION

Based on the foregoing, Petitioner's motion for an order granting leave to appeal to the Court of Appeals should be granted, along with such order, further and different relief as this Court deems just and proper.

Dated: New York, New York
August 10, 2021

Respectfully submitted,

STEWART LEE KARLIN
LAW GROUP, PC



STEWART LEE KARLIN, ESQ.
Attorneys for Petitioner-Appellant
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EXHIBIT “A”

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE DIVISION
----------X
ALLEN C. DAWSON,

Plaintiff-Appellant

-vs.-

NEW YORK UNIVERSITY,

Defendant-Respondent.
----------X

NOTICE OF ENTRY

Index No.: 162361/2015

PLEASE TAKE NOTICE, that within is a true and correct copy of the Decision and Order, duly entered in the office of the clerk, Supreme Court of the State of New York, Appellate Division, First Department on October 18, 2018. (Decision and Order is attached as Exhibit "A")

Dated: New York, New York
August 9, 2021

STEWART LEE KARLIN
LAW GROUP P.C.

Stewart Lee Karlin, Esq.
Attorney for Plaintiff-Appellant
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New York, NY 10038
(212) 792-9670

To:

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OFFICE OF GENERAL COUNSEL
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william.miller@nyu.edu
Attorneys for Defendant-Respondent

EXHIBIT “A”

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on October 18, 2018.

Present - Hon. David Friedman, Justice Presiding,
Rosalyn H. Richter
Barbara R. Kapnick
Troy K. Webber, Justices.

----------X

Allen C. Dawson,

Plaintiff-Appellant,

M-3458
Index No. 162361/15

-against-

New York University,

Defendant-Respondent.

----------X

Plaintiff-appellant having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on April 19, 2018 (Appeal No. 6321),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
FIRST DEPARTMENT: APPELLATE DIVISION

----------X

ALLEN C. DAWSON,

Plaintiff-Appellant **Index No. 162361/2015**

-against-

NEW YORK UNIVERSITY,

Defendant-Respondent.

----------X

AFFIDAVIT OF SERVICE

1. I, the undersigned, affirm, that: I am not a party to the action, am over 18 years of age and reside in New York, NY.

2. On **August 9, 2021**, I served one paper copy via First Class Mail and one electronic copy via NYSCEF of the Notice of Entry with Decision and Order on counsel for Defendant-Respondent.

3. Service was made on the following person at the following address:

William Miller, AGC
OFFICE OF GENERAL COUNSEL
NEW YORK UNIVERSITY
70 Washington Square South
New York, New York 10012
william.miller@nyu.edu
Attorneys for Defendant-Respondent

Sworn to me and subscribed before me on
August 9, 2021

X_____
Signature of Notary Public

By:_____
Charles Baldour
111 John Street, 22nd Floor
New York, NY 10038

STEWART LEE KARLIN
NOTARY PUBLIC STATE OF NEW YORK
NEW YORK COUNTY
LIC. #02KA6233825
MY EXP 3/15/22

EXHIBIT “B”

18-2859-cv
Purcell v. N.Y. Inst. of Tech., C. of Osteopathic Med.

In the
United States Court of Appeals
For the Second Circuit

_____

AUGUST TERM, 2018

ARGUED: APRIL 3, 2019
DECIDED: JULY 18, 2019

No. 18-2859-cv

JOHN PURCELL,
Plaintiff-Appellant,

v.

NEW YORK INSTITUTE OF TECHNOLOGY - COLLEGE OF OSTEOPATHIC MEDICINE,
Defendant-Appellee.

_____

Appeal from the United States District Court
for the Eastern District of New York.
No. 16-cv-03555 (JMA) (AKT) – Joan M. Azrack, *Judge*.

_____

Before: KATZMANN, *Chief Judge*, and WALKER and CABRANES, *Circuit Judges*.

