Appendix E
State Appellees Answer Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 21-11453

CHRISTINA MCLAUGHLIN
Appellant,
vs.
FLORIDA INTERNATIONAL UNIVERSITY BOARD OF TRUSTEES, ET AL.
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA, CASE NO.: 1:20-cv-22942-KMM

APPELLEES' ANSWER BRIEF

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APPELLEES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1-1 to 3 of the Rules of this Court, undersigned counsel for Appellees gives notice of the following people and entities who have an interest in the outcome of the case, adding any interested people or entities who were omitted from Appellant's CIP:

1. Acosta, R. Alex – Appellee/Defendant
2. Ansah, Tawia Baidoe – Appellee/Defendant
3. Baker, Thomas – Appellee/Defendant
4. Brown, Jocelyn – Appellee/Defendant
5. Cardona, Miguel – Appellee/Defendant
6. Cohen, Alix I – Counsel for Federal Appellees
7. Colan, Jonathan D – Counsel for Federal Appellees
8. Dambuleff, Andrei – Counsel for State Appellees
9. Daneshvar, Shahrzad – Counsel for Federal Appellees
10. Devos, Elisabeth – Appellee/Defendant
11. Elijah, Iris – Appellee/Defendant
12. Fajardo Orshan, Ariana – Former US Attorney for S. D. Fla
13. Florida Department of Financial Services, Department of Risk Management Services - Interested Party

APPELLEES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

14. Florida International University Board of Trustees – Appellee/Defendant

15. Gonzalez, Juan Antonio – US Attorney for S. D. Fla.

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20. McLaughlin, Christina – Appellant/Plaintiff

21. McLaughlin, Diana – Counsel for Appellant

22. Moore, Kevin Michael – United States District Judge, Southern District of Florida

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26. Rosenberg, Mark – Appellee/Defendant

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31. The Board of Governors for the State University System of Florida –

APPELLEES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee/Defendant

32. Wasserman, Howard – Appellee/Defendant

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Dated: December 13, 2021

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INTRODUCTION

In this Answer Brief, the Appellees/Defendants who are state entities or state employees sued in their official capacity will be referred to as "State Appellees," and Howard Wasserman in his individual capacity will be referred to as "Wasserman." Florida International University Board of Trustees will be referred to as "FIU BOT". The Board of Governors for the State University System of Florida will be referred to as "BOG." The Appellant, Christina McLaughlin, will be referred to as "Appellant." References to the Record will be made in accordance with Eleventh Cir. R. 28-5 and Fed. R. App. P. 28(e). References to the record shall be to Southern District docket entry number and page number: (D.E. # p.). A document not assigned a docket entry number will be referred to by its title. The Appellant's Initial Brief shall be cited as (I.Br. p.).

STATEMENT REGARDING ORAL ARGUMENT

The Appellees respectfully submit oral argument is not necessary. The dispositive issues raised in this appeal have been authoritatively determined and are adequately presented in the brief. 11th Cir. R. 28-1(c); 11th Cir. R. 34-3(d).

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STATEMENT OF JURISDICTION

This action was brought pursuant to Article III, Section I of the United States Constitution. The Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1367 to review the Omnibus Order granting defendants' motions to dismiss from the United States District Court for the Southern District of Florida. The district court Order granting the Motions to Dismiss was entered on April 12, 2021. (D.E. #64). Appellant filed a Notice of Appeal on April 28, 2021. (D.E. #65).

On July 22, 2021, this Court requested the parties to address a jurisdictional question. On October 12, 2021, the Court ruled it did have jurisdiction, and it noted Appellant, by pursuing an appeal, elected to stand on her amended complaint and waive her right to further amendment.

STATEMENT OF THE ISSUES

I. Did the district court properly dismiss the First Amendment, due process, and equal-protection claims against State Appellees, as government entities and individuals sued in their official capacities, because of sovereign-immunity protections when State Appellees are not legally persons capable of being sued under § 1983, Appellant demanded monetary relief, and Appellant has not identified any actual ongoing harm to justify injunctive relief?

II. Did the district court properly conclude Appellant's First Amendment claims against Wasserman had not been sufficiently pled, entitling Wasserman to qualified immunity?

III. Did the district court correctly dismiss the due process claims against Wassermann when Appellant did not exhaust her administrative remedies, received notice of the academic policies, and permitted a readmission hearing, and where students do not have a clearly established property right to a continuing legal education?

IV. Was the district court correct to determine there was no valid equal-protection claim when Appellant was not a member of a protected class and did not identify any similarly situated people?

V. Did the district court have jurisdiction to consider Appellant's FERPA claims based on a Florida statute that required the claim to be heard in Florida circuit court?

VI. Was the district court correct to find Appellant had failed to provide adequate presuit notice under Fla. Stat. § 768.28, barring her negligence claim against the State?

VII. Did Appellant abandon any arguments about her claims of fraud, breach of fiduciary duty, conspiracy, defamation, and denial of counsel by failing to make substantive argument in her initial brief about the dismissal of these claims?

VIII. Was the district court correct to determine Appellant's 115-page Amended Complaint amounted to a shotgun pleading when it was rambling, vague, imprecise, and replete with irrelevant allegations?

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the District Court

Appellant filed her initial Complaint on July 16, 2020, in the Southern District of Florida. (D.E. #1). She filed the operative First Amended Complaint on July 31, 2020, which included voluminous exhibits. (D.E. #10). She asserted First Amendment, due process, and equal-protection violations against State Appellees via 42 U.S.C. § 1983, as well as claims of FERPA violations, denial of counsel, fraud, civil conspiracy, breach of fiduciary duty, negligence, and defamation. *Id.* She made the same constitutional claims against Wasserman, along with many of the same tort claims. *Id.* State Appellees and Wasserman filed Motions to Dismiss on December 2, 2020. (D.E. #46, 47). On April 12, 2021, the district court entered an Order granting, among other things, both motions to dismiss, dismissing all claims against State Appellees with prejudice and three federal claims against Wasserman without prejudice; it declined to exercise supplemental jurisdiction over the tort claims against Wasserman. (D.E. #64). Plaintiff then filed a Notice of Appeal on April 28, 2021. (D.E. #65).

II. Statement of the Facts

Appellant attended Florida International University College of Law ("FIU Law") for the 2016 fall semester, with the first day of class on August 2, 2016. (D.E. #10 ¶ 144). FIU Law is overseen by BOG in BOG's role as the governing body of

Florida's public universities. (*Id.* ¶ 441). Her academic performance was poor, and she finished the fall semester with a 2.21 grade-point average ("GPA"). (*Id.* ¶ 802). FIU Law maintained in its Academic Policies a requirement of academic probation for students who finish the first semester with a GPA under 2.00. (D.E. #10-1 at 48-50). It also maintained in these published regulations two policies for exclusion from the school: § 1502 dictating a student who finished the first semester with a GPA under 1.60 shall be excluded and § 1601 holding a student who finished the first two semesters or any subsequent semesters with a GPA under 2.00 shall be "excluded from the College." (*Id.* at 49-50).

Appellant is a conservative Republican who supported Donald Trump. (D.E. #10 ¶ 1). She did not make any political statements or political conduct on campus. (*Id.*). She made some unspecified political statements online in "support for the Republican party [and] Donald J. Trump." (*Id.* ¶ 151). She posted photos online with some Republican politicians, including Rick Scott and John Bolton. (*Id.* ¶ 152). In the Spring 2017 semester, professor Brown told Appellant her support of Trump was immoral. (*Id.* ¶ 239, 545). Professor Baker performed a skit during class time where he "mock[ed] Trump supporters as mentally challenged fascists." (*Id.* ¶ 346).

Appellant had Wasserman as an instructor for her civil-procedure course during the spring 2017 semester, during which he expressed anti-Trump sentiments. (*Id.* ¶ 272). Wasserman assigned her a D grade. (*Id.* ¶ 270). She received grades from

other Appellees: Brown assigned a C+; Schrier assigned a B-; Baker assigned a D; Norberg assigned a C; and Weisbord assigned a C-. (*Id.* ¶¶ 238, 319, 342, 365, 399). Appellant finished the first year, the two semesters, with a cumulative GPA of 1.98. (*Id.* ¶ 19; D.E. #10-1 at 4-5). On May 19, 2017, FIU Law informed Appellant via email of her dismissal, and she received the formal letter of dismissal on May 23. (D.E. #10-1 at 7, 11).

Under § 1602 of the Academic Policies, a student who was dismissed for a sub-2.00 GPA but whose GPA was higher than 1.80 could "petition the Academic Standards Committee for readmission." (D.E. #10-1 at 50). It dictated the standard as "a strong presumption against readmission and the Committee shall not grant readmission except under the most compelling and extraordinary circumstances." (*Id.*). The May 23 letter informed Appellant of this procedure. (*Id.* at 11).

Appellant sent her written petition for readmission on May 22. (D.E. # 10 ¶ 502). Wasserman, as chair of the Academic Standards Committee, also chaired Appellant's readmission hearing, which took place on May 31. (*Id.* ¶¶ 546, 33). On June 2, FIU Law informed Appellant via letter her petition for readmission had been denied. (*Id.* ¶ 34; D.E. #10-1 at 73).

On November 24, 2017, Appellant sent a letter of her complaints to BOG, among others. (D.E. #10-1 p. 97-103). BOG requested a response from FIU Law and received it on December 21, 2017. (*Id.* at 92-95). BOG undertook its own

investigation, and on January 26, 2018, sent a letter to Appellant detailing its investigation of her complaints and its determination FIU Law acted properly. (D.E. #10-2 p. 10-11).

Appellant later graduated from a different accredited law school. (*Id.* ¶ 560).

III. Standard of Review

This Court reviews *de novo* a district court's grant of a motion to dismiss for failure to state a claim or lack of subject-matter jurisdiction. *Michel v. NYP Holdings, Inc.,* 816 F. 3d 686, 694 (11th Cir. 2016) (citing *Simpson v. Sanderson Farms, Inc.*, 744 F. 3d 702, 705 (11th Cir. 2014)). It reviews *de novo* qualified-immunity dismissals. *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001). Like district courts, this Court accepts the allegations in the operative complaint as true and construes the facts in the light most favorable to the Appellant. *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP,* 634 F. 3d 1352, 1359 (11th Cir. 2011). Appellant is mistaken in her Standard of Review. (I. Br. At 3). She claims an abuse-of-discretion review for denial of leave to amend, but she is not appealing any such denial. (*Id.*). She claims a court reviews a shotgun-pleading dismissal "de novo for abuse of discretion," but cites a case that makes no ruling on shotgun-pleading review. (*Id.*). The proper review is indeed abuse of discretion on the determination of whether a complaint amounted to a shotgun pleading. *Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1337 (11th Cir. 2005).

SUMMARY OF THE ARGUMENT

This Court should affirm the dismissal of Appellant's claims because they are legally deficient. The district court was correct to find the State is not a person under § 1983, and sovereign immunity barred the monetary claims for relief. Since there is no ongoing continuing violation of federal law when the Appellant successfully graduated from another law school and suffers no present or future harm, the exception for injunctive relief against State Appellees is inapplicable.

Wasserman in his individual capacity is entitled to qualified immunity for the First and Fourteenth Amendment claims in Counts I to III of Appellant's Amended Complaint. It was never alleged Wasserman ever saw or heard any political speech from Appellant, and thus she did not show a violation of her constitutional right via retaliation. She also did not show Wasserman violated any clearly established right. Similarly, there is no binding case holding students have a clearly established right to a continuing legal education. Appellant also fatally failed to exhaust her state remedies. As to her equal-protection claims, there is no clearly established law dictating political affiliation is a protected class, and Appellant failed to identify any similarly situated people, meaning she failed to show a deprivation of a constitutional right.

As properly held below, FERPA creates no private right of action, and Appellant's attempt to invoke Florida's version of FERPA fails because that statute

requires a complainant to file in Florida circuit court. Dismissal of Appellant's negligence claim was appropriate because the statutory presuit notice was insufficiently detailed, and the count would otherwise amount an impermissible claim of educational malpractice.

The district court was correct to deem Appellant's amended complaint a shotgun complaint because it was not a short, plain statement, was not clear about which allegations pertained to which count nor which defendant, and was generally rambling and oft irrelevant. Finally, for the state-law claims of fraud, defamation, breach of fiduciary duty, conspiracy, and denial of counsel, Appellant abandoned them by failing to substantively address their dismissal in her initial brief.

ARGUMENT

I. Dismissal Of The 42 U.S.C. § 1983 Claims Based On Constitutional Violations Must Be Affirmed As To State Appellees Because Sovereign Immunity Bars All Three Claims

Appellant provides little in the way of argument against the district court's determination sovereign immunity bars the First Amendment, due process, and equal-protection claims against State Appellees. That determination was correct. FIU BOT and BOG are state entities. Puig, Rosenberg, Acosta, Baidoe Ansah, Brown, Schrier, Baker, Norberg, Weisbord, Rosenthal, Lautenbach, and Elijah are all state officials and were each sued only in their official capacity.

To the extent she addresses it all, Appellant gives no valid reason and cites to insufficient authority for the idea the district court erred in its dismissal of the constitutional claims. She argues sovereign immunity will not bar a claim based on violations of the federal constitution, and a state is not immune where it has waived sovereign immunity. (I.Br. p. 47). The case she cites, *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), is a state-court decision dealing with the ability of state courts to hear challenges to tax statutes based on violations of the US Constitution or the Florida Constitution. *Kuhnlein*, 646 So. 2d at 717-721. And "a state's waiver of immunity from suits filed in state court does not waive immunity for suits filed in federal court." *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 172 (1909). Appellant makes no mention of whether Florida has waived immunity to 42 U.S.C. § 1983

claims, and it has not, as the district court ruled. *Gamble v. Florida Dept. of Health & Rehab. Services,* 779 F.2d 1509, 1515 (11th Cir. 1986); (D.E. #64 p. 22). In fact, it is well-settled law neither the State nor its officials acting in their official capacities are a person for purposes of § 1983. *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 66 (1989); *GeorgiaCarry.Org, Inc. v. Georgia,* 687 F.3d 1244, 1254 (11th Cir. 2012). So, because the state entities and the individuals sued in their official capacities cannot be a defendant in a § 1983 claim, all of Appellant's constitutional claims against State Appellees, to the extent they request relief of any nature other than injunctive, are barred, as the district court ruled. (D.E. #64 p. 23).

Appellant cites no caselaw in support of her argument the district court erred in finding there was no *Ex Parte Young*[1] exception to sovereign immunity. Moreover, she fails to provide reason there needs to be "prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). There is no continuing violation here because her allegations relate to past, completed conduct and, as the district court noted, Appellant has already graduated from law school. (D.E. # 64 p. 23).

Nicholl v. Att'y Gen. Ga., 769 F. App'x 813, 815 (11th Cir. 2019), is an appropriate, comparable case despite Appellant's protestations. The plaintiff in

[1] *Ex parte Young*, 209 U.S. 123 (1908).

Nicholl alleged his grade was given in retaliation of his exercise of constitutional rights. *Nicholl*, 769 F. App'x at 815. That the *Nicholl* plaintiff challenged only one grade where Appellant challenges several does not change anything. *Nicholl* gives no indication there is a difference between one grade or several; instead, it defines the assignment of a grade in a now-completed course as past conduct. *Nicholl*, 769 F. App'x at 815. Where assigning one grade is past conduct for *Ex Parte* purposes, so must be assigning several grades.

The alleged continuing harm here is Appellant "continues to suffer embarrassment and damage to her career." (I.Br. p. 48). But she has already graduated from an accredited law school. (D.E. #10 ¶ 6; D.E. #64 p. 23). And any claimed employment-related problems, ignoring their speculative nature, are probably because Appellant is not eligible to practice law in Florida, according to the Florida Bar's directory.[2] Alleged injuries "must be neither remote nor speculative, but actual and imminent." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *see also Antoine on behalf of I.A. v. Sch. Bd. of Collier County*, 301 F. Supp. 3d 1195, 1199 (M.D. Fla. 2018)("alleged negative impact to [Appellant's] future education and job opportunities are perceived injuries that are remote and

[2] https://www.floridabar.org/directories/find-mbr/?lName=mclaughlin&sdx=N&fName=&eligible=N&deceased=N&firm=&locValue=&locType=C&pracAreas=&lawSchool=&services=&langs=&certValue=&pageNumber=1&pageSize=10 (last accessed December 9, 2021)(Appellant is not listed in the directory).

speculative, not actual and imminent."). Any claims related to lost internship or educational expenses relate only to past conduct. Appellant has given no reason the district court was wrong to determine her harm is speculative and this is a situation where "a plaintiff seeks to adjudicate the legality of past conduct" and thus one outside the *Ex Parte Young* exception. (D.E. #64 p. 22). Nothing Appellant alleged shows any harm not totally speculative that State Appellees would have any ability to rectify.

II. Wasserman Is Entitled To Qualified Immunity Because the First Prong of Retaliation Was Not Satisfied And Appellant Failed To Meet Her Burden Of Showing A Clearly Established Law Was Violated

Moving to Wasserman, Appellant misstates the facts when she argues "the district court erred by making a determination of fact that FIU Law school professors were acting within their professional discretion." (I.Br. p. 42). The district court determined Wasserman was acting within the scope of his discretionary authority for qualified-immunity purposes. (D.E. #64 p. 32). Whether a state employee is acting within the scope of employment is a question of law when there are no undisputed facts. *Johnson v. Gulf Life Ins. Co.*, 429 So. 2d 744, 746 (Fla. 3d DCA 1983); *Lozada v. Hobby Lobby Stores, Inc.*, 702 Fed. Appx. 904, 910 (11th Cir. 2017). Appellant essentially abandoned her argument about Wasserman acting

within or outside of his scope of employment.[3] Nonetheless, the allegations against Wasserman, that he taught classes, graded exams, and served on the academic-standards committee, do show he was engaged in his professional duties. (D.E. #10 ¶¶ 269-70, 278, 281, 286, 289); *Bradley v. University System of Georgia*, 2010 WL 1416862 at *9 (N.D. Ga. 2010). The district court was permitted to make this finding. If a district court were not allowed to determine a defendant was acting within the scope of his employment, no qualified-immunity analysis could ever be performed at the motion-to-dismiss stage; obviously, qualified immunity is an argument that can be made in a motion to dismiss, and district courts can, and routinely do, dismiss a claim on that ground. *See Chesser*, 248 F.3d at 1121.

In any case, Appellant argues Wasserman could not have been acting in his professional duty because he "used nonacademic standards to grade her exams." (I.BR. p. 34). Again, this is precisely the type of professional conduct a law-school professor correctly engages in. *Bradley,* 2010 WL 1416862 at *9. The determination of scope of professional duty is not concerned with the correctness or legality of how that duty was undertaken, only that it was undertaken. *Holloman ex rel. Holloman*

[3] Appellant argues the district court's determination was wrong because there is no discretion to call a student immoral or impliedly mock her as mentally challenged, but these allegations have nothing to do with Wasserman. *Gombash v. Comm'r of Soc. Sec.*, 566 Fed. App'x. 857, 858 n.1 (11th Cir. 2014) (noting issues are not properly presented on appeal where appellant provides no supporting argument); (D.E. #10 ¶¶ 548, 346-47).

v. Harland, 370 F.3d 1252, 1265-66 (11th Cir. 2004).