_____

Plaintiff-Appellant John Purcell ("Purcell") brought this action against Defendant-Appellee New York Institute of Technology – College of Osteopathic Medicine ("NYIT") alleging violations of the Americans with Disabilities Act, ("ADA"), 42 U.S.C. § 12182, Title IX of the Education Amendments of 1972 ("Title

IX"), 20 U.S.C. § 1681 *et seq*., and New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296. Purcell's claims relate to events that took place in 2010 and 2011 during his second year of medical school at NYIT (the "2010–11 Claims") and in 2013 and 2014 during and after his fourth year of medical school at NYIT (the "2013–14 Claims"). The district court (Joan M. Azrack, *Judge*) dismissed Purcell's 2013–14 Claims, holding that they needed to be brought in a New York State Article 78 Proceeding within the four-month statute of limitations for such a proceeding. The district court also dismissed Purcell's 2010–11 Claims as untimely after concluding that the continuing violation doctrine did not apply to Purcell's 2010–11 Claims. We agree that Purcell's 2010–11 Claims are untimely but disagree that Purcell's 2013–14 Claims under the ADA and Title IX must be brought within four months in a New York State Article 78 Proceeding. We therefore AFFIRM the district court's dismissal of Purcell's 2010–11 Claims, VACATE the district court's dismissal of Purcell's 2013–14 ADA and Title IX claims, and REMAND for further proceedings.

_____

STEWART LEE KARLIN, Stewart Lee Karlin Law Group, PC, New York, NY, *for Plaintiff-Appellant*.

DOUGLAS P. CATALANO (Stefanie R. Munsky and Jamie Lang, *on the brief*), Clifton Budd & DeMaria, LLP, New York, NY, *for Defendant-Appellee*.

_____

JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiff-Appellant John Purcell ("Purcell") brought this action against Defendant-Appellee New York Institute of Technology – College of Osteopathic Medicine ("NYIT") alleging violations of the Americans with Disabilities Act,

("ADA"), 42 U.S.C. § 12182, Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, and New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 296. Purcell's claims relate to events that took place in 2010 and 2011 during his second year of medical school at NYIT (the "2010–11 Claims") and in 2013 and 2014 during and after his fourth year of medical school at NYIT (the "2013–14 Claims"). The district court (Joan M. Azrack, *Judge*) dismissed Purcell's 2013–14 Claims, holding that they needed to be brought in a New York State Article 78 Proceeding within the four-month statute of limitations for such a proceeding. The district court also dismissed Purcell's 2010–11 Claims as untimely after concluding that the continuing violation doctrine did not apply to Purcell's 2010–11 Claims. We agree that Purcell's 2010–11 Claims are untimely but disagree that Purcell's 2013–14 Claims under the ADA and Title IX must be brought within four months in a New York State Article 78 Proceeding. We therefore AFFIRM the district court's dismissal of Purcell's 2010–11 Claims, VACATE the district court's dismissal of Purcell's 2013–14 ADA and Title IX claims, and REMAND for further proceedings.

BACKGROUND

Purcell alleges that NYIT discriminated against him based on his homosexuality and mental-health disability. The following facts are taken from Purcell's amended complaint and must be accepted as true at the pleading stage.[1]

A. Purcell's 2010–11 Claims

On October 22, 2010, Purcell was unable to take one of his exams because of extreme anxiety caused by a "stalking" situation in his personal life.[2] Purcell sought help from Claire Bryant, one of the deans at NYIT, who suggested that

[1] *See Leibowitz v. Cornell Univ.*, 445 F.3d 586, 590 (2d Cir. 2006) (per curiam).

[2] App'x at 12.

Purcell speak with other faculty and set up a further meeting that included three other NYIT deans and a fourth NYIT faculty member. During this meeting, Purcell discussed his grades and personal situation, and one of the deans asked Purcell psychiatric questions and other questions about his medical history. Purcell was embarrassed by these questions and began crying. He was not permitted to leave the meeting until the deans escorted him to the academic health center. Purcell met with NYIT deans several more times during the school year, and during these meetings, the NYIT deans asked him questions about his personal life, medical history, and medication, and urged him to release his medical records to them.

Purcell also alleges that various acts of discrimination relating to his homosexuality took place throughout the school year. Specifically, Purcell alleges that he was sent X-rated pictures by an employee of NYIT through a mobile phone application; that several NYIT staff members made homophobic remarks to him or in his presence, including a professor who "use[d] the terms, 'pitcher and catcher' to describe gay men when lecturing to the class"; and that class materials distributed to students included histories of patients diagnosed as "significant for homosexuality."[3]

B. Purcell's 2013–14 Claims

During his fourth year of medical school, Purcell failed three of his clinical clerkships. On May 22, 2013, Purcell was informed that the Student Discipline Review Board determined that he violated the NYIT College of Osteopathic Medicine Code of Conduct for Academic Honesty. The board suspended Purcell for at least six months and conditioned the possibility of his return "upon a complete review of evaluations of [his] fourth year clerkships and a psychiatric

[3] *Id.* at 14.

evaluation performed by a physician chosen by the College."[4] From the facts alleged in Purcell's complaint, it is not clear whether this psychiatric evaluation was completed. On June 3, 2013, Purcell was informed by letter that he was "dismissed" from NYIT because he failed three clinical clerkships.[5]

Purcell petitioned to be reinstated. He asserts that, during the course of the reinstatement proceedings, multiple NYIT staff members made derogatory remarks regarding his mental health and sexual orientation. NYIT again conditioned its review of Purcell's petition on a psychiatric assessment, but the complaint is unclear as to whether Purcell agreed to this assessment or whether it was conducted. Purcell did meet with the Student Progress Committee on August 15, 2013, and with Dean Wolfgang G. Gilliar on August 27, 2013. The next day, Purcell's petition for reinstatement was denied on the basis of the previous day's meeting with Dean Gilliar "and a careful review" of Purcell's "academic progress" and "personal circumstances."[6] On April 2, 2014, Purcell appealed the decision to Associate Dean Ronald Portanova, and his appeal was denied.

C. Procedural History

On May 13, 2016, Purcell filed this action in New York State Supreme Court, claiming relief under the ADA, Title IX, and NYSHRL. On June 28, 2016, NYIT removed the action to federal court. NYIT then moved to dismiss the action. The district court referred the motion to a magistrate judge, and on August 4, 2017, the magistrate judge issued her Report and Recommendation recommending that Purcell's 2013–14 Claims be dismissed as untimely because they were not brought in a New York State Article 78 Proceeding within Article 78's four-month statute

[4] *Id.* at 16–17.

[5] *Id.* at 17.

[6] *Id.* at 18.

of limitations, but that Purcell be permitted to pursue his 2010–11 Claims. In an order entered on September 18, 2017, the district court adopted the magistrate judge's recommendations and dismissed Purcell's 2013–14 Claims. On December 8, 2017, NYIT filed another motion to dismiss the remaining 2010–11 Claims, and on August 30, 2018, the district court dismissed Purcell's 2010–11 Claims, concluding that these claims were also untimely. This appeal followed.

DISCUSSION

"We review *de novo* the district court's grant of a motion to dismiss,"[7] "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor."[8]

Purcell's 2010–11 Claims and 2013–14 Claims were both dismissed as untimely, although for different reasons, and on appeal, Purcell challenges both decisions. We agree that the district court erred in dismissing Purcell's 2013–14 Claims brought under the ADA and Title IX, but not his 2010–11 Claims.[9]

A. Purcell's 2013–14 Claims

Neither Title IX nor the ADA includes an express statute of limitations, and the four-year federal catch-all statute of limitations does not apply to either.[10]

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[7] *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007).

[8] *Leibowitz*, 445 F.3d at 590.

[9] To the extent Purcell's appeal can be read to challenge dismissal of his NYSHRL claims as well as his federal ones, any such challenge has been forfeited because Purcell's argument in his opening brief regarding his 2013–14 Claims addressed only his ADA and Title IX claims. *See GlobalNet Financial.Com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 385 (2d Cir. 2006). In any event, the reasons we give today for reversing the district court's dismissal of Purcell's federal claims do not apply to his NYSHRL claims.

[10] "[A] cause of action 'aris[es] under an Act of Congress enacted' after December 1, 1990—and therefore is governed by § 1658's 4-year statute of limitations—if the plaintiff's claim against

Accordingly, "we must apply 'the most appropriate or analogous state statute of limitations.'"[11]

In *Curto*, we agreed with our sister circuits that personal injury actions are the "most closely analogous" to Title IX claims, and thus applied New York's three-year statute of limitations to Title IX claims.[12] District courts in this circuit have used the same reasoning with respect to ADA claims, applying either a three-year statute of limitations under New York law,[13] or Connecticut's three-year general tort statute of limitations.[14] We have found no corresponding case from Vermont. We have also previously endorsed a three-year statute of limitations for New York-based ADA claims by summary order,[15] and explicitly do so now in this published opinion.[16]

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the defendant was made possible by a post-1990 enactment." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). Both the ADA and Title IX were enacted prior to December 1, 1990.

[11] *Curto v. Edmundson*, 392 F.3d 502, 504 (2d Cir. 2004) (per curiam) (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987)); *see also Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 414 (2005) ("To determine the applicable statute of limitations for a cause of action created by a federal statute, we first ask whether the statute expressly supplies a limitations period. If it does not, we generally 'borrow' the most closely analogous state limitations period.").