For qualified-immunity purposes, for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right." *Lowe v. Aldridge*, 958 F.2d 1565, 1570 (11th Cir. 1992).

As the district court noted, Appellant raised two possible ways her First Amendment rights were allegedly violated: retaliation because of her exercise of speech and a chilling effect on her rights because of Wasserman's classroom conduct. (D.E. #64 p. 34). These are addressed in turn.

A necessary element in a retaliation claim is to "establish [that] speech . . . was constitutionally protected." *Bennett v. Hendrix*, 423 F. 3d 1247, 1250 (11th Cir. 2015). As to that speech, the district court was correct in finding Plaintiff did not plead any identifiable speech. (D.E. #64 p. 34). There is not a single allegation in the Amended Complaint of what Appellant's speech was other than off-campus speech that was conservative in nature. (D.E. #10 ¶¶ 151-52). There is no allegation Wasserman ever heard or saw any political speech from Appellant related to her off-campus speech that affected her in the on-campus setting. Like the district court ruled, these allegations of speech are so vague and hollow it is not possible to say the speech was constitutionally protected because no one knows what the speech was. (D.E. #64 p. 34-35). Taking the allegations as true, Wasserman never heard

Appellant say a word nor make any expressive conduct at all.

Appellant's reliance on the recent Supreme Court decision in *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021), is wholly misplaced; *B.L.* is not comparable. In *B.L.*, the plaintiff was not selected for a school cheerleading squad, posted a statement about the school on her public Snapchat account, and was later suspended specifically because of that Snapchat post. *Id.* at 2043. It was undisputed in *B.L.* that school officials saw the post and made a decision because of it. *Id.*

So, the district court was correct in determining Appellant showed neither a required element of retaliation – that she made protected speech – nor that Wasserman could have been on notice grading assignments from a student from whom he had never heard any political opinion of any kind could be violative of a constitutional right. *Bennett*, 423 F.3d at 1250; (D.E. #64 p. 34-35). And, equally fatal, *B.L.* was decided years after the date of Wasserman's alleged misconduct and would not have been able to put him on notice to strip him of qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 244 (2009).

As to Appellant's second First Amendment theory, that she had her speech chilled because of Wasserman's classroom conduct, she again essentially abandons any argument about the district court's finding she had not pled sufficient allegations to show her speech had been suppressed. *Gombash*, 566 Fed. App'x. at 858 n.1; (D.E. #64 p. 34). In her brief, she writes she "pled she felt intimidated and suppressed in

her free expression of political affiliation [and] felt silenced to express her support of conservatism," buts cites no caselaw to support its sufficiency. (I.Br. p. 41). The district court was correct to find this insufficiently vague. (D.E. #64 p. 34). There is nothing in the allegations more than an expression of a personal, subjective discomfort, meaning Appellant never showed a violation of her constitutional rights.

Additionally fatal is no caselaw exists at all to put Wasserman on notice "express[ing] extreme, anti-Trump and 'Not My President' rhetoric during class time" could be violative of Appellant's clearly established rights. (D.E. #10 ¶ 272). Law professors are permitted to make political statements. "[A]cademic freedom and political expression [are] areas in which government should be extremely reticent to tread." *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957).

Appellant argues this case "showcases the hostile educational environment and pervasive discrimination and retaliation suffered by conservative students on college campuses," (I.BR. p. 41), but does not state how that could possibly be relevant to or determinative of her claims here and cites to an article that cites to a different article[4] that refers to a University of Colorado study in which 4,445 of 24,898, or 18 percent, of that university's students responded.[5] Lawsuits do not exist

[4] https://www.patheos.com/blogs/blackwhiteandgray/2014/12/disrespect-intimidation-and-prejudice-at-the-university-of-colorado/ (last accessed August 26, 2021)

[5] https://www.colorado.edu/oda/sites/default/files/attached-files/methpoprespondents.pdf (last accessed August 26, 2021).

as forms of general imagined grievances; they are narrowed to particular individualized harms.

III. Appellant Had No Clearly Established Right To A Continuing Legal Education Nor To Any Process Greater Than What She Received And Failed To Exhaust Administrative Remedies

For the sake of clarity, the district court's correct determination was sovereign immunity barred the due process claims against State Appellees. (D.E. #64 p. 23). This means Appellant's various arguments about how State Appellees may have violated her due process rights are irrelevant in this appeal. Appellant does not have much to say in her brief relating directly to the sovereign-immunity issues, instead making general arguments about due process, such as a continuing right to education because of FIU Law's Academic Policies and FIU Law's failure to provide notice about possible academic dismissal. (I.Br. p. 36-40).

Though Appellant makes these arguments and, as will be discussed below, misstates the procedural history, as the due process issues relate to Wasserman, Appellant had no established liberty or property interest in a continuing education, meaning there is no substantive due process violation, and Wasserman is entitled to qualified immunity. Moreover, she did not exhaust her state remedies, barring her procedural due process claim; and, even if it were not barred, there is no clearly established law that notice and a petition-for-readmission hearing amount to process that is constitutionally deficient, again meaning Wasserman is protected by qualified

immunity. The district court was correct in dismissing her due process claims. (D.E. #64 p. 36).

The district court was correct that no student has a clearly established right to a continuing legal education. (*Id.* at 35). Appellant disagrees and asks this Court to overturn the case the district court relied on, *Doe v. Valencia Coll.*, 903 F.3d 1220, 1235 (11th Cir. 2018). (I.Br. at 38); *see also Lambert v. Board of Trustees*, 793 Fed. Appx. 938, 944 (11th Cir. 2019)(affirming dismissal of substantive due process claim and reiterating the conclusion in *Valenica Coll.*). Courts have occasionally assumed a property interest for the purpose of examining a due process claim. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 223 (1985); *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 84-85 (1978).

For Wasserman to be liable for a deprivation of substantive due process, Appellant would need to show that property interest exists in such a clearly defined way Wasserman should have known it would be a violation of constitutional rights to deny it.[6] This she has not, and cannot, do. The case she refers to in her statement

[6] Appellant expends great effort in arguing there *might* or should be a protected property interest in a continuing education. But when neither this Court nor the Supreme Court has ever held there *is* such a property right, qualified immunity shields Wasserman because that means there is no clearly established right to a continuing legal education. Nothing could have put Wasserman on notice so as to open him to a due-process-violation claim. Appellant, by asking this Court to overturn *Valencia*, effectively concedes she does not have a clearly established right to a continuing education. *Valencia Coll.*, 935 F.3d at 1235.

of the issues and summary of her argument, *Lankheim v. Fla. Atl. Univ. Bd. of Trustees*, 992 So. 2d 828 (4th DCA), is a state-appellate-court case that also simply assumes a protected liberty interest for examination of procedural due process and has no binding precedential value. *Id.* at 834-45. The student in that case notably was in good standing, academically and otherwise, at all times. *Id.* at 834.

Next, the district court was correct about the other case Appellant relies on, *Barnes v. Zaccari*, 669 F.3d 1295, 1298 (11th Cir. 2012); (D.E. #64 p. 36). *Barnes* is basically irrelevant; it found a protected property interest in continuing education where Georgia created and implemented a policy dictating a student could not be dismissed because of conduct without a hearing and a finding of misconduct or code violation and then effectively expelled a student on disciplinary grounds without giving that student notice or a hearing. *Id.* at 1299-1304. "There is a clear dichotomy between a student's due process rights in disciplinary dismissals and in academic dismissals." *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976).[7]

Barnes makes no holding or ruling relevant to a property interest in academic dismissals. *Barnes*, 669 F.3d at n. 9 ("We do not hold that all students at state colleges and universities are entitled to continued enrollment. We hold only that one making satisfactory academic progress and obeying the rules of the school has a

[7] Decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981, are binding in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981).

legitimate claim of entitlement to continued enrollment under the Board and VSU's policies."). FIU Law's Policies specifically provided for dismissal because of deficient academic performance: FIU Law Academic Policy § 1601 stated a student who finishes the first two semesters with a GPA under 2.00 shall be dismissed. (D.E. #10-1 p. 50). The result is, where no highest court has established a protected property interesting in continuing post-secondary education, qualified immunity protects Wasserman against a substantive due process claim, as the district court found. (D.E. #64 p. 35). "[T]o the extent [Appellant] is alleging a substantive due process claim based on h[er] dismissal . . . from the Graduate School, [s]he has failed to state a claim because there is no fundamental right to a public education." *Amiri v. Gupta*, 2018 WL 3548729 at *6 (N.D. Ala. 2018); *see also Ellison v. Bd. of Regents of Univ. Sys. of Georgia,* 2006 WL 664326 at *1 (S.D. Ga. 2006); *Plyler v. Doe*, 457 U.S. 202, 221 (1982)("Public education is not a "right" granted to individuals by the Constitution.")

Further, qualified immunity protects Wasserman against a procedural due process claim. To say nothing about how little Wasserman was involved in the overall process of Appellant's academic dismissal or the degree of process she received, clearly established law holds students have no right to a formal hearing in academic dismissals, *Horowitz*, 435 U.S. at 87-90, and, relatedly, there is no clearly established right that a student is entitled to more process than notice via academic

regulations and a petition-for-readmission hearing in which she is allowed to make arguments and submit evidence. The regulations clearly provided notice of academic dismissal because of a GPA under 2.00. Appellant attended a readmission hearing with the Committee where they adhered to the procedure and standard found under FIU Law Academic Policy § 1602 and § 1604. Under these facts, there is neither the showing of a deprivation of a constitutional right nor the showing Wasserman could have had any indication his actions, such as chairing the readmission hearing, were violative of a clearly established due process right.

As to exhaustion, Plaintiff seemingly abandons this argument when she states "there is no administrative exhaustion requirement for claims involving violations of fundamental constitutional rights such as . . . violation of due process" and cites no caselaw. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681-82 (11th Cir. 2014)(lack of caselaw usually means abandonment); (I.Br. p. 51). Even if not abandoned, this statement of the law is wrong. If there were no exhaustion requirement for due-process claims, this Court would not have stated a violation of procedural due process is not complete "unless and until [a] State fails to provide due process ... [and] the state may cure a procedural deprivation by providing a later procedural remedy." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994). This means where a student "could seek relief for his procedural deprivations in state court," he had not exhausted his state remedies. *Watts v. Florida Intern. Univ.*, 495

F.3d 1289, 1294 (11th Cir. 2007). Appellant made no allegation she was denied relief from these procedural deficiencies in a Florida state court. (D.E. #10 at ¶ 112). This exhaustion failure bars her claims. *McKinney*, 20 F.3d at 1557. Rather than pursuing a grievance in Florida circuit court, she filed this federal lawsuit. That, on its own, affirms the district court's dismissal.

Appellant then proceeds to argue her presuit notice under Fla. Stat. § 768.28 amounted to exhaustion of her state remedies, even though the dismissal in the district court relating to her failure to exhaust state remedies was regarding the due process claim against Wasserman, and her §768.28 failure related to her negligence claim. (I.Br. p. 51-52; D.E. #64 at 36). She also states "the district court's dismissal with prejudice was based on that (sic) Ms. McLaughlin has no substantive due process rights, not whether there was sufficient procedural due process." (I.Br. p. 6). As stated, the dismissal with prejudice was for State Appellees and on sovereign-immunity grounds.

IV. Appellant Shows Neither A Protected Class Nor Similarly Situated People And Did Not State An Equal Protection Claim

Appellant, in addressing the dismissal of her equal-protection claim against Wasserman, seemingly identifies the violation to be because of her political affiliation and political activity. (I.BR. p. 45). But she then discusses a GPA remediation system and cites a case to assert a proposition about freedom of association, freedom of speech, and property rights. *Id.* None of this relates to the

equal-protection claim. Appellant has, again, abandoned this argument by addressing it perfunctorily and citing to no relevant caselaw. *Sapuppo*, 739 F.3d at 681-82.

Even outside abandonment, the district court was correct because Appellant clearly never identified a protected class or similarly situated individuals. (D.E. #64 p. 37). The presumption from the Amended Complaint is her asserted protected class is that of either a conservative, Republican, or, more nebulously, a Trump supporter. (D.E. #10 ¶ 1). These are not protected classes for equal-protection purposes. *See Chandler v. Georgia Pub. Telecommunications Com'n*, 917 F.2d 486, 489 (11th Cir. 1990). There is an indication in Appellant's brief her class may have been that of a student not put in remediation, which is also clearly not a protected class. (I.Br. at 45). This additionally affirms the district court's dismissal. Appellant does not cite to any case establishing political affiliation as a protected class because such a case does not exist. That notable absence is fatal to her equal-protection claim against Wasserman, for there is neither a showing of a deprivation of a constitutional right nor that that right was clearly established.

The district court was further correct because Appellant did not, and probably cannot, identify similarly situated individuals outside her protected class who were treated more favorably. "If a plaintiff fails to show the existence of a similarly situated [person], judgment as a matter of law is appropriate where no other plausible

allegation of discrimination is present." *Arafat v. Sch. Bd. of Broward County*, 549 Fed. Appx. 872, 874 (11th Cir. 2013). There is not one allegation in the Amended Complaint identifying any similarly situated people or that those people were treated more favorably than she. Interestingly, Appellant states she "pled several students were chosen for advantageous treatment because of their favored political affiliation" but does not cite to the record to support this. (I.Br. p. 30). Though Appellant did not have to prove disparate treatment at the motion-to-dismiss stage, she needed factual allegations showing similarly situated people were treated more favorably. There is nothing in the Amended Complaint about this above a bald and conclusory statement. "To state an equal protection claim, a plaintiff must demonstrate that similarly situated persons outside his protected class were treated more favorably and that 'the state engaged in invidious discrimination against him based on race, religion, national origin, or some other constitutionally protected basis.'" *Watson v. Div. of Child Support Services*, 560 Fed. Appx. 911, 913 (11th Cir. 2014); *Prescott v. Florida*, 343 Fed. Appx. 395, 400 (11th Cir. 2009)(same proposition); *Womack v. Carroll County, Georgia*, 840 Fed. Appx. 404, 407 (11th Cir. 2020)(same).

Thus, again, Appellant did not show a deprivation of her constitutional right to equal protection. The district court was correct to dismiss the equal-protection claim against Wasserman.

V. The District Court Correctly Ruled Appellant's FERPA Claims Are Barred And In The Wrong Court

The district court was correct in applying *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), to Appellant's FERPA claims. (D.E. #64 p. 23). That case clearly holds FERPA creates no private cause of action. *Gonzaga*, 536 U.S. at 289. Appellant bizarrely argues the district court erred by denying leave to amend the FERPA claim under Fla. Stat. § 1002.225(3). (I.Br. p. 54-55). That statute, as the district court noted, confers jurisdiction to Florida circuit court and no others. Fla. Stat. § 1002.225(3). Because the district court properly dismissed Appellant's federal claims, there is no supplemental jurisdiction over this state-law claim.

VI. Appellant Did Not Provide Presuit Notice For Her Negligence Claim, Which Is Also An Impermissible Educational Malpractice Claim

Appellant seemingly misconstrues the exhaustion requirement as relating solely to presuit notice requirements dictated by Fla. Stat. § 768.28(6). She states the district court "missed Plaintiff provided her 'date of birth, place of birth, social security number' as part of her educational records in the exhibits." (I.Br. p. 51-52). She does not cite these records, but even if she did, they are irrelevant to the notice claim. The issue is not whether the exhibits in their entirety provide the information requested in § 768.28(6)(c); it is whether the statutory notice itself actually provided that information and whether that information was presented to the relevant state agency and the Department of Financial Services. (*See* D.E. #64 p. 29). The presuit-

notice statute is strictly construed. *Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 212 (Fla. 1983). Appellant cannot just assert she "met all statutory presuit notice requirements when the letter and all exhibits are read together" and cite no caselaw and prevail. (I.Br. p. 52).

Even if the district court was mistaken, Appellant's negligence claim fails anyway because it amounts to a claim for educational malpractice, and Florida courts refuse to recognize a cause of action for educational malpractice. *Tubell v. Dade Cnty. Pub. Sch.*, 419 So. 2d 388 (Fla. 3d DCA 1982). Sometimes a common-law negligence "claim is in essence one of educational malpractice, that is, failure to use reasonable care to provide an adequate education. This claim fails because Florida law recognizes no such cause of action." *C.P. v. Leon County Sch. Bd.*, 2005 WL 2133699 at *5 (N.D. Fla. 2005).

The allegations pertaining to State Appellees for negligence are generally premised on academic decisions and conduct relating to Appellant's enrollment or the evaluation of her complaints about her education at FIU Law. These are claims of educational malpractice and cannot stand.

VII. Appellant Abandoned The Remaining State-Law Tort Claims

Appellant only briefly mentions the state-tort claims against the State Appellees, making some arguments related to her FERPA and negligence claims. (I.Br. 51-52, 54). However, she ignores the district court's ruling on the rest of her

state-law claims. The total of her argument appears to be the "arguments regarding tort claims in the Amended Complaint and the Answer to the Motion to Dismiss are incorporated herein." (*Id.* at 55). This is obviously insufficient. An appellant abandons a claim when: (1) she "makes only passing references to it;" (2) she raises it in a "perfunctory manner without supporting arguments and authority"; (3) [or] she refers to it only in the "'statement of the case' or 'summary of the argument.'" *Sapuppo*, 739 F.3d at 681-82. Appellant's brief contains neither argument nor citation relating to denial of counsel, fraud, conspiracy, defamation, or breach of fiduciary duty.

As it relates to her attempt to incorporate arguments made to the district court, those would still not be enough because they necessarily could not be "arguments . . . attacking the merits of the district court's order." *Reid v. Lawson*, 837 Fed. Appx. 767 (11th Cir. 2021). "Even liberally construed, [she] reiterates only the allegations in her [complaint] and the procedural history in the district court, without addressing the findings and supporting reasoning by the district court as to any of its stated grounds for dismissal." *Id.* Appellant's arguments below in response to State Appellees' and Wasserman's motions to dismiss could not be about how the district court erred because they were made before the district court rendered an opinion.

This means Appellant has not addressed the district court's findings: (1) FERPA confers no private right of action, and thus any denial-of-counsel claim

inherent in it fails (D.E. #64 p. 24-25); (2) the bad-faith and malice elements of Appellant's fraud, conspiracy, and defamation claims meant sovereign immunity barred them (*Id.* p. 26); and (3) the lack of a written contract and Appellant's simple status of student created no breach of a fiduciary duty. (*Id.* p. 27). So, beyond the fact these claims were properly dismissed with prejudice, Appellant abandoned any argument against them. There is nothing for the Court to consider.

The attempt to incorporate her arguments from below also may be an attempt at circumventing the content-limitation rule. "A principal brief is acceptable if it contains no more than 13,000 words." Fed. R. App. P. 32(a)(7)(B)(i). Appellant's brief, by her count, clocks in at 12,764 words. (I.Br. p. 61). Obviously, an appellant simply incorporating arguments from below defeats the purpose of a word- or page-limit rule, and Appellant cannot be permitted to reference outside pleadings to stay within her allotted word count.