[12] *Curto*, 392 F.3d at 504.

[13] *See, e.g., Volpe v. New York City Dep't of Educ.*, 195 F. Supp. 3d 582, 594 (S.D.N.Y. 2016); *De La Rosa v. Lewis Foods of 42nd St., LLC*, 124 F. Supp. 3d 290, 299, n.14 (S.D.N.Y. 2015); *Keitt v. New York City*, 882 F. Supp. 2d 412, 425 (S.D.N.Y. 2011).

[14] *Duprey v. Connecticut Dep't of Motor Vehicles*, 191 F.R.D. 329, 341 (D. Conn. 2000).

[15] *See, e.g., Stropkay v. Garden City Union Free Sch. Dist.*, 593 F. App'x 37, 41 (2d Cir. 2014) (summary order).

[16] This holding does not affect our prior decisions regarding employment discrimination claims under Title I of the ADA, which are subject to a 180-day or 300-day time limit within which a plaintiff must file a complaint with the EEOC. *See Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 325 (2d Cir. 1999).

The outcome reached by the magistrate judge and district court implies that in this case, the most appropriate or analogous state statute of limitations might be the four-month statute of limitations applicable to a New York State Article 78 Proceeding. Although New York courts have determined that "CPLR article 78 proceedings are the appropriate vehicle" for "controversies involving colleges and universities,"[17] we do not believe that the statute of limitations for ADA and Title IX claims involving decisions by colleges and universities should be any different from other ADA or Title IX claims.[18]

The magistrate judge and district court, however, framed the issue not in terms of the statute of limitations but rather in terms of the remedy. As noted above, New York state courts have established a "policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment," and have determined that the constrained scope of an Article 78 proceeding best "ensure[s] that the over-all integrity of the educational institution is maintained."[19] Therefore, the court below held, the exclusive remedy for Purcell's alleged wrongs was an Article 78 Proceeding brought in New York state court.

Respectfully, this was error. Purcell has raised federal claims in federal court. "[A]bsent a 'plain indication to the contrary' we presume that 'the application of [a] federal act [is not] dependent on state law.'"[20] Aside from the

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[17] *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92 (1999).

[18] *See Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (in determining which state statute of limitations applies to a § 1983 claim, a "broad characterization" of all claims is favored over "an analysis of the particular facts of each claim"), *superseded by statute on other grounds*, 28 U.S.C. § 1658, *as recognized in Jones*, 541 U.S. 369.

[19] *Maas*, 721 N.E.2d at 968–69.

[20] *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989));

statute of limitations issue we have just canvassed, there is no plain indication in the ADA or Title IX that either federal-court jurisdiction or the scope of a claim under those statutes is dependent on state law. To the contrary, both laws clearly lay out the standards for asserting a claim,[21] and both just as clearly apply to private colleges like NYIT.[22] However strongly New York may feel about the need to defer to academic decision-making, and however justified its decision to funnel all related *state* claims into Article 78 proceedings may be, New York cannot "nullify a *federal* right or cause of action [it] believe[s] is inconsistent with [its] local policies."[23]

NYIT cites a summary order, *Attallah v. New York College of Osteopathic Medicine*,[24] for the proposition that this Court has allowed dismissal of a federal civil rights claim because Article 78 was available. However, *Attallah* dealt with a § 1983 procedural due process claim. Applying longstanding due process doctrine, this Court affirmed the district court's conclusion "that Attallah could not plausibly claim the deprivation of a protected interest without due process of law because an adequate post-deprivation remedy in the form of an Article 78 proceeding was *available* under state law."[25] Indeed, this Court explicitly disabused the plaintiff of his belief that the district court had applied New York's

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see also Van Gemert v. Boeing Co., 553 F.2d 812, 813 (2d Cir. 1977) ("It is the source of the right . . . which determines the controlling law.").

[21] *See* 20 U.S.C. § 1681; 42 U.S.C. § 12182.

[22] NYIT, "as a 'postgraduate private school,' is doubtless a place of public accommodation" within the meaning of the ADA. *McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135, 138 (2d Cir. 2007) (per curiam) (citing 42 U.S.C. § 12181(7)(J)). Title IX's definition of a covered program, meanwhile, includes any "college, university, or other postsecondary institution" that received federal funding. 20 U.S.C. § 1687(2)(A).

[23] *Haywood v. Drown*, 556 U.S. 729, 736 (2009) (emphasis added).

[24] 643 F. App'x 7 (2d Cir. 2016).

[25] *Id.* at 9–10.

university doctrine to his claim.[26] It is instead the rule NYIT proposes—that federal antidiscrimination claims involving academic and disciplinary decisions by private New York universities must be brought in Article 78 Proceedings—that would contradict decisions of this Court, many of which have adjudicated ADA and Title IX claims in those precise circumstances.[27] Purcell may bring his federal claims against NYIT in federal court.[28]

For these reasons, we hold that the four-month statute of limitations for a New York State Article 78 Proceeding does not apply to Purcell's ADA and Title IX claims. Rather, a three-year statute of limitations applies to both claims, and because Purcell brought this action on May 13, 2016, his 2013–14 Claims are timely.

B. Purcell's 2010–11 Claims

Purcell does not dispute that this action was filed more than three years after his 2010–11 Claims accrued, but on appeal, Purcell argues that the district court

[26] *See id.* at 9.

[27] *See, e.g.*, *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016); *Lipton v. New York Univ. Coll. of Dentistry*, 507 F. App'x 10 (2d Cir. 2013) (summary order); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81 (2d Cir. 2011); *Maxwell v. New York Univ.*, 407 F. App'x 524 (2d Cir. 2010) (summary order); *McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135 (2d Cir. 2007) (per curiam); *Ascani v. Hofstra Univ.*, 173 F.3d 843 (2d Cir. 1999) (summary order); *Yusuf v. Vassar Coll.*, 35 F.3d 709 (2d Cir. 1994).

[28] NYIT also cites a state-court case in which a (federal) Title VI race discrimination claim against a university was dismissed on the basis that it had to be adjudicated in an Article 78 proceeding. *See Dawson v. New York Univ.*, 2017 WL 276331 (N.Y. Sup. Ct. Jan. 20, 2017), *aff'd*, 160 A.D.3d 555 (N.Y. App. Div. 2018). Even assuming New York can apply its university claim-funneling doctrine to federal antidiscrimination claims in state court, *but see Haywood*, 556 U.S. at 740 ("having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy"), *Dawson* does not apply here because NYIT removed this case to federal court.

erred in dismissing his 2010–11 Claims as untimely because it failed to apply the continuing violation doctrine to his 2010–11 Claims.

"[U]nder the continuing violation doctrine, a plaintiff may bring claims for discriminatory acts that would have been barred by the statute of limitations as long as an act contributing to that [discrimination] took place within the statutory time period."[29] Therefore, "a continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the [defendant] to continue unremedied for so long as to amount to a discriminatory policy or practice."[30]

We agree with the district court that the continuing violation doctrine does not apply to Purcell's 2010–11 Claims because "the amended complaint does not plausibly allege that [Purcell's 2010–11 Claims and 2013–14 Claims] are part of the same alleged hostile environment practice."[31] Purcell's 2010–11 Claims and 2013–14 Claims are separated by almost two years, during which period he does not allege any discrimination by NYIT. Due to this significant passage of time, Purcell has not plausibly alleged that he is the victim of any "ongoing" discriminatory practice or policy.[32] Additionally, of the harassers named in Purcell's 2010–11 Claims, only one reappears in Purcell's 2013–14 Claims. The lack of overlap

[29] *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 91 (2d Cir. 2011) (internal quotation marks and brackets omitted).

[30] *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994).

[31] App'x at 150. Because we agree that the continuing violation doctrine does not apply to Purcell's 2010–11 Claims, we need not address the district court's alternative reasoning that "because Plaintiff's 2013[–14] Claims are premised on a discrete act–his dismissal from NYIT–those claims cannot save his untimely" 2010–11 Claims. *Id.* at 151.

[32] *See McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010).

between alleged harassers also points against finding a continuing violation.[33] Therefore, we agree with the district court that Purcell's 2010–11 Claims are untimely and cannot be saved by the continuing violation doctrine.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's dismissal of Purcell's 2010–11 Claims, VACATE the district court's dismissal of Purcell's 2013–14 Claims brought under the ADA and Title IX, and REMAND for further proceedings.

[33] *See Sanderson v. N.Y. State Elec. & Gas Corp.*, 560 F. App'x 88, 92 (2d Cir. 2014) (summary order); *McGullam*, 609 F.3d at 78.