There is no recovery from this failure. The abandonment is complete because the Court does not consider arguments raised for the first time in a reply brief. *United States v. Ferreira*, 268 Fed. Appx. 829, 832 (11th Cir. 2008); *United States v. Britt*, 437 F.3d 1103, 1104–05 (11th Cir. 2006); *Kellner v. NCL (Bahamas), LTD.*, 753 Fed. Appx. 662, 667 (11th Cir. 2018) (listing cases).

VIII. The Amended Complaint Was a Shotgun Pleading

First, Appellant claims she can "cure all pleading deficiencies" in an amended

complaint, as far as those deficiencies relate to the shotgun pleading, yet states this on appeal despite being given opportunity to amend below and waiving her right to amend by appealing. (I.Br. p. 57; D.E. #64 p. 39; Court's October 12, 2021, ruling).

Next, her Amended Complaint was indeed a shotgun pleading. It comprised 115 pages and 1,064 paragraphs. (D.E. #10). It committed the "most common" sin of "containing multiple counts where each count adopts the allegations of all preceding counts." *Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1321 (11th Cir. 2015). The counts do incorporate only the first 757 paragraphs, but those are replete with factual allegations against many parties and otherwise irrelevant allegations. Plaintiff alleged the same purported failure to review her grades ten times. (D.E. #10 ¶¶ 33, 41-42, 45, 59, 125, 390, 557, 591). There were allegations about Plaintiff's presence at a speech from Barack Obama. (*Id.* ¶ 155). She alleged a law professor having a "sexual affair" with students. (*Id.* ¶¶ 38, 205, 408-411, 416). The captioned "First Cause of Action" included: factual allegations; (*Id.* ¶¶ 767, 769, 776, and 778); was predicated on the Florida Constitution and the First and Fourteenth Amendments of the U.S. Constitution; alleged a general violation of free-speech rights but did not explain whether it was grounded in retaliation or other free-speech theories; failed to list exactly who the claim was brought against; and alleged a private cause of action for FERPA violations under Florida law (*Id.* ¶¶ 773-75), but only identified violations from FIU BOT and the

Department of Education. (*Id.* ¶¶ 764, 770, 782). Even if it was not virtually impossible to parse out what the claims might be and who they might be pled against, it took a Herculean effort from both State Appellees and the district court to extract water from this rock.[8]

CONCLUSION

The claims against State Appellees and Wasserman are not supported by the law. Appellant's conclusion, (I.Br. p. 57), relays how this case is not reliant on any verifiable set of facts but rather a chimerical grievance reflecting a wide-ranging conspiracy directed only at her. Resultantly, on what the four corner of the Amended Complaint present, the district court made no error in dismissing the claims.

WHEREFORE, based on the foregoing reasons, State Appellees and Howard Wasserman respectfully assert the district court did not err in granting the Motions to Dismiss and request this Court affirm the order.

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[8] In an emblematic display to this Court of unnecessary confusion and effort, Appellant attaches, but never cites to, 232 pages of exhibits to her initial brief, even though exhibits are part of the record on appeal, Fed. R. App. P. 10(a)(1), and the Court is not permitted to consider exhibits not presented to the district court. *United States v. Cross*, 928 F.2d 1030, 1053 (11th Cir. 1991). To ensure completeness, State Appellees still incurred the expense of going through these exhibits.

CERTIFICATE OF COMPLIANCE

This Answer Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 7,504 words.

This Answer Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because undersigned counsel prepared this document using Microsoft Word 2016 using Times New Roman 14-point font.

Dated: December 13, 2021

/s/ Lourdes Espino Wydler
Oscar E. Marrero, Esq.
Lourdes Espino Wydler, Esq.
Andrei F. Dambuleff, Esq.

CERTIFICATE OF SERVICE

I hereby certify I electronically filed the foregoing document with the Court of Appeals Clerk of the Court using CM/ECF on December 13, 2021, and conventionally filed the foregoing document with the Court of Appeals Clerk of Court via Federal Express. I also certify the foregoing document is being served this day on all counsel of record identified in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notice of Electronic Filing.

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Appendix F
Federal Appellees Answer Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **21-11453-BB**

Christina M. McLaughlin,

Appellant,

- versus -

Florida International University, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE U.S. DEPARTMENT OF EDUCATION AND SECRETARY OF EDUCATION

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McLaughlin v. FIU, et al., Case No. 21-11453-BB

Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities who have an interest in the outcome of this case.

Acosta, R. Alexander

Altonaga, Hon. Cecilia M.

Ansah, Tawia Baidoe

Baker, Thomas

Board of Governors for the State University System of Florida

Brown, Joycelyn

Cardona, Miguel

Cohen, Alix I.

Colan, Jonathan D.

Daneshvar, Shahrzad

Devos, Elisabeth D.

Elijah, Iris

Fajardo Orshan, Ariana

Florida International University

Gayles, Hon. Darrin P.

McLaughlin v. FIU, et al., Case No. 21-11453-BB

Certificate of Interested Persons (Continued)

Gonzalez, Juan Antonio

Laudenbach, Ned C.

Marrero, Oscar Edmund

Matzkin, Daniel

McLaughlin, Diana

McLaughlin, Christina

Moore, Hon. K. Michael

Norberg, Scott F.

Leinicke, John Steven

Puig, Claudia

Rosenberg, Mark B.

Rosenthal, Marcy

Rubio, Lisa Tobin

Schrier, Rosario L.

Smachetti, Emily M.

United States Department of Education

United States of America

Wasserman, Howard

McLaughlin v. FIU, et al., Case No. 21-11453-BB

Certificate of Interested Persons (Continued)

Weisbord, Noah

Williams, Hon. Kathleen M.

Wydler, Lourdes Espino

s/ *Alix I. Cohen*
Alix I. Cohen
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

This is an appeal from a final decision of the United States District Court for the Southern District of Florida in a civil case. Subject to the arguments below, the district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered its order dismissing Christina McLaughlin's Amended Complaint on April 12, 2021 (DE 64).[1] McLaughlin filed a timely notice of appeal on April 28, 2021 (DE 65). *See* Fed. R. App. P. 4(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

[1] On July 22, 2021, this Court issued a jurisdictional question directing the parties to address whether the district court's omnibus order (DE 64) dismissing McLaughlin's claims was a final and appealable order. On October 12, 2021, this Court determined that the order is final and appealable.

Statement of the Issues

I. Whether this Court should affirm the dismissal of McLaughlin's claims against the Federal Defendants because she abandoned any challenge to the district court's rulings.

II. Whether the district court properly dismissed McLaughlin's claims against the Federal Defendants because FERPA does not provide a private right of action and the Federal Defendants are entitled to sovereign immunity.

Statement of the Case

1. Course of Proceedings, Disposition in the Court Below, and Statement of the Facts

A. The Amended Complaint

On July 31, 2020, Christina McLaughlin, a former law student at Florida International University ("FIU"), filed an 11-count Amended Complaint against 17 defendants, alleging that she was "systematically targeted . . . for academic expulsion because she openly supported and volunteered for the Republican party," including for former President Donald Trump (DE 10, ¶ 1). In addition to suing FIU, numerous FIU Law professors and faculty members, and other state actors, she sued two federal defendants: the U.S. Department of Education and Elisabeth D. DeVos, in her official capacity as Secretary of Education (the "Federal Defendants") (DE 10).

According to the Amended Complaint and its exhibits, McLaughlin was a student at FIU's College of Law from Fall 2016 through Spring 2017 (DE 10, ¶ 1). On May 19, 2017, FIU Law expelled McLaughlin because her cumulative Grade Point Average ("GPA") of 1.98 fell below the school's minimum standard GPA of 2.00 (*id.* ¶ 13; DE 10-1:11 (Ex. 4)). McLaughlin alleged that her GPA was "fraudulently manufactured by the defendant professors and administration" who sought to "politically retaliate" against her for her viewpoints and to "engineer a leftist law school class" (*id.* ¶¶ 19, 36). Specifically, she alleged law professors "us[ed] non-academic standards for grading; temper[ed] with scantron tabulation; [and used] unauthorized grade unblinding to fraudulently mis-record grades" (*id.* ¶ 204).

Mclaughlin's expulsion from FIU Law, and the school's subsequent refusal to readmit her, led to her filing a complaint with the U.S. Department of Education ("DOE"), in part under the Family Educational Rights and Privacy Act ("FERPA") (*id.* ¶¶ 65, 634; DE 10-1:97-103 (Ex. 13)). In pertinent part, FERPA prohibits federal funding of educational agencies or institutions that have a policy of denying, or which effectively prevent, parents of students in attendance at the educational institutions the right to inspect and review education records of their children. *See* 20 U.S.C. § 1232g(a)(1)(A). The right to inspect and review education records, like other rights accorded to parents under

FERPA, transfers to the student when the student turns 18 years old or attends an institution of postsecondary education. *See* 20 U.S.C. § 1232g(d). Students to whom such rights have transferred are termed "eligible students." 34 C.F.R. §§ 99.3 and 99.5(a)(1).

FERPA also prohibits federal funding under programs administered by the DOE unless the educational agency or institution provides an opportunity for a hearing where the parents or eligible student may challenge the content of the student's education records, "in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein[.]" 20 U.S.C. § 1232g(a)(2). A parent or eligible student may file a written complaint with the DOE's Family Policy Compliance Office, now known as the Student Privacy Policy Office, regarding an alleged FERPA violation. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.63.

On March 15, 2018, the Family Policy Compliance Office (now the Student Privacy Policy Office) received McLaughlin's FERPA complaint (*see* DE 10-5:2 (Ex. 43)).[2] The Student Privacy Policy Office's investigation is

[2] McLaughlin sent her FERPA complaint to multiple addressees, *see* DE 10-1:97 (Ex. 13), and it was received by the Office for Civil Rights in December of 2017 (DE 10-2:35 (Ex. 22)). The Office for Civil Rights declined to investigate

ongoing, and the agency has not issued a final determination (DE 10, ¶¶ 86, 628).

McLaughlin's allegations against the DOE pertain to its handling of her FERPA complaint. Though she acknowledged that "FERPA fails to state an exact time reference for responding to complaints" (*id.* ¶ 877), she paradoxically alleged that the DOE "failed to timely and effectively process" her FERPA complaint (*id.* ¶¶ 85, 627, 878).

She further complained that "the DOE and FIU participated in an either expressed conspiracy or implied collusion to deny Ms. McLaughlin her FERPA rights" (*id.* at ¶ 97). Specifically, McLaughlin alleged that the "DOE's actions and failure to act aided FIU's infringement of [her] right to free speech and political expression" (*id.* ¶ 771), and "[t]he DOE failed to make a determination on FIU's notice of investigation because the DOE intended to support FIU's unconstitutional infringement of freedom of speech, failure to provide due process and equal protection of the law because the deep state DOE shares the anti-Trump, anti-conservative animus" (*id.* ¶ 867). McLaughlin posited that "the

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her complaint because it did not have jurisdiction or authority to investigate the issues raised (*see id.*). Her FERPA complaint was not received by the appropriate office, the Student Privacy Policy Office, until March of 2018 (*see* DE 10-5:2 (Ex. 43)).

DOE is so poisoned and corrupted by anti-Trump deep-state swamp operatives that they . . . intentionally tried to bury and obviate [her] complaint" (*id.* ¶ 89).

Based on these allegations, McLaughlin asserted seven causes of action against the DOE: violation of her First Amendment rights to free speech and political expression (Count 1) (*id.* ¶¶ 771-82); violation of her Fourteenth Amendment and Florida constitutional right to equal protection of the law (Count 3) (*id.* ¶ 867); breach of the DOE's legal obligation to properly enforce a student FERPA complaint (Count 4) (*id.* ¶¶ 872-94); fraud (Count 7) (*id.* ¶ 926); civil conspiracy (Count 8) (*id.* ¶¶ 941-46); breach of fiduciary duty (Count 9) (*id.* ¶¶ 969-74); and negligence (Count 10) (*id.* ¶¶ 1031-39).

The only allegations McLaughlin made involving then-Secretary of Education DeVos were that she sent letters addressed to Secretary DeVos about her FERPA complaint and the Family Policy Compliance Office's handling of her complaint on multiple dates, including April 17, 2018, October 18, 2018, December 7, 2018, and April 22, 2019 (DE 10, ¶¶ 647-50, 725, 731). Secretary DeVos is not directly named in any causes of action.

To remedy the alleged harms, McLaughlin sought "monetary damages of TWENTY FIVE MILLION DOLLARS ($25,000,000.000) and all equitable and just remedies under law including but not limited to punitive damages" (*id.* ¶ 103).

B. The Federal Defendants' Motion to Dismiss

The Federal Defendants moved to dismiss all counts against them in the Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and alternatively, for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) (DE 44).

First, the Federal Defendants argued that the district court lacked jurisdiction for multiple reasons. They asserted sovereign immunity barred McLaughlin's constitutional claims (DE 44-1:14).[3] With respect to the tort claims, the Federal Defendants explained that neither the DOE nor Secretary DeVos were proper defendants, because under 28 U.S.C. § 2679(b), the exclusive remedy for a state law tort claim against a federal employee acting within the scope of her employment is an action against the United States under the Federal Tort Claims Act ("FTCA") (*id.* at 15). Even if the court were to substitute the United States as the defendant, the Federal Defendants argued, McLaughlin failed to exhaust her administrative remedies under the FTCA (*id.* at 15-16; DE 44-2). Moreover, her tort claims were barred by the "discretionary function" exception (DE 44-1:19-22), and because there is no state-tort analogue for which a private person could be held liable for the alleged breach of FERPA

[3] Consistent with 11th Circuit Rule 28-5, this brief refers to the page number that appears in the header generated by the district court's electronic filing system, not the document's internal pagination.

(*id.* at 22-23). In addition, the United States did not waive immunity for the intentional tort claims: fraud and civil conspiracy (*id.* at 16-17).

The Federal Defendants further explained that *all* counts against them should be dismissed for an additional reason: under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), FERPA provides no private right of action, and every count against them was "premised upon the DOE's purported failure to comply with FERPA" (*id.* at 18- 19).

Second, the Federal Defendants raised several arguments under Rule 12(b)(6), including: McLaughlin failed to state a claim against Secretary DeVos, failed to plead the elements of a fraud claim, cannot allege civil conspiracy because Florida does not recognize an independent action for conspiracy, and cannot state a claim for negligence or breach of fiduciary duty because the Federal Defendants owe no duty to McLaughlin (*id.* at 24-28).

McLaughlin opposed the Federal Defendants' motion to dismiss (DE 52). She argued that the United States waived sovereign immunity from suits for equitable relief under 5 U.S.C. § 702; the DOE and Secretary DeVos are proper defendants because it is "possible" they were not acting within the scope of their employment; she was not required to exhaust her administrative remedies because exhaustion would have been futile; the "discretionary function" exception to the FTCA does not apply; and *Gonzaga* only precludes a private

cause of action against educational institutions (*id.* at 4-10). She also responded that she alleged sufficient facts against Secretary DeVos and properly pleaded her tort claims (*id.* at 11-13).

C. Ruling under Review: The Order Dismissing the Amended Complaint

After the Federal Defendants filed a reply in support of their motion to dismiss (DE 59), the district court granted the motion, dismissing all claims against the Federal Defendants with prejudice (DE 64).[4]

With respect to the constitutional claims (Counts 1 and 3), the district court dismissed these counts with prejudice because the DOE and Secretary of Education "are immune from suit under the principles of sovereign immunity" (*id.* at 13-15). McLaughlin failed to prove that the federal government waived sovereign immunity because her Amended Complaint "clearly seeks monetary damages—in excess of $25 million dollars—in connection with the alleged constitutional violations" (*id.* at 14). Her "vague prayer for 'equitable relief' in addition to damages [was] of no consequence," the court explained, because 5 U.S.C. § 702 cannot "be read so broadly that such sovereign immunity is waived any time a plaintiff seeks equitable relief" (*id.*).

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[4] The district court issued an Omnibus Order, which addressed the Federal Defendants' Motion to Dismiss (DE 44), the State Defendants' Motion to Dismiss (DE 47), and Defendant Howard Wasserman's Motion to Dismiss (DE 46). This brief addresses only the rulings pertaining to the Federal Defendants.

With respect to the tort claims (Counts 4, 7, 8, 9, and 10), the court found the DOE and Secretary of Education were not proper parties because they were acting within the scope of their employment and substituted the United States as the defendant (*id.* at 17). The court then found that the tort claims must be dismissed for failure to exhaust administrative remedies under the FTCA (*id.*). It rejected McLaughlin's argument that exhaustion would be futile, because "DOE's purported delay in issuing [McLaughlin] a final decision on her FERPA complaint is inapposite to the requirement that she exhaust her administrative remedies under the FTCA prior to bringing suit" (*id.*).

Although that reason alone warranted dismissal, the court went on to explain other grounds for dismissal, which warranted dismissal with prejudice (*id.* at 18). The court dismissed the fraud and civil conspiracy claims (Counts 7 and 8) with prejudice because they fell into the intentional tort exception to the United States' waiver of sovereign immunity in the FTCA (*id.*). The court dismissed the remaining claims—breach of legal obligation to enforce a FERPA complaint, breach of fiduciary duty, and negligence (Counts 4, 9 and 10)—with prejudice because they are "rooted in DOE's purported failure to timely resolve [McLaughlin's] FERPA complaint," and "FERPA does not provide a private right of action" (*id.* at 18-19).

2. Standard of Review

This Court reviews a district court's grant of a motion to dismiss *de novo*. *See Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1205–06 (11th Cir. 2012).

Summary of the Argument

This Court should affirm the dismissal of McLaughlin's claims against the Federal Defendants for multiple reasons. As a threshold matter, this Court need not evaluate the district court's rulings on the merits, because McLaughlin failed to raise any arguments challenging the court's reasons for dismissing her claims against the Federal Defendants with prejudice. She thus abandoned her appeal.

Should this Court reach the merits, however, it should affirm the dismissal of the claims against the Federal Defendants because all seven of McLaughlin's claims against them are premised on the DOE's purported failure to timely resolve her FERPA complaint. The Supreme Court held in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that FERPA does not provide a private right of action. No matter how McLaughlin labels her claims, she cannot use artful pleading to circumvent what the Supreme Court has already held: a student may not bring a private right of action to enforce her rights under FERPA.

Moreover, this Court should affirm the dismissal of McLaughlin's claims against the Federal Defendants for a third reason: sovereign immunity. Congress

has not waived the federal government's immunity against awards of monetary damages for alleged constitutional violations. And, McLaughlin cannot bring her tort claims under the FTCA, because there is no state tort analog for which a private person would be liable and her intentional tort claims fall within the misrepresentation exception.

Argument

I. This Court Should Affirm The Dismissal Of McLaughlin's Claims Against The Federal Defendants Because She Abandoned Any Challenge To The District Court's Rulings.

The district court dismissed the claims against the Federal Defendants with prejudice for two reasons: (1) the United States has not waived sovereign immunity for constitutional claims seeking monetary damages, or for torts premised on misrepresentation or deceit; and (2) FERPA does not provide a private right of action, and the remaining tort claims were all based on a purported breach of FERPA (DE 64:14, 18-19). McLaughlin abandoned any challenge to those rulings because she does not present any argument or proffer any legal authorities contesting those conclusions in her counseled Initial Brief.

The Federal Rules of Appellate Procedure require that an appellant's brief include "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). This Court deems abandoned and will not address the merits of

"a legal claim or argument that has not been briefed before the court." *Access Now, Inc. v. S.W. Airlines*, Co., 385 F.3d 1324, 1330 (11th Cir. 2004).

It is not sufficient to make "passing references" to a district court's holdings, "without advancing any arguments or citing any authorities to establish that they were error." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). *See also Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009) ("[S]imply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal."); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) ("Under our caselaw, a party seeking to raise a claim or issue on appeal must plainly and prominently so indicate . . . At the very least, he must devote a discrete, substantial portion of his argumentation to that issue."); *Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) ("[J]udges are not like pigs, hunting for truffles buried in briefs.").

McLaughlin abandoned any challenge to the district court's rulings on sovereign immunity and on FERPA not providing a private right of action. Though the "Statement of the Case" section of McLaughlin's Initial Brief includes a subsection addressing the DOE (Br. 32-37), it merely restates allegations from the Amended Complaint without citation; it does not set forth any argument concerning the district court's rulings. *See Greenbriar, Ltd. v. City of*

Alabaster, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (holding appellant's reference to an issue "in its Statement of the Case in its initial brief," without elaborating any argument on the merits, was insufficient to raise the issue on appeal). In the rest of the brief, she "makes only passing references to" these issues "in a perfunctory manner[,] without supporting argument and authority." *Sapuppo*, 739 F.3d at 681.

First, the Initial Brief contains no argument challenging the district court's ruling that sovereign immunity bars McLaughlin's constitutional claims because the United States has not waived immunity from suits seeking money damages for alleged constitutional violations (DE 64:14). In the section labeled "Sovereign Immunity," when discussing the Federal Defendants, McLaughlin makes only two points: (1) she discusses the "discretionary function" exception to the FTCA, which was not the basis for the court's ruling, and (2) she cites the standard for *qualified* immunity, which is not at issue here (Br. 59-60). She thus abandoned any challenge to the district court's ruling that sovereign immunity bars her constitutional claims.[5]

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[5] Though this Court has said sovereign immunity is jurisdictional, it is not jurisdictional "in the sense that it must be raised and decided by this Court on its own motion." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 515 n.19 (1982). A party may therefore abandon a challenge to a district court's dismissal based on sovereign immunity. *See Thompson v. Kelly*, 710 F. App'x 430, 431 (11th Cir. 2018) (holding appellant abandoned any argument on sovereign immunity); *Flowers v. Fulton Cty. Sch. Sys.*, 654 F. App'x 396, 400 (11th Cir. 2016) (same);

Second, McLaughlin does not make any argument disputing the district court's conclusion that the United States is shielded from liability for her fraud and civil conspiracy claims because they fall within the misrepresentation exception to the FTCA (DE 64:18). Although McLaughlin does challenge the district court's alternative ruling that she failed to exhaust her administrative remedies under the FTCA (Br. 62-64), the district court explained exhaustion was just one of multiple grounds for dismissal, and it was not the reason for dismissal with prejudice (DE 64:17-18). As this Court has explained, "[t]o obtain reversal of a district court judgment that is based on multiple, independent grounds, an appellant must convince [this Court] that every stated ground for the judgment against him is incorrect. When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Sapuppo*, 739 F.3d at 680.

Third, McLaughlin does not challenge the district court's ruling that the remaining tort claims must be dismissed because they are based on FERPA, which does not provide a private right of action (DE 64:19). She states in a conclusory manner that the court "err[ed] by not allowing [her] to amend her

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Tindol v. Alabama Dep't of Rev., 632 F. App'x 1000, 1002 (11th Cir. 2015) (same).

complaint to more precisely claim her right under Fla. Stat. [§] 1002.225(3)" (Br. 64-65). But she does not "advanc[e] any arguments or cit[e] any authorities to establish that" the district court's ruling was erroneous. *See Sapuppo*, 739 F.3d at 681; *Singh*, 561 F.3d at 1279 ("Singh's simple statement that our treating his conviction as a conviction for immigration purposes would violate his right to equal protection, without further explanation or discussion, did not sufficiently raise the issue on appeal, and thus it is abandoned.").

This Court thus does not need to evaluate the merits of the district court's decision to dismiss the claims against the Federal Defendants, because McLaughlin failed to raise any arguments challenging the district court's bases for dismissing those claims.

II. The District Court Properly Dismissed McLaughlin's Claims Against The Federal Defendants Because FERPA Does Not Provide A Private Right Of Action And The Federal Defendants Are Entitled To Sovereign Immunity.

Should the court reach the merits, the district court properly dismissed McLaughlin's claims against the Federal Defendants with prejudice because FERPA does not provide a private right of action and the United States has not waived sovereign immunity from McLaughlin's claims.

A. FERPA Does Not Provide a Private Right of Action.

All of McLaughlin's allegations against the DOE and Secretary of Education pertain to her assertion that they did not properly handle her FERPA complaint (DE 10, ¶¶ 83-88, 627-50, 744-57). But the Supreme Court held in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), that FERPA does not provide a private right of action.

As the Court explained in *Gonzaga*, "Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records. The Act directs the Secretary of Education to withhold federal funds from any public or private 'educational agency or institution' that fails to comply with these conditions." *Id.* at 278. It does not include the "'rights-creating' language critical to showing the requisite constitutional intent to create new rights." *Id.* at 287.

Though *Gonzaga* involved FERPA's nondisclosure provision, the same reasoning applies to the record-access provisions that McLaughlin seeks to enforce, which likewise "contain no rights-creating language, . . . have an aggregate, not individual, focus, and . . . serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions." *Id.* at 290; 20 U.S.C. § 1232g(a)(1)(A)-(B). *See also Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 786 (2d Cir. 2002) (Sotomayor, J.) ("*Gonzaga* compels the conclusion

that FERPA's record-access provisions, § 1232(g)(a)(1), do not create a personal right enforceable under § 1983[.]"); *United States v. Miami University*, 294 F.3d 797, 809 n.11 (6th Cir. 2002) ("In *Gonzaga University v. Doe*, the Supreme Court held that the FERPA does not create personal rights that an individual may enforce through 42 U.S.C. § 1983.").

The district court dismissed three of McLaughlin's claims—breach of legal obligation to properly enforce a student FERPA complaint (Count 4), breach of fiduciary duty (Count 9), and negligence (Count 10)—because they were "rooted in DOE's purported failure to timely resolve [her] FERPA complaint" (DE 64:18-19). That conclusion is correct. Count 4 is explicitly based on FERPA, alleging the DOE "breach[ed] [its] legal obligation to enforce Ms. McLaughlin's vested FERPA rights" (DE 10, ¶ 892). Though McLaughlin suggests her "FERPA count is based on Fla. Stat. [§] 1002.225(3)" (Br. 64), that statute is not referenced in Count 4. Nor could she amend to state a claim against the DOE or Secretary of Education under Fla. Stat. § 1002.225(3), as that statute only authorizes a student to "bring an action in [Florida] circuit court" to obtain an injunction against a Florida "public postsecondary educational institution." Neither the DOE nor Secretary DeVos are "public postsecondary educational institutions," and even if this Florida statute actually applied to the DOE or Secretary DeVos, sovereign immunity would bar such a claim.

Count 9 is similarly based on FERPA, as that count alleged that the DOE has a "fiduciary duty to timely, objectively, and thoroughly investigate Ms. McLaughlin's [FERPA] complaint," and it breached that duty by failing to "make a determination" on her complaint (DE 10, ¶¶ 969-74). As is Count 10, which alleged the DOE "negligently mishandled" her FERPA complaint (*id.* ¶¶ 1031-33).

Though the district court dismissed only those three counts for this reason, this Court may affirm "on any basis supported by the record, regardless of whether the district court decided the case on that basis." *Martin v. United States*, 949 F.3d 662, 667 (11th Cir. 2020). This Court may affirm the dismissal of all seven counts against the Federal Defendants on this basis, as they were all premised on an alleged violation of FERPA. The fraud and civil conspiracy counts (Counts 7 and 8) were based on Mclaughlin's allegations that the DOE conspired with FIU to violate her FERPA rights (DE 10, ¶¶ 97, 942-44). Her constitutional claims (Counts 1 and 3) likewise stem from McLaughlin's allegations that the DOE mishandled her FERPA complaint. Count 1 alleged that DOE's "fail[ure] to make a timely determination of [her] FERPA complaint" "violated [her] right to freedom of speech and expression" (*id.* ¶¶ 772, 776-782). Count 3 alleged that the DOE "failed to make a determination" on her FERPA complaint because it "intended to support FIU's

unconstitutional infringement of freedom of speech, [and] failure to provide due process and equal protection of the law" (*id.* ¶ 867).

All of McLaughlin's claims against the Federal Defendants, therefore, are premised on the only factual allegation against the DOE that can be found in her 536-page Amended Complaint: that it did not timely resolve her FERPA complaint. She cannot use artful pleading to circumvent Congress's intent not to provide a private right of action under FERPA. *Cf. Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 201–03 (2d Cir. 2005) (affirming dismissal of fraud and unjust enrichment claims that were premised on a statute that did not provide a private right of action because the plaintiff could not use "artful pleading to circumvent a bar against private actions") (cleaned up); *Palmer v. Illinois Farmers Ins. Co.*, 666 F.3d 1081, 1086 (8th Cir. 2012) (holding plaintiffs could not "circumvent [the state's] administrative remedies and create a private right of action when the legislature has not"); *Ochoa v. State Farm Life Ins. Co.*, 910 F.3d 992, 995 (7th Cir. 2018) (holding plaintiffs could not "circumvent" statute's lack of private right of action "by framing an alleged statutory violation as a breach of contract"). Accordingly, this Court may affirm on this basis alone.

B. The United States Has Not Waived Sovereign Immunity from McLaughlin's Claims.

This Court should affirm the dismissal of the Amended Complaint for an additional reason: sovereign immunity bars McLaughlin's claims. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The Secretary of Education is also protected by sovereign immunity because McLaughlin sued her in her official capacity, and official capacity suits are "another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

"A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. 187, 193 (1996) (citations omitted). The United States has not waived sovereign immunity for McLaughlin's constitutional claims, and her tort claims do not fall within the waiver of sovereign immunity in the FTCA.

1. The Constitutional Claims

The United States has not waived sovereign immunity for claims against the government seeking money damages for alleged constitutional violations. *See FDIC*, 510 U.S. at 477, 484–86. In 5 U.S.C. § 702, Congress waived sovereign immunity for suits by a "person suffering legal wrong because of agency action

. . . seeking relief *other than money damages*[.]" Here, however, McLaughlin seeks money damages—in excess of $25 million (DE 10, ¶ 103)—for her constitutional claims, so they are barred by sovereign immunity.

Although McLaughlin also vaguely requests "equitable relief" (DE 10, ¶¶ 786, 871), that does not make her claims fall within § 702's waiver. As the Supreme Court explained in *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), the "other than money damages" language in § 702 distinguishes between "specific relief and compensatory, or substitute, relief"—not between equitable and monetary relief. *See id.* at 261. Claims seeking "specific relief," which "attempt to give the plaintiff the very thing to which he was entitled," fall within § 702's waiver, whereas claims seeking damages that "*substitute* for a suffered loss" fall outside § 702. *See id.* at 262. The Amended Complaint does not include a request for specific relief.

McLaughlin stated in her response in opposition to the motion to dismiss that she "intends to seek equitable relief that the DOE must issue a findings letter through writ of mandamus" (DE 52:5). But she could not have further amended her complaint to request that relief because, as discussed, FERPA does not confer a private right of action, and she cannot obtain relief through her constitutional claims that she "is precluded from seeking directly" under FERPA. *Cf. Dist. Lodge No. 166, Int'l Ass'n of Machinists & Aerospace Workers v.*

TWA Servs., Inc., 731 F.2d 711, 717 (11th Cir. 1984) (holding mandamus could not be used as an "end run" around statute that did not provide a private right of action). The district court, therefore, properly dismissed McLaughlin's constitutional claims with prejudice based on sovereign immunity (DE 64:14).

2. The Tort Claims

By contrast, "the federal government has, as a general matter, waived its immunity from tort suits based on state law tort claims" through the FTCA. *See Zelaya v. United States*, 781 F.3d 1315, 1321 (11th Cir. 2015). The FTCA provides, in pertinent part:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

28 U.S.C. § 1346(b)(1) (emphasis added). The final section of chapter 171, § 2680, lists various exceptions to the waiver of sovereign immunity in the FTCA. These include an exception for "[a]ny claim arising out of . . . *misrepresentation*, deceit, or interference with contract rights." § 2680(h) (emphasis added).

As a preliminary matter, the district court properly substituted the United States as a party (DE 64:17), because a federal agency such as the DOE cannot be sued for claims within the scope of the FTCA. *See* 28 U.S.C. § 2679(a). And, under 28 U.S.C. § 2679(b)(1), where a federal employee such as the Secretary of Education "acts within the scope of his or her employment, an individual can recover only against the United States[.]" *Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169 (11th Cir. 1998).

Although the Attorney General did not certify that the DOE and Secretary of Education were acting within the scope of their employment, *see* 28 U.S.C. § 2679(d)(1), the district court construed the Federal Defendants' motion (submitted by the United States Attorney for the Southern District of Florida), as such a certification (DE 64:17). McLaughlin does not challenge the court's decision to treat the motion as a scope-of-employment certification. Instead, she argues the court improperly placed the burden on her to establish that the Federal Defendants were not acting within the scope of their employment (Br. 43). But having construed the motion as a § 2679(d)(1) certification, the court correctly placed the burden on McLaughlin to establish the DOE's and Secretary of Education's conduct exceeded the scope of their employment. *See Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996) (explaining that a § 2679(d)(1) certification is "*prima facie* evidence that the employee acted within the scope of

his employment," and "the burden of altering the status quo by proving that the employee acted outside [t]he scope of employment is . . . on the plaintiff") (citation and internal quotation marks omitted).

Even if the court had not construed the motion as a certification, it still would have properly concluded that the Federal Defendants were acting within the scope of their employment here. Section 2679(d)(3) provides that if the Attorney General refuses to certify, "the court may conduct its own independent inquiry into the scope-of-employment issue, for purposes of substitution, if requested to do so by the employee." *Jamison v. Wiley*, 14 F.3d 222, 235 (4th Cir. 1994). The DOE and Secretary of Education requested that the court find they were acting within the scope of their employment in their motion to dismiss (DE 44-1:15). Upon that request, the court properly concluded that they were acting within the scope of their employment. The DOE, a federal agency, could not have been acting outside the scope of its employment in handling McLaughlin's FERPA complaint. And the only allegations involving Secretary DeVos in the Amended Complaint are that she was an addressee on letters McLaughlin sent about her FERPA complaint (DE 10, ¶¶ 647-50, 725, 731)—which is plainly within the scope of her employment.[6]

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[6] The district court also properly ruled that McLaughlin failed to exhaust her administrative remedies under the FTCA (DE 64:17). *See* 28 U.S.C. § 2675(a). The government does not address exhaustion in this brief, however,

After substituting the United States as the defendant and concluding the FTCA governs McLaughlin's tort claims, the district court also correctly dismissed the fraud and civil conspiracy claims, because they "fall squarely within the intentional tort exception as they contain elements of misrepresentation and deceit" (*id.* at 18). "The test in applying the misrepresentation exception is whether the essence of the claim involves the government's failure to use due care in obtaining and communicating information." *JBP Acquisitions, LP v. U.S. ex rel. FDIC*, 224 F.3d 1260, 1264 (11th Cir. 2000). The exception "encompasses failure to communicate as well as miscommunication." *Id.* at 1265 n.3. "[I]f the governmental conduct that is essential to proving a plaintiff's claim would be covered by the misrepresentation exception, then the Government is shielded from liability by sovereign immunity, no matter how the plaintiff may have framed his claim or articulated his theory." *Zelaya*, 781 F.3d at 1334.

McLaughlin's fraud and civil conspiracy claims (Counts 7 and 8) are based on her assertion that the DOE's "fail[ure] to effectively communicate" with her about "the progress of her [FERPA] complaint" somehow "perpetuat[ed]" or facilitated FIU's decision to expel her for "non-academic reasons" (DE 10, ¶¶ 97, 750-51, 926, 941-44). In other words, the conduct

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because it was not the basis for the court's dismissal with prejudice (DE 64:18).

underlying these claims was the DOE's purported failure to communicate information about McLaughlin's FERPA complaint, which aided FIU's misrepresentations about the reasons for her expulsion. This falls within the "misrepresentation" exception to the waiver of sovereign immunity in the FTCA. *See Zelaya*, 781 F.3d at 1334–38 (holding the plaintiffs' claim that the SEC violated a notification provision fell within the misrepresentation exception to the FTCA because it "focused on non-communication of financial information by the SEC"); *JBP Acquisitions*, 224 F.3d at 1265–66 (holding negligence claims fell within misrepresentation exception to the FTCA because they were based on the government's failure to communicate certain information).

Though the district court did not reach the issue, this Court may affirm the dismissal of all McLaughlin's tort claims against the Federal Defendants because she did not identify any state tort analog for which the Federal Defendants would be liable if they were a private person.

Congress waived sovereign immunity under the FTCA only "where the United States, if a private person, would be liable to the claimant in accordance with" the law of the state where the alleged tort occurred. *See* 28 U.S.C. § 1346(b)(1); *Shivers v. United States*, 1 F.4th 924, 928 (11th Cir. 2021), *cert. petition pending* ("The FTCA addresses *violations of state law* by federal employees, not

federal constitutional claims.") (emphasis added). This is because "[t]he FTCA was enacted to provide redress to injured individuals for ordinary torts recognized by state law but committed by federal employees," not to "redress breaches of federal statutory duties." *Zelaya*, 781 F.3d at 1323–24. Thus, "a state tort cause of action is a *sine qua non* of FTCA jurisdiction," and this Court has "dismissed FTCA suits that have pleaded breaches of federal duties without identifying valid state tort causes of action." *Id.* at 1324.

Here, as discussed earlier (*see supra* at Part II(A)), McLaughlin's claims are all based on the DOE's alleged violation of FERPA, not valid Florida torts. Her claim for "breach of the DOE's legal obligation to properly enforce a student FERPA complaint" (Count 4) does not even identify a state tort, and Florida does not recognize a "freestanding cause of action" for "civil conspiracy" (Count 8). *See Tejera v. Lincoln Lending Servs., LLC*, 271 So. 3d 97, 103 (Fla. 3d DCA 2019); *SFM Holdings, Ltd. v. Banc of America Securities, LLC*, 764 F.3d 1327, 1339 (11th Cir. 2014) (applying Florida law). In addition, though her fraud, breach of fiduciary duty, and negligence counts (Counts 7, 9, and 10) are labeled as Florida torts, in substance, they allege against the Federal Defendants mere breaches of FERPA—not a violation of a state law duty for which a private person could be liable (DE 10, ¶¶ 969, 1031, 1036).

Accordingly, the United States' waiver of sovereign immunity in the FTCA does not cover McLaughlin's claims. *See Zelaya*, 781 F.3d at 1325–26 (explaining that it was "questionable" whether the plaintiffs could meet this requirement where their negligence claim alleged the SEC breached a "duty of care owed to investors as a result of violations of its federal statutory duties"); *Ochran v. United States*, 273 F.3d 1315, 1317–18 (11th Cir. 2001) (affirming summary judgment for the government where the plaintiff's purported negligence claim did not fall within the FTCA because the plaintiff did not allege facts which support a violation of a state law duty).[7]

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[7] McLaughlin's tort claims are also barred by the "discretionary function" exception to the FTCA, 28 U.S.C. § 2680(a), which applies where the challenged conduct is "discretionary in nature" and "based on considerations of public policy." *United States v. Gaubert*, 499 U.S. 315, 322–23 (1991). Her claims are all based on her allegation that the DOE did not timely review her FERPA complaint, and she contends that the DOE had no discretion with respect to whether to issue a final findings letter because of the DOE's issuance of a notice of investigation. However, the regulations governing the review of FERPA complaints do not specifically prescribe a course of action that the DOE failed to follow with respect to the processing of McLaughlin's FERPA complaint and leave the timing, manner, and scope of the investigation and the issuance of a notice of findings within the discretion of the Office of the Chief Privacy Officer (now the Student Privacy Policy Office). *See* 34 C.F.R. §§ 99.60, 99.62, 99.64, 99.66. *Cf. Baer v. United States*, 722 F.3d 168, 175 (3d Cir. 2013) (affirming dismissal of suit based the incompetence of an SEC investigation because "SEC regulations afford examiners discretion regarding the timing, manner, and scope of investigations");*Vickers v. United States*, 228 F.3d 944, 951 (9th Cir. 2000) ("[T]he discretionary function exception protects agency decisions concerning the scope and manner in which it conducts an investigation so long as the agency does not violate a mandatory directive.").

Conclusion

For the foregoing reasons, the district court's decision granting the Federal Defendants' motion to dismiss should be affirmed.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14-point Calisto MT.

Certificate of Service

I hereby certify that four copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 8th day of December 2021, and that, on the same day, the foregoing brief was filed using CM/ECF and served on all counsel of record via CM/ECF.

s/ *Alix I. Cohen*
Alix I. Cohen
Assistant United States Attorney

cbe

Appendix G
Southern District of Florida Docket

CLOSED,JB,MEDIATION,REF_DISCOV

U.S. District Court
Southern District of Florida (Miami)
CIVIL DOCKET FOR CASE #: 1:20-cv-22942-KMM

McLaughlin v. Florida International University Board of Trustees et al
Assigned to: Chief Judge K. Michael Moore
Referred to: Magistrate Judge Jacqueline Becerra
Case in other court: 21-11453-E
Cause: 42:1983 Civil Rights Act

Date Filed: 07/16/2020
Date Terminated: 04/12/2021
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Plaintiff

Christina McLaughlin

represented by **Diana McLaughlin**
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2392298481
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ATTORNEY TO BE NOTICED

V.

Defendant

Florida International University Board of Trustees

represented by **Lourdes Espino Wydler**
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ATTORNEY TO BE NOTICED

Defendant

Chair of FIU Board of Trustees

represented by **Lourdes Espino Wydler**

Claudia Puig

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Oscar Edmund Marrero
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ATTORNEY TO BE NOTICED

Defendant

President of Florida International University
Mark B. Rosenberg

represented by **Lourdes Espino Wydler**
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LEAD ATTORNEY
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Oscar Edmund Marrero
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Defendant

Dean of the FIU College of Law 2009-2017
R. Alex Acosta

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Oscar Edmund Marrero
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Defendant

Interim Dean FIU Law 2017
Tawia Baidoe Ansah

represented by **Lourdes Espino Wydler**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Oscar Edmund Marrero
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Defendant

FIU Adjunct Professor of Law 2016-2017
Joycelyn Brown

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Oscar Edmund Marrero
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Howard Wasserman
FIU Professor of Law, In his official capacity and personally

represented by **Lourdes Espino Wydler**
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ATTORNEY TO BE NOTICED

Oscar Edmund Marrero
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Defendant

Rosario L. Schrier
FIU Professor of Law, In her official capacity
doing business as
Lozada

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Oscar Edmund Marrero
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Defendant

Thomas E Baker
FIU Professor of Law, In his official capacity

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ATTORNEY TO BE NOTICED

Oscar Edmund Marrero
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Defendant

Scott F. Norberg
FIU Professor of Law, In his official capacity

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Defendant

FIU Associate Professor of Law 2016-2017
Noah Weisbord

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Defendant

Assistant Dean of Academic Affairs
Marci Rosenthal

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Oscar Edmund Marrero
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LEAD ATTORNEY
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Defendant

THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA

represented by **Lourdes Espino Wydler**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Oscar Edmund Marrero
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Defendant

Chair of Florida Board of Governors of State University System
Ned C. Laudenbach

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Defendant

Assistant Counsel Florida Board of Governor
Iris Elijah

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Defendant

United States Department of Education
Office of General Counsel

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Secretary U.S. Dept. of Education
Elisabeth D. Devos

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
07/16/2020	1	COMPLAINT against All Defendants. Filing fees $ 400.00. Pay.gov Agency Tracking ID FLSDC-#AFLSDC-13185538, payment transferred from : 1:20-cv-22924-XXXX McLaughlin v. FIU/Florida International University et al, filed by Christina McLaughlin. (Attachments: # 1 Civil Cover Sheet, # 2 Summon(s), # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit)(McLaughlin, Diana) (Entered: 07/16/2020)
07/16/2020	2	Clerks Notice of Judge Assignment to Judge Darrin P. Gayles. Pursuant to 28 USC 636(c), the parties are hereby notified that the U.S. Magistrate Judge Alicia M. Otazo-Reyes is available to handle any or all proceedings in this case. If agreed, parties should complete and file the Consent form found on our website. It is not necessary to file a document indicating lack of consent. Pro se (NON-PRISONER) litigants may receive Notices of Electronic Filings (NEFS) via email after filing a Consent by Pro Se Litigant (NON-PRISONER) to Receive Notices of Electronic Filing. The consent form is available under the forms section of our website. (kpe) (Entered: 07/17/2020)
07/17/2020	3	Clerks Notice to Filer re: Electronic Case. Party(ies) Improperly Formatted. The Filer failed to enter the party name(s) in accordance with the CM/ECF Format for Adding Parties for Attorneys Guide. The correction was made. It is not necessary to re-file the document. (kpe) (Entered: 07/17/2020)
07/17/2020	4	Summons Issued as to Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, Secretary U.S. Dept. of Education, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA, United States Department of Education, Howard Wasserman. (kpe) (Entered: 07/17/2020)
07/17/2020	5	ORDER OF RECUSAL. Judge Darrin P. Gayles recused. Case reassigned to Judge Kathleen M. Williams for all further proceedings. Signed by Judge Darrin P. Gayles on 7/17/2020. *See attached document for full details.* (yar) (Entered: 07/17/2020)
07/22/2020	6	ORDER RECUSING AND REASSIGNING CASE. Judge Kathleen M. Williams recused. Case reassigned to Judge Cecilia M. Altonaga for all further proceedings. Signed by Judge Kathleen M. Williams on 7/21/2020. *See attached document for full details.* (vjk) (Entered: 07/22/2020)
07/22/2020	7	ORDER OF RECUSAL. Judge Cecilia M. Altonaga recused. Case reassigned to Chief

		Judge K. Michael Moore for all further proceedings. Signed by Judge Cecilia M. Altonaga on 7/22/2020. *See attached document for full details.* (vjk) (Entered: 07/22/2020)
07/23/2020	8	PAPERLESS PRETRIAL ORDER. This order has been entered upon the filing of the complaint. Plaintiff's counsel is hereby ORDERED to forward to all defendants, upon receipt of a responsive pleading, a copy of this Order. It is further ORDERED that S.D. Fla. L.R. 16.1 shall apply to this case and the parties shall hold a scheduling conference no later than twenty (20) days after the filing of the first responsive pleading by the last responding defendant, or within sixty (60) days after the filing of the complaint, whichever occurs first. However, if all defendants have not been served by the expiration of this deadline, Plaintiff shall move for an enlargement of time to hold the scheduling conference, not to exceed 90 days from the filing of the Complaint. Within ten (10) days of the scheduling conference, counsel shall file a joint scheduling report. Failure of counsel to file a joint scheduling report within the deadlines set forth above may result in dismissal, default, and the imposition of other sanctions including attorney's fees and costs. The parties should note that the time period for filing a joint scheduling report is not tolled by the filing of any other pleading, such as an amended complaint or Rule 12 motion. The scheduling conference may be held via telephone. At the conference, the parties shall comply with the following agenda that the Court adopts from S.D. Fla. L.R. 16.1: (1) Documents (S.D. Fla. L.R. 16.1.B.1 and 2) - The parties shall determine the procedure for exchanging a copy of, or a description by category and location of, all documents and other evidence that is reasonably available and that a party expects to offer or may offer if the need arises. Fed. R. Civ. P. 26(a)(1)(B). (a) Documents include computations of the nature and extent of any category of damages claimed by the disclosing party unless the computations are privileged or otherwise protected from disclosure. Fed. R. Civ. P. 26(a)(1)(C). (b) Documents include insurance agreements which may be at issue with the satisfaction of the judgment. Fed. R. Civ. P. 26(a)(1)(D). (2) List of Witnesses - The parties shall exchange the name, address and telephone number of each individual known to have knowledge of the facts supporting the material allegations of the pleading filed by the party. Fed. R. Civ. P. 26(a)(1)(A). The parties have a continuing obligation to disclose this information. (3) Discussions and Deadlines (S.D. Fla. L.R. 16.1.B.2) - The parties shall discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. Failure to comply with this Order or to exchange the information listed above may result in sanctions and/or the exclusion of documents or witnesses at the time of trial. S.D. Fla. L.R. 16.1.I. Pursuant to Administrative Order 2016-70 of the Southern District of Florida and consistent with the Court of Appeals for the Eleventh Circuits Local Rules and Internal Operating Procedures, within three days of the conclusion of a trial or other proceeding, parties must file via CM/ECF electronic versions of documentary exhibits admitted into evidence, including photographs of non-documentary physical exhibits. The Parties are directed to comply with each of the requirements set forth in Administrative Order 2016-70 unless directed otherwise by the Court. Telephonic appearances are not permitted for any purpose. Upon reaching a settlement in this matter the parties are instructed to notify the Court by telephone and to file a Notice of Settlement within twenty-four (24) hours. Signed by Chief Judge K. Michael Moore on 7/23/2020. (tsr) (Entered: 07/23/2020)
07/23/2020	9	PAPERLESS ORDER REFERRING PRETRIAL DISCOVERY MATTERS TO MAGISTRATE JUDGE JACQUELINE BECERRA. PURSUANT to 28 U.S.C. § 636 and the Magistrate Rules of the Local Rules of the Southern District of Florida, the above-captioned Cause is referred to United States Magistrate Judge Jacqueline Becerra to take all necessary and proper action as required by law with respect to any and all pretrial discovery matters. Any motion affecting deadlines set by the Court's Scheduling Order is

		excluded from this referral, unless specifically referred by separate Order. It is FURTHER ORDERED that the parties shall comply with Magistrate Judge Jacqueline Becerra's discovery procedures. Signed by Chief Judge K. Michael Moore on 7/23/2020. (tsr) (Entered: 07/23/2020)
07/31/2020	10	First AMENDED COMPLAINT against All Defendants, filed by Christina McLaughlin. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit)(McLaughlin, Diana) (Entered: 07/31/2020)
09/18/2020	11	CERTIFICATE OF SERVICE by Christina McLaughlin (McLaughlin, Diana) (Entered: 09/18/2020)
09/18/2020	12	CERTIFICATE OF SERVICE by Christina McLaughlin (McLaughlin, Diana) (Entered: 09/18/2020)
09/25/2020	13	REQUEST FOR WAIVER of Service sent to FIU et al. on 09/11/2020 by Christina McLaughlin. Waiver of Service due by 10/13/2020. (McLaughlin, Diana) (Entered: 09/25/2020)
09/25/2020	14	REQUEST FOR WAIVER of Service sent to Florida Board of Governnors etal. on 09/11/2020 by Christina McLaughlin. Waiver of Service due by 10/13/2020. (McLaughlin, Diana) (Entered: 09/25/2020)
09/25/2020	15	REQUEST FOR WAIVER of Service sent to Howard Wasserman on 09/11/2020 by Christina McLaughlin. Waiver of Service due by 10/13/2020. (McLaughlin, Diana) (Entered: 09/25/2020)
09/30/2020	16	PAPERLESS ORDER. THIS CAUSE came before the Court upon a sua sponte examination of the record. On July 23, 2020, the Court entered a Pretrial Order 8 requiring the Parties to file a joint scheduling report within ten (10) days of their joint scheduling conference, which was to be held "within sixty (60) days after the filing of the complaint." 8 . The Order cautioned, "[f]ailure of counsel to file a joint scheduling report within the deadlines set forth above may result in dismissal, default, and the imposition of other sanctions including attorney's fees and costs." Id. The deadline for filing a joint scheduling report has passed and no extension of time has been requested. Accordingly, based on the foregoing, it is ORDERED AND ADJUDGED that this action is DISMISSED WITHOUT PREJUDICE. The Clerk of Court is instructed to CLOSE this case. All pending motions, if any, are DENIED AS MOOT. The Parties may move to reopen this matter upon the Parties filing a joint scheduling report. Signed by Chief Judge K. Michael Moore on 9/30/2020. (tsr) (Entered: 09/30/2020)
10/01/2020	17	First MOTION for Extension of Time Reopen Case and Enlargement of Time re 16 Order Dismissing Case,,,, by Christina McLaughlin. Responses due by 10/15/2020 (McLaughlin, Diana) (Entered: 10/01/2020)
10/02/2020	18	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Motion to Reopen Case and Enlargement of Time to Hold Scheduling Conference. 17 . Therein, Plaintiff "requests that the Court reopen this case and allow at least thirty (30) days after the filing of the first responsive pleading by the last responding defendant to hold a pre-trial scheduling conference." Id. at 3. On July 23, 2020 the Court entered a pretrial order requiring the Parties to file a joint scheduling report within ten (10) days of their joint scheduling conference, which was to be held "within sixty (60) days after the filing of the complaint." 8 . Further, the Pretrial Order noted that "[f]ailure of counsel to file a joint scheduling report within the deadlines set forth above may result in dismissal, default, and the imposition of other sanctions including attorney's fees and costs." Id. On September 30, 2020, the Court administratively closed this case for failure to timely file a joint scheduling report. 16 . In closing the case, the Court instructed the Parties to move to

reopen the matter "upon the Parties filing a joint scheduling report." Id. Instead of complying with the Court's Order, Plaintiff requested an extension of time, arguing that the administrative closure of this case is "particularly punitive and does not serve the interest of fairness or justice." 17 at 2. Additionally, Plaintiff requests that the Court "provide the exact rule, or authority and rationale" upon which the Court acted to close the case. Id. at 3.

"When an act may or must be done within a specified time, the court may, for good cause, extend the time." Fed. R. Civ. P. 6. However, "on motion made after the time has expired, the court may extend the time if the party failed to act because of excusable neglect." Id. The determination of whether neglect is "excusable" is an "equitable [inquiry] taking account of all relevant circumstances surrounding the party's omission." Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507 U.S. 380, 395 (1993) (citation omitted). A lawyer's misunderstanding of clear law cannot constitute excusable neglect. See Advanced Estimating Sys., Inc. v. Riney, 130 F.3d 996, 998 (11th Cir. 1997).

Here, Plaintiff argues that (1) that the COVID-19 pandemic "made the service of summons... difficult," (2) Plaintiff did not receive an email notification of the Court's Paperless Pretrial Order 8 , (3) "a U.S. agency will not participate in a pre-trial conference before filing a responsive pleading," and (4) Plaintiff cannot communicate with Defendants because none have made an appearance in the case. 17 at 1-2. Plaintiff further argues that dismissal for failure to hold a joint scheduling conference is "contrary to the Fed. R. Civ. Procedure's intent." Id. at 3. Finally, Plaintiff argues that "it is unachievable for the parties to agree to a scheduling report while the case's status is dismissed." Id.

Plaintiff fails to demonstrate that her neglect to timely file a joint scheduling report or motion for extension of time is excusable. As an initial matter, Plaintiff is represented by counsel, and counsel's failure to read the Court's Pretrial Order entered on the docket associated with the case the attorney filed is inexcusable. See Dynasty Mgmt. Grp. v. Alsina, No. 16-20511-CIV-WILLIAMS, 2016 WL 9376356, at *1 (S.D. Fla. Nov. 1, 2016) ("[C]ounsel's... failure to read the Court's orders and familiarize himself with case documents is inexcusable."). Further, Plaintiff's argument that federal agencies do not participate in scheduling conferences until they have filed a responsive pleading is not supported by any citation or authority. Indeed, Local Rule 16.1(b) provides that all litigants, except those exempted from initial disclosures under Rule 26(a)(1), are required to participate in a scheduling conference. S.D. Fla. L.R. 16.1(b). This matter does not fall within any exemption listed under Rule 26(a)(1). See Fed. R. Civ. P. 26(a)(1)(b). Moreover, Plaintiff's appeals to fairness fall flat because Plaintiff disregards the fact that the Court advised Plaintiff that she could "move for an enlargement of time to hold the scheduling conference." 8 . Plaintiff did not do so.

Finally, Plaintiff claims entitlement to justification by the Court--including legal citation--for the exercise of its discretionary power to control its docket. See 17 at 3. As an initial matter, "[d]istrict courts have 'unquestionable' authority to control their own dockets [which] includes 'broad discretion in deciding how best to manage the cases before them.'" Smith v. Psychiatric Sol.'s, Inc., 750 F.3d 1253, 1262 (11th Cir. 2014) (internal citation omitted). Nonetheless, the Court entertains Plaintiff's request: "The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962). The Court has found that exercising its inherent power to administratively close cases where the parties failed to file a joint scheduling report aids the Court and the parties in the expeditious and just resolution of cases. To be clear, the Court dismissed this case without prejudice, with

		instruction to reopen upon compliance with Local Rule 16.1(b). And despite Plaintiff's argument to the contrary, there is no obstacle to complying with the Court's directive. This administrative closure has no effect on Plaintiff's ability to meet and confer with Defendants, and Plaintiff's First Amended Complaint will remain the operative pleading if the case is reopened. To re-open her case, Plaintiff need only comply with the Local Rules and this Court's Orders; a responsibility borne by Plaintiff since bringing suit in this district. Accordingly, UPON CONSIDERATION of the Motion 17 , the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion to Reopen Case and Enlargement of Time to Hold Scheduling Conference 17 is DENIED. Signed by Chief Judge K. Michael Moore on 10/2/2020. (tsr) (Entered: 10/02/2020)
10/05/2020	19	CERTIFICATE OF SERVICE by Christina McLaughlin re 18 Order on Motion for Extension of Time,,,,,,,,,,,,,,,,,,,,,,,,,,,, (McLaughlin, Diana) (Entered: 10/05/2020)
10/05/2020	20	CERTIFICATE OF SERVICE by Christina McLaughlin re 18 Order on Motion for Extension of Time,,,,,,,,,,,,,,,,,,,,,,,,,,,, (McLaughlin, Diana) (Entered: 10/05/2020)
10/05/2020	21	CERTIFICATE OF SERVICE by Christina McLaughlin re 18 Order on Motion for Extension of Time,,,,,,,,,,,,,,,,,,,,,,,,,,,, (McLaughlin, Diana) (Entered: 10/05/2020)
10/14/2020	22	WAIVER OF SERVICE Returned Executed by Christina McLaughlin. Assistant Dean of Academic Affairs waiver sent on 9/11/2020, answer due 11/10/2020; Thomas E Baker waiver sent on 9/11/2020, answer due 11/10/2020; Chair of FIU Board of Trustees waiver sent on 9/11/2020, answer due 11/10/2020; Dean of the FIU College of Law 2009-2017 waiver sent on 9/11/2020, answer due 11/10/2020; FIU Adjunct Professor of Law 2016-2017 waiver sent on 9/11/2020, answer due 11/10/2020; FIU Associate Professor of Law 2016-2017 waiver sent on 9/11/2020, answer due 11/10/2020; Florida International University Board of Trustees waiver sent on 9/11/2020, answer due 11/10/2020; Interim Dean FIU Law 2017 waiver sent on 9/11/2020, answer due 11/10/2020; Scott F. Norberg waiver sent on 9/11/2020, answer due 11/10/2020; President of Florida International University waiver sent on 9/11/2020, answer due 11/10/2020; Rosario L. Schrier waiver sent on 9/11/2020, answer due 11/10/2020. (McLaughlin, Diana) (Entered: 10/14/2020)
10/14/2020	23	WAIVER OF SERVICE Returned Executed by Christina McLaughlin. Assistant Counsel Florida Board of Governor waiver sent on 9/11/2020, answer due 11/10/2020; Chair of Florida Board of Governors of State University System waiver sent on 9/11/2020, answer due 11/10/2020; THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA waiver sent on 9/11/2020, answer due 11/10/2020. (McLaughlin, Diana) (Entered: 10/14/2020)
10/14/2020	24	WAIVER OF SERVICE Returned Executed by Christina McLaughlin. Howard Wasserman waiver sent on 9/11/2020, answer due 11/10/2020. (McLaughlin, Diana) (Entered: 10/14/2020)
10/16/2020	25	First MOTION for Leave to Appeal in forma pauperis by Christina McLaughlin. (McLaughlin, Diana) (Entered: 10/16/2020)
10/19/2020	26	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Application to Proceed in District Court without Prepaying Fees or Costs. 25 . Plaintiff paid the filing fee associated with this matter upon filing the Complaint 1 on July 16, 2020. The Court closed the case on September 30, 2020, for failure of counsel to file a joint scheduling report. 16 . The Court advised the Parties that Plaintiff may move to reopen the matter upon the filing of a joint scheduling report. Id. Plaintiff need not pay an additional filing fee to reopen the matter. Accordingly, UPON CONSIDERATION of the Application 25 ,

		the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Application to Proceed in District Court without Prepaying Fees or Costs is DENIED AS MOOT. Signed by Chief Judge K. Michael Moore on 10/19/2020. (hwr) (Entered: 10/19/2020)
11/04/2020	27	NOTICE of Attorney Appearance by John Steven Leinicke on behalf of United States Department of Education. Attorney John Steven Leinicke added to party United States Department of Education(pty:dft). (Leinicke, John) (Entered: 11/04/2020)
11/10/2020	28	Joint SCHEDULING REPORT - **Rule 16.1** by Christina McLaughlin (McLaughlin, Diana) (Entered: 11/10/2020)
11/12/2020	29	PAPERLESS ORDER SCHEDULING TRIAL IN MIAMI. This case is now set for trial commencing the two week trial period of October 25, 2021, at 9 a.m. in Courtroom 13-1, (thirteenth floor) United States Courthouse, 400 North Miami Avenue, Miami, Florida. All parties are directed to report to the calendar call on October 21, 2021, at 2 p.m., at which time all matters relating to the scheduled trial date may be brought to the attention of the Court. A final pretrial conference as provided for by Rule 16, Fed. R. Civ. P., and Rule 16.1(C), S.D. Fla. L.R., is scheduled for October 12, 2021, at 11 a.m. A bilateral pretrial stipulation and all other pretrial preparations shall be completed NO LATER THAN FIVE DAYS PRIOR TO THE PRETRIAL CONFERENCE. All motions to amend the pleadings or to join additional parties must be filed by the later of forty-five (45) days after the date of entry of this Order, or forty-five (45) days after the first responsive pleading by the last responding defendant. Any and all pretrial motions, including motions for summary judgment, Daubert motions, and motions in limine must be filed no later than eighty (80) days prior to the trial date. Responses to summary judgment motions must be filed no later than fourteen (14) days after service of the motion, and replies in support of the motion must be filed no later than seven (7) days after service of the response, with both deadlines computed as specified in Rule 6, Fed. R. Civ. P. Each party is limited to one Daubert motion. If all evidentiary issues cannot be addressed in a 20-page memorandum, the parties must file for leave to exceed the page limit. Each party is also limited to one motion in limine (other than Daubert motions). If all evidentiary issues cannot be addressed in a 20-page memorandum, the parties must file for leave to exceed the page limit. Rule 26(a)(2) expert disclosures shall be completed one hundred thirty (130) days prior to the date of trial. All discovery, including expert discovery, shall be completed one hundred (100) days prior to the date of trial. The failure to engage in discovery pending settlement negotiations shall not be grounds for continuance of the trial date. All exhibits must be pre-marked, and a typewritten exhibit list setting forth the number and description of each exhibit must be submitted at the time of trial. Plaintiff's exhibits shall be marked numerically with the letter "P" as a prefix. Defendant's exhibits shall be marked numerically with the letter "D" as a prefix. For a jury trial, counsel shall prepare and submit proposed jury instructions to the Court. The Parties shall submit their proposed jury instructions and verdict form jointly, although they do not need to agree on each proposed instruction. Where the parties do not agree on a proposed instruction, that instruction shall be set forth in bold type. Instructions proposed only by a plaintiff should be underlined. Instructions proposed only by a defendant should be italicized. Every instruction must be supported by citation to authority. The parties should use the Eleventh Circuit Pattern Jury Instructions for Civil Cases as a guide, including the directions to counsel contained therein. The parties shall jointly file their proposed jury instructions via CM/ECF, and shall also submit their proposed jury instructions to the Court via e-mail at moore@flsd.uscourts.gov in WordPerfect or Word format. For a non-jury trial, the parties shall prepare and submit to the Court proposed findings of fact and conclusions of law fully supported by the evidence, which counsel expects the trial to develop, and fully supported by citations to law. The proposed jury instructions or the proposed findings of fact and conclusions of law shall be submitted to the Court no later than five (5) business days prior to the scheduled

		trial date. Pursuant to Administrative Order 2016-70 of the Southern District of Florida and consistent with the Court of Appeals for the Eleventh Circuit's Local Rules and Internal Operating Procedures, within three days of the conclusion of a trial or other proceeding, parties must file via CM/ECF electronic versions of documentary exhibits admitted into evidence, including photographs of non-documentary physical exhibits. The Parties are directed to comply with each of the requirements set forth in Administrative Order 2016-70 unless directed otherwise by the Court. THE FILING BY COUNSEL OF A "NOTICE OF UNAVAILABILITY" BY MOTION OR OTHERWISE IS NOT PROVIDED FOR UNDER THE LOCAL RULES AND SHALL NOT BE PRESUMED TO ALTER OR MODIFY THE COURT'S SCHEDULING ORDER. Signed by Chief Judge K. Michael Moore on 11/12/2020. (hwr) (Entered: 11/12/2020)
11/12/2020	30	PAPERLESS ORDER OF REFERRAL TO MEDIATION. Trial having been set in this matter for the two week trial period beginning October 25, 2021, at 9:00 a.m. pursuant to Rule 16 of the Federal Rule of Civil Procedure and Rule 16.2 of the Local Rules of the United States District Court for the Southern District of Florida, it is hereby ORDERED AND ADJUDGED as follows: 1. All parties are required to participate in mediation. The mediation shall be completed no later than eighty (80) days before the scheduled trial date. 2. Plaintiff's counsel, or another attorney agreed upon by all counsel of record and any unrepresented parties, shall be responsible for scheduling the mediation conference. The parties are encouraged to avail themselves of the services of any mediator on the List of Certified Mediators, maintained in the office of the Clerk of this Court, but may select any other mediator. The parties shall agree upon a mediator and file a Notice of Mediator Selection within fifteen (15) days from the date of this Order. If there is no agreement, lead counsel shall file a request for the Clerk of Court to appoint a mediator in writing within fifteen (15) days from the date of this Order, and the Clerk shall designate a mediator from the List of Certified Mediators. Designation shall be made on a blind rotation basis. 3. The parties shall agree upon a place, date, and time for mediation convenient to the mediator, counsel of record, and unrepresented parties and file a Notice of Scheduling Mediation no later than one hundred and ten (110) days prior to the scheduled trial date. If the parties cannot agree to a place, date, and time for the mediation, they may motion the Court for an order dictating the place, date, and time. 4. The physical presence of counsel and each party or representatives of each party with full authority to enter in a full and complete compromise and settlement is mandatory. If insurance is involved, an adjuster with authority up to the policy limits or the most recent demand, whichever is lower, shall attend. 5. All discussions, representations and statements made at the mediation conference shall be confidential and privileged. 6. At least ten (10) days prior to the mediation date, all parties shall present to the mediator a brief written summary of the case identifying issues to be resolved. Copies of those summaries shall be served on all other parties. 7. The Court may impose sanctions against parties and/or counsel who do not comply with the attendance or settlement authority requirements herein, or who otherwise violate the terms of this Order. The mediator shall report non-attendance and may recommend imposition of sanctions by the Court for non-attendance. 8. The mediator shall be compensated in accordance with the standing order of the Court entered pursuant to Rule 16.2.B.6, or on such basis as may be agreed to in writing by the parties and the mediator selected by the parties. The cost of mediation shall be shared equally by the parties unless otherwise ordered by the Court. All payments shall be remitted to the mediator within 30 days of the date of the bill. Notice to the mediator of cancellation or settlement prior to the scheduled mediation conference must be given at least two (2) full business days in advance. Failure to do so will result in imposition of a fee for one hour. 9. If a full or partial settlement is reached in this case, counsel shall promptly notify the Court of the settlement in accordance with Local Rule 16.2.F, by filing a notice of settlement signed by

		the counsel of record within ten (10) days of the mediation conference. Thereafter, the parties shall forthwith submit an appropriate pleading concluding the case. 10. Within five (5) days following the mediation conference, the mediator shall file a Mediation Report indicating whether all required parties were present. The report shall also indicate whether the case settled (in full or in part), was continued with the consent of the parties, or whether the mediator declared an impasse. 11. If mediation is not conducted, the case may be stricken from the trial calendar, and other sanctions may be imposed. Signed by Chief Judge K. Michael Moore on 11/12/2020. (hwr) (Entered: 11/12/2020)
11/12/2020	31	PAPERLESS ORDER. THIS CAUSE came before the Court upon the filing of the Parties' Joint Scheduling Report 28 . On September 30, 2020, the Court entered an Order 16 dismissing the instant matter because the Parties failed to file a joint scheduling report. The Parties have now complied with the Court's Order by filing a Joint Scheduling Report 28 . Accordingly, UPON CONSIDERATION of the Joint Scheduling Report, the pertinent portions of the record, and otherwise being fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Clerk of Court shall REOPEN this case. All previously issued orders in this action remain in effect except those inconsistent with this Order. The Parties shall move the Court to reopen any previously filed motions that were mooted when this case was closed. Signed by Chief Judge K. Michael Moore on 11/12/2020. (hwr) (Entered: 11/12/2020)
11/12/2020	32	Plaintiff's MOTION for Leave to Proceed in forma pauperis by Christina McLaughlin. (McLaughlin, Diana) (Entered: 11/12/2020)
11/13/2020	33	NOTICE of Attorney Appearance by Oscar Edmund Marrero on behalf of Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA, Howard Wasserman. Attorney Oscar Edmund Marrero added to party Assistant Counsel Florida Board of Governor(pty:dft), Attorney Oscar Edmund Marrero added to party Assistant Dean of Academic Affairs(pty:dft), Attorney Oscar Edmund Marrero added to party Thomas E Baker(pty:dft), Attorney Oscar Edmund Marrero added to party Chair of FIU Board of Trustees(pty:dft), Attorney Oscar Edmund Marrero added to party Chair of Florida Board of Governors of State University System(pty:dft), Attorney Oscar Edmund Marrero added to party Dean of the FIU College of Law 2009-2017(pty:dft), Attorney Oscar Edmund Marrero added to party FIU Adjunct Professor of Law 2016-2017(pty:dft), Attorney Oscar Edmund Marrero added to party FIU Associate Professor of Law 2016-2017(pty:dft), Attorney Oscar Edmund Marrero added to party Florida International University Board of Trustees(pty:dft), Attorney Oscar Edmund Marrero added to party Interim Dean FIU Law 2017(pty:dft), Attorney Oscar Edmund Marrero added to party Scott F. Norberg(pty:dft), Attorney Oscar Edmund Marrero added to party President of Florida International University(pty:dft), Attorney Oscar Edmund Marrero added to party Rosario L. Schrier(pty:dft), Attorney Oscar Edmund Marrero added to party THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA(pty:dft), Attorney Oscar Edmund Marrero added to party Howard Wasserman(pty:dft). (Marrero, Oscar) (Entered: 11/13/2020)
11/13/2020	34	NOTICE of Attorney Appearance by Lourdes Espino Wydler on behalf of Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of

		Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA, Howard Wasserman. Attorney Lourdes Espino Wydler added to party Assistant Counsel Florida Board of Governor(pty:dft), Attorney Lourdes Espino Wydler added to party Assistant Dean of Academic Affairs(pty:dft), Attorney Lourdes Espino Wydler added to party Thomas E Baker(pty:dft), Attorney Lourdes Espino Wydler added to party Chair of FIU Board of Trustees(pty:dft), Attorney Lourdes Espino Wydler added to party Chair of Florida Board of Governors of State University System(pty:dft), Attorney Lourdes Espino Wydler added to party Dean of the FIU College of Law 2009-2017(pty:dft), Attorney Lourdes Espino Wydler added to party FIU Adjunct Professor of Law 2016-2017(pty:dft), Attorney Lourdes Espino Wydler added to party FIU Associate Professor of Law 2016-2017(pty:dft), Attorney Lourdes Espino Wydler added to party Florida International University Board of Trustees(pty:dft), Attorney Lourdes Espino Wydler added to party Interim Dean FIU Law 2017(pty:dft), Attorney Lourdes Espino Wydler added to party Scott F. Norberg(pty:dft), Attorney Lourdes Espino Wydler added to party President of Florida International University(pty:dft), Attorney Lourdes Espino Wydler added to party Rosario L. Schrier(pty:dft), Attorney Lourdes Espino Wydler added to party THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA(pty:dft), Attorney Lourdes Espino Wydler added to party Howard Wasserman(pty:dft). (Wydler, Lourdes) (Entered: 11/13/2020)
11/13/2020	35	Unopposed MOTION for Extension of Time to File Response/Reply/Answer as to 10 Amended Complaint/Amended Notice of Removal by Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA, Howard Wasserman. (Attachments: # 1 Text of Proposed Order) (Wydler, Lourdes) (Entered: 11/13/2020)
11/16/2020	36	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Motion to Reopen Application to Proceed In Forma Pauperis. 32 . Therein, Plaintiff requests that the Court reconsider her earlier Application to Proceed in District Court Without Prepaying Fees or Costs 25 , which the Court denied as moot while the case was closed 26 . Id. As the Court previously advised in its Order 26 , Plaintiff need not pay an additional filing fee to reopen the matter. 26 . The filing fee was paid upon the filing of the Complaint on July 16, 2020. 1 . Moreover, the matter has already been reopened by the Court sua sponte upon the filing of the Joint Scheduling Report. 31 . Accordingly, UPON CONSIDERATION of the Motion 32 , pertinent portions of the record, and otherwise being fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Plaintiff's Motion to Reopen Application to Proceed In Forma Pauperis 32 is DENIED AS MOOT. Signed by Chief Judge K. Michael Moore on 11/16/2020. (hwr) (Entered: 11/16/2020)
11/16/2020	37	PAPERLESS ORDER. THIS CAUSE came before the Court upon Defendants' Unopposed Motion for Extension of Time to Respond to the Amended Complaint. 35 . Therein, Defendants request a twenty (20) day extension of time to respond to Plaintiff's Amended Complaint 10 . Id. Defendants argue that "[i]n light of the constitutional claims alleged against these fifteen (15) Defendants and eleven (11) counts in the Amended Complaint, additional time to finalize the motions to dismiss is necessary" because of the "complex constitutional and government immunity issues" involved. Id. Accordingly, UPON CONSIDERATION of the Motion 35 , pertinent portions of the record, and otherwise

		being fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendants' Motion for Extension of Time to Respond to the Amended Complaint 35 is GRANTED. Defendants shall respond to Plaintiff's Amended Complaint on or before December 2, 2020. Signed by Chief Judge K. Michael Moore on 11/16/2020. (hwr) (Entered: 11/16/2020)
11/25/2020	38	Plaintiff's MOTION to Appoint Mediator by Christina McLaughlin. Responses due by 12/9/2020 (McLaughlin, Diana)Terminated & Redocketed SEE DE 40 Image on 11/25/2020 (ail). (Entered: 11/25/2020)
11/25/2020	39	Plaintiff's MOTION for Extension of Time to File Response/Reply/Answer by Christina McLaughlin. (McLaughlin, Diana) (Entered: 11/25/2020)
11/25/2020	40	Request for Clerk to Appoint Mediator SEE DE 38 ORDER(ail) (Entered: 11/25/2020)
11/25/2020	41	Clerks Notice to Filer re 38 Plaintiff's MOTION to Appoint Mediator ,. **Wrong Event Selected**; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see 40 Request for Clerk to Appoint Mediator. It is not necessary to refile this document. (ail) (Entered: 11/25/2020)
11/30/2020	42	Clerk's Appointment of Mediator: Mark E. Stein added (pt) (Entered: 11/30/2020)
11/30/2020	43	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Unopposed Motion for Extension of Time to Respond to Motions to Dismiss or Responsive Pleading. 39 . Therein, Plaintiff requests a twenty-eight (28) day extension of time to file a response in opposition to any motion(s) to dismiss Defendants may file, and leave to exceed the page limitation established by Rule 7.1(c) of the Local Rules of the Southern District of Florida. Id. Defendants previously requested an extension of time to respond to Plaintiff's Amended Complaint because of the "complex constitutional and government immunities involved" 35 , which the Court granted 37 . Plaintiff argues that (1) Defendants "stated that they intend to file motions to dismiss citing several defenses," (2) Defendants are represented by three different attorneys and "may file more than one motion to dismiss or responsive pleading," and (3) "the on-going COVID-19 Pandemic has created additional unforeseen hardships to comply with FL S.D. Local Rule 7.1." Id. Additionally, Plaintiff requests that "if Defendant's [sic] file more than one Motion to Dismiss... she be allowed to respond [with] an opposing memoranda of law with the equivalent number of additional pages granted for defendants' motion." Because Defendants have not yet filed their motion(s) to dismiss, Plaintiff's Motion is premature. Accordingly, UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 39 is DENIED WITHOUT PREJUDICE. Signed by Chief Judge K. Michael Moore on 11/30/2020. (hwr) (Entered: 11/30/2020)
12/01/2020	44	Defendant's MOTION TO DISMISS 10 Amended Complaint/Amended Notice of Removal FOR FAILURE TO STATE A CLAIM *Under Rules 12(b)(1) and 12(b)(6) for Lack of Subject Matter Jurisdiction* by Secretary U.S. Dept. of Education, United States Department of Education. Attorney John Steven Leinicke added to party Secretary U.S. Dept. of Education(pty:dft). Responses due by 12/15/2020 (Attachments: # 1 Memorandum, # 2 Exhibit 1 - Sasser Declaration)(Leinicke, John) (Entered: 12/01/2020)
12/02/2020	45	Unopposed MOTION for Leave to File Excess Pages *on Motion to Dismiss Amended Complaint* by Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF

		GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA. (Attachments: # 1 Text of Proposed Order)(Wydler, Lourdes) (Entered: 12/02/2020)
12/02/2020	46	MOTION to Dismiss 10 Amended Complaint/Amended Notice of Removal by Howard Wasserman. Responses due by 12/16/2020 (Attachments: # 1 Text of Proposed Order) (Wydler, Lourdes) (Entered: 12/02/2020)
12/02/2020	47	MOTION to Dismiss 10 Amended Complaint/Amended Notice of Removal by Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA. Responses due by 12/16/2020 (Attachments: # 1 Text of Proposed Order)(Wydler, Lourdes) (Entered: 12/02/2020)
12/03/2020	48	PAPERLESS ORDER. THIS CAUSE came before the Court upon Defendants' Unopposed Motion to Exceed Page Limit on Motion to Dismiss the Amended Complaint and Incorporated Memorandum of Law. 45 . Therein, Defendants request leave to exceed the page limit set by Rule 7.1(c) of the Local Rules of the Southern District of Florida in their Motion to Dismiss by four (4) pages. Id. Local Rules "serve more than a technical purpose, and are held in great esteem by courts around the country." State Farm Mut. Auto. Ins. Co. v. B&A Diagnostic, Inc., 145 F. Supp. 3d 1154, 1158 (S.D. Fla. 2015). Defendants argue that they cannot "adequately address [all] issues within the 20-page limit" because "Plaintiff's Amended Complaint is 115 pages containing a multitude of allegations against every Defendant" and the claims of the individual Defendants sued in their official capacities are "addressed in the same motion as the two state entity Defendants." Id. at 2. The Court finds that a limited expansion of the page limit set by the local rules is appropriate here. Accordingly, UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendants' Motion 45 is GRANTED. Defendants' Motion to Dismiss shall not exceed twenty-four (24) pages. Signed by Chief Judge K. Michael Moore on 12/3/2020. (hwr) (Entered: 12/03/2020)
12/04/2020	49	Plaintiff's MOTION for Extension of Time EXTENSION OF TIME TO RESPOND TO MOTIONS TO DISMISS by Christina McLaughlin. Responses due by 12/18/2020 (McLaughlin, Diana) (Entered: 12/04/2020)
12/07/2020	50	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Unopposed Motion for Extension of Time to Respond to Motions to Dismiss. 49 . Therein, Plaintiff requests an extension of time to respond to Defendants' motions to dismiss to January 4, 2020, because "this is a complicated civil rights case alleging infringement of due process and equal protection rights and several tort claims against defendants." Id. at 1. Plaintiff cites the "on-going COVID-19 Pandemic" and the "upcoming Christmas holidays" as additional hardships. Id. at 2. Plaintiff further requests "that she be allowed to respond with the equivalent number of additional pages granted for defendants' motions." Id. UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 49 is GRANTED IN PART and DENIED IN PART. Plaintiff's responses to Defendants' motions to dismiss 44 , 46 , 47 shall be due on or before January 4, 2021. Plaintiff's response to State Defendants' Motion to Dismiss 47 shall not exceed twenty-four (24) pages in length. All other responses shall not exceed twenty (20) pages in length in compliance with Rule 7.1(c) of the Local Rules of the Southern District of Florida. Signed by Chief Judge K. Michael Moore on 12/7/2020. (hwr) (Entered: 12/07/2020)

12/07/2020		Set Deadlines per DE 50 Order as to 44 MOTION to Dismiss, 46 MOTION to Dismiss, 47 Defendant's MOTION TO DISMISS. Responses due by 1/4/2021. (kpe) (Entered: 12/07/2020)
12/21/2020	51	NOTICE OF UNAVAILABILITY by Christina McLaughlin for dates of 01/15/2021 to 01/30/2021 (McLaughlin, Diana) (Entered: 12/21/2020)
01/04/2021	52	RESPONSE in Opposition re 44 Defendant's MOTION TO DISMISS 10 Amended Complaint/Amended Notice of Removal FOR FAILURE TO STATE A CLAIM *Under Rules 12(b)(1) and 12(b)(6) for Lack of Subject Matter Jurisdiction* filed by Christina McLaughlin. Replies due by 1/11/2021. (McLaughlin, Diana) (Entered: 01/04/2021)
01/04/2021	53	RESPONSE to Motion re 47 MOTION to Dismiss 10 Amended Complaint/Amended Notice of Removal filed by Christina McLaughlin. Replies due by 1/11/2021. (McLaughlin, Diana) (Entered: 01/04/2021)
01/04/2021	54	RESPONSE to Motion re 46 MOTION to Dismiss 10 Amended Complaint/Amended Notice of Removal filed by Christina McLaughlin. Replies due by 1/11/2021. (McLaughlin, Diana) (Entered: 01/04/2021)
01/07/2021	55	Unopposed MOTION for Extension of Time to File Response/Reply/Answer *in Support of Motions to Dismiss* by Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA, Howard Wasserman. (Attachments: # 1 Text of Proposed Order)(Wydler, Lourdes) (Entered: 01/07/2021)
01/08/2021	56	PAPERLESS ORDER. THIS CAUSE came before the Court upon Defendants' Unopposed Motion for Extension of Time to File Reply Memorandum of Law in Support of the Motions to Dismiss. 55 . Therein, Defendants' request a ten (10) day extension of time to file their Replies to Plaintiff's Responses in Opposition 53 , 54 to Defendants' Motions to Dismiss 46 , 47 . Id. at 2. Defendants argue that "additional time to review the legal issues and draft the Replies in support of dismissal is necessary under the circumstances" because of the "constitutional and state-law claims alleged against these fifteen (15) Defendants and eleven (11) counts discussed in the Responses." Id. UPON CONSIDERATION of the Motion 55 , the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 55 is GRANTED. Defendants' Replies in Support of their Motions to Dismiss 46 , 47 shall be due on or before January 21, 2021. Signed by Chief Judge K. Michael Moore on 1/8/2021. (hwr) (Entered: 01/08/2021)
01/08/2021	57	Unopposed MOTION for Extension of Time to File Response/Reply/Answer as to 52 Response in Opposition to Motion, by Secretary U.S. Dept. of Education, United States Department of Education. (Attachments: # 1 Text of Proposed Order)(Leinicke, John) (Entered: 01/08/2021)
01/11/2021	58	PAPERLESS ORDER. THIS CAUSE came before the Court upon Federal Defendants' ("Defendants") Unopposed Motion for Extension of Time to File Reply in Support of Motion to Dismiss. 57 . Therein, Defendants request a ten (10) day extension of time to file their Reply to Plaintiff's Response in Opposition 52 to Defendants' Motion to Dismiss 44 . Id. at 2. Defendants argue that "[t]his is a complex case involving many defendants and legal issues" and counsel "has had to prepare for other previously scheduled court hearings, meetings, and deadlines" within the seven (7) day response period provided by

		the Local Rules of the Southern District of Florida. Id. at 2. UPON CONSIDERATION of the Motion 57 , the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 57 is GRANTED. Defendants' Reply in Support of their Motion to Dismiss 44 shall be due on or before January 21, 2021. Signed by Chief Judge K. Michael Moore on 1/11/2021. (hwr) (Entered: 01/11/2021)
01/15/2021	59	REPLY to Response to Motion re 44 Defendant's MOTION TO DISMISS 10 Amended Complaint/Amended Notice of Removal FOR FAILURE TO STATE A CLAIM *Under Rules 12(b)(1) and 12(b)(6) for Lack of Subject Matter Jurisdiction* filed by Secretary U.S. Dept. of Education, United States Department of Education. (Leinicke, John) (Entered: 01/15/2021)
01/21/2021	60	REPLY to Response to Motion re 46 MOTION to Dismiss 10 Amended Complaint/Amended Notice of Removal filed by Howard Wasserman. (Wydler, Lourdes) (Entered: 01/21/2021)
01/21/2021	61	REPLY to Response to Motion re 47 MOTION to Dismiss 10 Amended Complaint/Amended Notice of Removal filed by Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA. (Wydler, Lourdes) (Entered: 01/21/2021)
04/03/2021	62	Notification of Ninety Days Expiring *and Request for Oral Hearing* by Christina McLaughlin (McLaughlin, Diana) (Entered: 04/03/2021)
04/05/2021	63	Unopposed MOTION to Stay *Discovery Pending Disposition of Motions to Dismiss* by Assistant Counsel Florida Board of Governor, Assistant Dean of Academic Affairs, Thomas E Baker, Chair of FIU Board of Trustees, Chair of Florida Board of Governors of State University System, Dean of the FIU College of Law 2009-2017, FIU Adjunct Professor of Law 2016-2017, FIU Associate Professor of Law 2016-2017, Florida International University Board of Trustees, Interim Dean FIU Law 2017, Scott F. Norberg, President of Florida International University, Rosario L. Schrier, THE BOARD OF GOVERNORS FOR THE STATE UNIVERSITY SYSTEM OF FLORIDA, Howard Wasserman. Responses due by 4/19/2021 (Attachments: # 1 Text of Proposed Order) (Wydler, Lourdes) (Entered: 04/05/2021)
04/12/2021	64	ORDER GRANTING IN PART and DENYING IN PART 44 , 46 , 47 Motions to Dismiss; administratively closing case; terminating parties. Signed by Chief Judge K. Michael Moore on 4/12/2021. *See attached document for full details.* (hwr) (Entered: 04/12/2021)
04/28/2021	65	Notice of Appeal *Omnibus Order* as to 64 Order on Motion to Dismiss for Failure to State a Claim,,,,, by Christina McLaughlin. Filing fee $ 505.00. IFP Filed. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (McLaughlin, Diana) (Entered: 04/28/2021)
04/28/2021	66	Second MOTION for Leave to Proceed in forma pauperis *Notice of Appeal* by Christina McLaughlin. (McLaughlin, Diana) (Entered: 04/28/2021)
04/28/2021	67	MOTION for Extension of Time to Amend 65 Notice of Appeal, 64 Order on Motion to Dismiss for Failure to State a Claim,,,,, by Christina McLaughlin. Responses due by

		5/12/2021 (McLaughlin, Diana) (Entered: 04/28/2021)
04/29/2021		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 65 Notice of Appeal. Notice has been electronically mailed. (hh) (Entered: 04/29/2021)
04/29/2021	68	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Motion for Permission to Appeal In Forma Pauperis and Affidavit. 66 . To appeal in forma pauperis, a party must file in the district court a motion and an affidavit that "(A) shows... the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal." Fed. R. App. P. 24(a). Here, Plaintiff's Motion demonstrates an inability to pay and claims a right to appeal, but nothing in Plaintiff's Motion nor her Notice of Appeal identifies for the Court the issues Plaintiff intends to present on appeal. See generally 65 ; 66 . Accordingly, UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 66 is DENIED WITHOUT PREJUDICE. Signed by Chief Judge K. Michael Moore on 4/29/2021. (hwr) (Entered: 04/29/2021)
04/29/2021	69	PAPERLESS ORDER. THIS CAUSE came before the Court upon Plaintiff's Motion to Extend Time to Amend Complaint. 67 . On April 12, 2021, the Court (1) dismissed with prejudice Plaintiff's claims against Federal Defendants and State Defendants; (2) dismissed without prejudice Plaintiff's claims against Defendant Wasserman; and (3) granted Plaintiff leave to file an amended complaint within twenty-one (21) days as to the claims dismissed without prejudice. ("Omnibus Order") (ECF No. 64). On April 28, 2021, Plaintiff filed a Notice of Appeal, wherein Plaintiff seeks to appeal the Court's Omnibus Order in its entirety. See 65 . As to the claims dismissed with prejudice, Plaintiff asserts her appeal is a matter of right. Id. at 1. As to the claims dismissed without prejudice, Plaintiff seeks "permissive appeal because the Omnibus Order concerns matters arising from the same transaction or occurrence." Id. In the instant Motion, Plaintiff requests an extension of time to file an amended complaint against Defendant Wasserman to twenty-one (21) days after the Eleventh Circuit's decision as to whether Plaintiff's permissive appeal will be heard. 67 at 2. UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion 67 is GRANTED. Plaintiff's amended complaint shall be due within twenty-one (21) days of the Eleventh Circuit's decision regarding Plaintiff's permissive appeal. Signed by Chief Judge K. Michael Moore on 4/29/2021. (hwr) (Entered: 04/29/2021)
04/30/2021	70	Acknowledgment of Receipt of NOA from USCA re 65 Notice of Appeal, filed by Christina McLaughlin. Date received by USCA: 4/29/21. USCA Case Number: 21-11453-E. (hh) (Entered: 04/30/2021)
05/05/2021	71	MOTION for Leave to Appeal in forma pauperis by Christina McLaughlin. (McLaughlin, Diana) (Entered: 05/05/2021)
05/06/2021	72	TRANSCRIPT INFORMATION FORM by Christina McLaughlin re 65 Notice of Appeal,. No Transcript Requested. (McLaughlin, Diana) (Entered: 05/06/2021)
05/06/2021	73	ORDER GRANTING 71 Motion for Leave to Appeal in forma pauperis. Signed by Chief Judge K. Michael Moore on 5/6/2021. *See attached document for full details.* (hwr) (Entered: 05/06/2021)
08/17/2021	74	Pursuant to 11th Cir. R. 11-2 and 11th Cir. R. 11-3, the Clerk of the District Court for the Southern District of Florida certifies that the record is complete for purposes of this appeal re: 65 Notice of Appeal, Appeal No. 21-11453-BB. The entire record on appeal is available electronically. (apz) (Entered: 08/17/2021)

06/14/2022	75	MANDATE of USCA. AFFIRMING order of the district court as to 65 Notice of Appeal, filed by Christina McLaughlin ; Date Issued: 6/14/2022 ; USCA Case Number: 21-11453-BB. (kpe) (Entered: 06/15/2022)

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Appendix H
Southern District of Florida Omnibus Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-22942-KMM

CHRISTINA MCLAUGHLIN,

Plaintiff,

v.

FLORIDA INTERNATIONAL UNIVERSITY BOARD OF TRUSTEES, *et al.*,

Defendants.
_____/

OMNIBUS ORDER

THIS CAUSE came before the Court upon Defendants United States Department of Education ("DOE") and Secretary of Education's (collectively, "the Federal Defendants") Motion to Dismiss ("Federal Defs.' Mot.") (ECF No. 44) and Memorandum in Support ("Mem. in Supp.") (ECF No. 44-1); Defendants Florida International University Board of Trustees ("FIU BOT"), Board of Governors for the State University System of Florida ("BOG"), Claudia Puig ("Puig"), Mark B. Rosenberg ("Rosenberg"), R. Alex Acosta ("Acosta"), Tawia Baidoe Ansah ("Ansah"), Joycelyn Brown ("Brown"), Rosario L. Schrier ("Schrier"), Thomas E. Baker ("Baker"), Scott F. Norberg ("Norberg"), Noah Weisbord ("Weisbord"), Marci Rosenthal ("Rosenthal"),[1] Ned C. Lautenbach ("Lautenbach"),[2] and Iris Elijah's ("Elijah") (collectively, "the State Defendants") Motion to Dismiss ("State Defs.' Mot.") (ECF No. 47); and Defendant Howard Wasserman's ("Wasserman") Motion to Dismiss ("Def. Wasserman Mot.") (ECF No. 46). Plaintiff Christina

[1] Incorrectly sued as Marcy Rosenthal. *See* (ECF No. 47).

[2] Incorrectly sued as Ned C. Laudenbach. *See id.*

McLaughlin ("Plaintiff") filed Responses in Opposition.[3] ("Resp. to Federal Defs.' Mot.") (ECF No. 52); ("Resp. to State Defs.' Mot.") (ECF No. 53); ("Resp. to Def. Wasserman") (ECF No. 54). The Federal Defendants, the State Defendants, and Defendant Wasserman filed Replies. ("Federal Defs.' Reply") (ECF No. 59); ("State Defs.' Reply") (ECF No. 61); ("Def. Wasserman Reply") (ECF No. 60). The Motions are now ripe for review.

I. BACKGROUND[4]

In this action, Plaintiff alleges a myriad of constitutional violations against numerous defendants. *See generally* Am. Compl. Plaintiff, a Florida resident, was enrolled as a first-year law student ("1L year") at Florida International University ("FIU") Law during the 2016-2017 academic year. *Id.* ¶¶ 143–144. During her 1L year, Plaintiff was a candid supporter of the Republican party on social media. *Id.* ¶¶ 151–152. At a "Hillary Clinton for President" rally held at FIU in the Fall of 2016, "[i]t became plainly evident to all the surrounding classmates that [Plaintiff] was a Donald Trump supporter." *Id.* ¶¶ 153–156. Thereafter, Plaintiff "noted an almost immediate difference in attitude and behavior from classmates, professors, and FIU administration" and "FIU Law began an intentional hostile, discriminatory and retaliatory campaign" against Plaintiff. *Id.* ¶¶ 156–158. After former President Trump's inauguration, Plaintiff "felt threatened and stifled to voice any comments in support of President Trump for fear

[3] In each Response, Plaintiff requests a sixty (60) minute in-person hearing before the Court because the Amended Complaint is "very complicated" and "[a]n in-person hearing would also create a more specific and lengthy video appellate record for possible interlocutory review." Resp. to Federal Defs.' Mot. at 2; Resp. to State Defs.' Mot. at 2; Resp. to Def. Wasserman at 2. Local Rule 7.1(b)(2) provides that "[t]he Court in its discretion may grant or deny a hearing as requested." S.D. Fla. L.R. 7.1(b)(2). The Court sees no need to set a hearing regarding the pending motions here.

[4] The following background facts are taken from Plaintiff's First Amended Complaint ("Am. Compl.") (ECF No. 10) and are accepted as true for purposes of ruling on this Motion to Dismiss. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV-MOORE/SIMONTON, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009).

of further retaliatory action especially concerning grades." *Id.* ¶¶ 159–160. Plaintiff "felt unsafe to show any expression of her political allegiance such as wearing a 'Trump/Pence' shirt or hat because of the vitriol expressed by the law professors." *Id.* ¶ 161.

A brief overview of each named Defendant and the allegations against them follows:

1. The DOE "failed to timely and effectively process [Plaintiff's] FERPA[5] complaint" and, as of the date of the Amended Complaint, "failed to make a finding for 952 days since the DOE was in receipt [of the complaint,] 779 days since the DOE sent a Notice of Investigation and 601 days since the DOE stated that the investigation was nearing completion." The DOE has "intentionally stalled making a determination of [Plaintiff's] complaint in order to prevent [Plaintiff] from filing suit within the statute of limitations." *Id.* ¶¶ 627–757.
2. The Secretary of Education is named as the recipient of several letters sent by Plaintiff. The Secretary of Education is sued in her official capacity. *Id.* ¶¶ 647–650, 725, 731.
3. The FIU BOT is the governing body of FIU and Puig is its Chair. The FIU BOT "defended, supported, and sanctioned all actions taken by professors, deans, employees, and agents referred to in [the Amended Complaint]." Each member of the FIU BOT is sued in their official capacity. *Id.* ¶¶ 164–174.
4. The BOG is the governing body of all public Florida universities, Lautenbach is its Chair, and Elijah served as its Assistant General Counsel. The BOG "defended, supported, and sanctioned all actions taken by professors, deans, employees and agents referred to in [the Amended Complaint]" and "failed to protect [Plaintiff], a lawfully matriculated student, from the nefarious acts committed by one of the

[5] The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g).

Florida Universities." Elijah had an "excessively close relationship with FIU" and "knew or should have known to recuse herself from any participation, involvement, direction or control of [Plaintiff's] complaint." Each member of the BOG is sued in their official capacity. *Id.* ¶¶ 441–460.

5. Rosenberg is the President of FIU who (i) failed to redress Plaintiff's complaint; (ii) unfairly dismissed Plaintiff's request for a FERPA hearing; (iii) converted Plaintiff's FERPA challenge to a student grievance; and (iv) "victim shamed" Plaintiff—all of which was done "to conceal, divert, and cover-up the felonious acts committed by FIU Law professors." Rosenberg is sued in his official capacity. *Id.* ¶¶ 175–196.

6. Acosta is the Dean of FIU Law who either allowed or ignored law professors' actions, which included (i) "using non-academic standards for grading"; (ii) "tampering with scantron tabulation"; and (iii) "unauthorized grade unblinding to fraudulently mis-record[] grades." Acosta is sued in his official capacity. *Id.* ¶¶ 197–210.

7. Ansah was FIU Law's interim Dean at the time of Plaintiff's academic dismissal, who Plaintiff characterizes as "a well-known out-spoken, anti-conservative, anti-Trump critic" and whose actions "demonstrate[] the depth of anti-Trump/anti-conservative ideology among Ansah and other FIU Law professors." Ansah (i) "failed to substantively respond to Plaintiff's reasonable attempts to learn about the readmission procedure and to have counsel present"; and (ii) "depicted [Plaintiff] as a failed 1L student without any mention of the fact that [Plaintiff] had not been placed on remediation or ever failed any class." Ansah is sued in his official capacity. *Id.* ¶¶ 211–229.

8. Brown was an interim FIU Law professor during the Spring 2017 semester who (i) "is a radical leftist who either belongs to or provides support for several radical leftist organizations"; (ii) gave Plaintiff a final grade of "C+"; (iii) told Plaintiff that her support for Donald Trump was "immoral"; (iv) told Plaintiff her assignments were downgraded rather than graded according to the rubric; and (v) "intentionally lowered [Plaintiff's] grades to retaliate and politically engineer the student body class." Brown is sued in her official capacity. *Id.* ¶¶ 230–267.

9. Schrier is an FIU Law professor who (i) gave Plaintiff a final grade of "B-"; (ii) "gave several 'Feel the Bern' speeches promoting socialism during regular classroom time"; (iii) "engaged in political indoctrination and attempted to sway the students to voting for the Democratic nominee"; (iv) gave Plaintiff lower academic grades and became "inhospitable" after learning about Plaintiff's support for President Trump and the Republican Party; (v) "used non-academic standards to grade [Plaintiff's] assignments"; (vi) participated in and voted to deny Plaintiff's readmission during her readmission hearing; and (vii) "discriminated and retaliated against [Plaintiff] because of her political beliefs." Schrier is sued in her official capacity.[6] *Id.* ¶¶ 317–339.

10. Baker is an FIU Law professor who (i) gave Plaintiff a final grade of "D"; (ii) "performed a skit demeaning Trump supporters" during class; (iii) "made his

[6] The Amended Complaint is ambiguous in terms of whether Schrier is sued only in her official capacity, or both in her individual and official capacity. *Compare* Am. Compl. at 1 (identifying Wasserman as the only Defendant sued in both his official capacity and "personally"), *with id.* ¶ 338 (stating that "Schrier is sued personally and in her official capacity"). To the extent Plaintiff sought to sue Schrier both in her individual and official capacity, this ambiguity may not have placed Schrier on notice of the breadth of the claims against her. It is notable that counsel for State Defendants filed a separate Motion to Dismiss on behalf of Wasserman. *See* Wasserman Mot. at 1 ("Professor Wasserman is the only Defendant sued both in his individual capacity . . . and official capacity."). The Court resolves this ambiguity in Schrier's favor.

classroom a hostile educational environment and stifled [Plaintiff's] freedom of speech and political expression in his classroom"; (iv) after learning of Plaintiff's support for President Trump and the Republican Party, "graded her exam unblinded and failed to use anonymous grading to record [Plaintiff's] exam scores"; (v) "intentionally lowered [Plaintiff's] grades to retaliate and politically engineer the student body class"; (vi) "used non-academic standards to record [Plaintiff's] final grade"; (vii) "fraudulently tampered with [Plaintiff's] Scantron score to record a fraudulent exam score"; and (viii) "colluded with other professors to unlawfully expel" Plaintiff. Baker is sued in his official capacity. *Id.* ¶¶ 340–362.

11. Norberg is an FIU Law professor who (i) gave Plaintiff a final grade of "C"; (ii) "is a vocal anti-Trump leftist and used his classroom to espouse anti-Trump rhetoric"; (iii) "was one of 10 FIU Law professors to sign [an] anti-Trump/anti-Kavanaugh letter"; (iv) after learning of Plaintiff's support for Republican candidates, "developed animus for [Plaintiff] for her political beliefs"; (v) "erroneously 'bumped down' [Plaintiff's] final grade" from a "C+" to a "C" due to confusion over a missing assignment that Plaintiff had in fact turned in; (vi) "fraudulently tampered with Scantron exam scores"; (vii) "used non-academic standards to score unblinded essay exams"; and (viii) "colluded with other professors and administrators to effectuate an unlawful academic dismissal." Norberg is sued in his official capacity. *Id.* ¶¶ 363–397.

12. Weisbord was an FIU Law professor who (i) gave Plaintiff a final grade of "C-"; (ii) "used his classroom to accuse President Trump of being a criminal in violation of International and Humanitarian laws"; (iii) "accused President Trump of being a war criminal"; (iv) was "well-known" to have inappropriate sexual relationships

with other 1L students in Plaintiff's class; (v) "used non-academic standards and unblinded grading" in favor of those he had sexual affairs with and unfavorably for Plaintiff; and (vi) due to the "influence of sexual affair and political discrimination," partly caused the 0.02 percent grade point average ("GPA") deficit that resulted in Plaintiff's academic expulsion. Weisbord is sued in his official capacity. *Id.* ¶¶ 398–418.

13. Rosenthal was FIU Law's interim Assistant Dean of Academic Affairs who (i) was directed "to act as FIU's agent concerning [Plaintiff's] complaint"; (ii) "failed to disclose to the Plaintiff that [Rosenthal] is a member of the Florida Bar and may legally represent clients"; (iii) violated the Florida Bar's Rule of Ethics because Rosenthal "knew or should have known that [Plaintiff] was represented by counsel and that [Plaintiff] intended to pursue legal action against FIU Law" and Rosenthal contacted Plaintiff "directly" without obtaining the consent of Plaintiff's attorney; (iv) "used [Rosenthal's] enormous disparity in status and knowledge [as a former DOE employee and expert on FERPA law] in an attempt to overpower and potentially bully [Plaintiff]; and (v) "purposely denied [Plaintiff] assistance of counsel." Rosenthal is sued in her official capacity. *Id.* ¶¶ 419–440.

14. Wasserman is an FIU Law professor who (i) is "a publically [sic], well-known, anti-Trump blogger"; (ii) "engaged in political indoctrination"; (iii) gave Plaintiff a final grade of "D"; (iv) "used non-academic standards to grade [Plaintiff's] exams"; (v) "graded [Plaintiff's] exam unblinded and failed to use anonymous grading to record [Plaintiff's] exam scores"; (vi) "intentionally lowered [Plaintiff's] grades to retaliate and politically engineer the student body class"; (vii) "did not apply the objective grading rubric to [Plaintiff's] written exams"; (viii) "tampered

with [Plaintiff's] multiple-choice Scantron results to manufacture a fraudulent exam score"; (ix) "coordinated with other professors and FIU staff to unlawfully cause an academic dismissal"; (x) "planned a hit-job to force [Plaintiff] out of law school because of her support for candidate Donald Trump"; (xi) as the senior professor who supervised all grading and academic standing, "had access, opportunity and authority to jerry-rig students' education records and class standing"; (xii) "chaired and conducted [] Plaintiff's [Academic Standards Committee ("ASC")] readmission hearing"; (xiii) "refused to allow [] Plaintiff's attorney from attending the ASC readmission hearing"; and (xiv) "breached his duty to carefully and deliberately evaluate [Plaintiff's] academic performance before denying her petition for readmission . . . because he had predetermined the outcome making the ASC hearing a sham proceeding." Wasserman is sued both in his individual and official capacity. *Id.* ¶¶ 268–316.

On May 19, 2017, Plaintiff was academically dismissed from FIU Law despite being a student in good standing. *Id.* ¶¶ 145–146. Plaintiff alleges that (1) "her academic dismissal violated her [right to] due process because FIU never placed [Plaintiff] on notice of the risk of academic dismissal before the academic dismissal was final; (2) FIU Law's policy regarding notice of expulsion and remediation for 1L students in their Spring semester violated Plaintiff's right to equal protection; (3) FIU Law violated Plaintiff's rights to due process and equal protection by offering students with higher GPAs the opportunity to participate in remediation and "cut[ting] off the benefit of remediation at [Plaintiff's] ranking"; (4) FIU Law violated Plaintiff's right to procedural due process because its regulations create a strong presumption against readmission, create a non-rebuttable presumption of FIU Law infallibility, and deny access to educational

records but require clear and convincing evidence for readmission; and (5) FIU, as the governing university over FIU Law, violated FERPA in several respects. *Id.* ¶¶ 461–626.

The causes of action include violation of Plaintiff's First Amendment right to freedom of speech and political expression (Count I), *id.* ¶¶ 758–786; violation of Plaintiff's Fourteenth Amendment and Florida constitutional rights to due process (Count II), *id.* ¶¶ 787–855; violation of Plaintiff's Fourteenth Amendment and Florida constitutional rights to equal protection of the law (Count III), *id.* ¶¶ 856–871; breach of a legal obligation to properly enforce a student FERPA complaint (Count IV), *id.* ¶¶ 872–894; violation of Plaintiff's FERPA rights (Count V), *id.* ¶¶ 895–907; denial of Plaintiff's right to assistance of counsel under federal law (Count VI), *id.* ¶¶ 908–921; fraud (Count VII), *id.* ¶¶ 922–928; civil conspiracy (Count VIII), *id.* ¶¶ 929–946; breach of fiduciary duty (Count IX), *id.* ¶¶ 947–981; negligence (Count X), *id.* ¶¶ 982–1043; and defamation (Count XI), *id.* ¶¶ 1044–1064. Plaintiff seeks injunctive relief; declaratory judgment; nominal damages; compensatory, actual, and punitive damages in excess of $25 million dollars; and attorneys' fees and costs. *Id.* at 113–14.

Now, the Federal Defendants, the State Defendants, and Defendant Wasserman move to dismiss the various claims against them. *See generally* Federal Defs.' Mot.; State Defs.' Mot.; Def. Wasserman Mot.

II. LEGAL STANDARD

A. 12(b)(1) Standard

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted). Such

jurisdiction must be proven by a preponderance of the evidence. *Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079, 1085 (11th Cir. 2010). "Attacks on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) come in two forms": facial and factual attacks. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990) (per curiam). "Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings." *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion, meaning that the court must consider the allegations of the complaint to be true." *Fru Veg Marketing, Inc. v. Vegfruitworld Corp.*, 896 F. Supp. 2d 1175, 1179 (S.D. Fla. 2012). The burden is on the party seeking to invoke the Court's jurisdiction to establish that jurisdiction exists. *Kokkonen*, 511 U.S. at 377. If the Court determines that it lacks subject matter jurisdiction, it must dismiss the claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

B. 12(b)(6) Standard

A court may also dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). This requirement "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). The court takes the plaintiff's factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007). A pleading that offers "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting

Twombly, 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

C. Impermissible Shotgun Pleading Standard

The United States Court of Appeals for the Eleventh Circuit has described impermissible shotgun pleadings at length:

> Though the groupings cannot be too finely drawn, we have identified four rough types or categories of shotgun pleadings. The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type, at least as far as our published opinions on the subject reflect, is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

Weiland v. Palm Beach Cnty. Sheriff's Office, 792 F.3d 1313, 1321–23 (11th Cir. 2015) (citation omitted). "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323. "Courts in this district and the Eleventh Circuit have warned litigants that shotgun pleadings tend to impede the orderly, efficient, and economic disposition of disputes as well as the court's overall ability to administer justice." *Pyatt v. Fla. Int'l Univ. Bd. of Trs.*, 1:20-CV-24085-BLOOM/Otazo-Reyes, 2020 WL 6945962, at *4 (S.D. Fla. Nov. 25, 2020) (citation and internal quotation marks omitted).

III. DISCUSSION

The Federal Defendants argue that the Court should dismiss the claims against them under Rule 12(b)(1) for lack of subject matter jurisdiction, or alternatively under Rule 12(b)(6) for failure

to state a claim upon which relief may be granted. *See generally* Federal Defs.' Mot. The State Defendants and Defendant Wasserman move to dismiss the Amended Complaint as an impermissible shotgun pleading as well as on substantive grounds. *See generally* State Defs.' Mot.; Def. Wasserman Mot. These arguments are addressed in turn below.

A. Federal Defendants

The Federal Defendants set forth both a facial and factual attack on subject matter jurisdiction. Mem. in Supp. at 5. Specifically, Federal Defendants argue that Plaintiff's constitutional claims against them—Counts I and III—fail because the United States has not explicitly waived sovereign immunity. *Id.* at 6. As to the remaining tort claims—Counts IV, VII, VIII, IX, and X—the Federal Defendants argue that these claims cannot proceed because (1) neither the DOE nor the Secretary of Education are proper defendants; (2) Plaintiff failed to exhaust her administrative remedies under FERPA; (3) there is no basis for Plaintiff's intentional tort claims of fraud and civil conspiracy to commit fraud as the United States has not waived sovereign immunity; (4) FERPA does not provide subject matter jurisdiction; (5) the "discretionary function" exception bars all of Plaintiff's potential FTCA claims; and (6) there is no private party analog to the alleged conduct, thus negating any government liability under the FTCA. *Id.* at 7–15.

Plaintiff first argues that sovereign immunity is explicitly waived for constitutional claims, citing 5 U.S.C. § 702 and 28 U.S.C. § 1331. Resp. to Federal Defs.' Mot. at 4–5. Regarding the tort claims, Plaintiff argues that (1) the DOE and Secretary of Education are proper defendants; (2) Plaintiff was not required to exhaust her administrative remedies; (3) Plaintiff alleges a claim of discrimination based on her support of former President Trump, which is a constitutional violation and statutory right under FERPA; (4) Plaintiff's complaint is based on First and Fifth Amendment constitutional violations; (5) there is no "discretionary function" exception to the

Federal Defendants' duty to issue a final determination letter to Plaintiff; and (6) Plaintiff has facially pled claims against Federal Defendants under both Federal and State law. *Id.* at 5–10.

1. Constitutional Claims—Counts I and III

The Federal Defendants argue that the constitutional claims against them fail because the United States has not explicitly waived its sovereign immunity. Mem. in Supp. at 6. In response, Plaintiff argues that (1) citing 5 U.S.C. § 702, "the United States has explicitly waived sovereign immunity"; (2) citing 28 U.S.C. 1331, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"; and (3) citing 28 U.S.C. 1346(b)(1), "the Court shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Resp. to Federal Defs.' Mot. at 4–5 (internal quotation marks omitted).

"Under settled principles of sovereign immunity, the United States, as a sovereign, is immune from suit, save as it consents to be sued . . . ." *United States v. Dalm*, 494 U.S. 596 (1990) (citations and internal quotation marks omitted). Such immunity extends to United States' agencies. *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1315 (11th Cir. 2006) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)). Further, such immunity generally applies in an official capacity suit, which is akin to a suit against the official's agency or entity. *Nalls v. Bureau of Prisons of U.S.*, 359 F. App'x 99, 100 (11th Cir. 2009) (per curiam). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). "[A] plaintiff bears the burden of establishing subject matter

jurisdiction . . . and, thus, must prove an explicit waiver of immunity." *Ishler v. Internal Revenue*, 237 F. App'x 394, 398 (11th Cir. 2007) (per curiam) (citation omitted).

Here, the DOE, as an agency of the United States, and the Secretary of Education, as an official of the United States, are immune from suit under the principles of sovereign immunity, and Plaintiff fails to prove that immunity has been explicitly waived. *Ishler*, 237 F. App'x at 398. Plaintiff invokes 5 U.S.C. § 702 for the first time in her response and argues that she "intends to seek equitable relief that the DOE must issue a findings letter through writ of mandamus."[7] Resp. to Federal Defs.' Mot. at 5. However, Plaintiff's Amended Complaint fails to plead entitlement to such relief and quite clearly seeks monetary damages—in excess of $25 million dollars—in connection with the alleged constitutional violations. *See* Am. Compl. at 114–15. Specifically, Plaintiff seeks "an award of monetary damages and equitable relief" as to Count I, and "an award of nominal and compensatory damages and equitable relief" as to Count III. *Id.* ¶¶ 786, 871. Plaintiff's vague prayer for "equitable relief" in addition to damages is of no consequence. Section 702 is not to be read so broadly such that sovereign immunity is waived any time a plaintiff seeks equitable relief, whether in addition to or in lieu of monetary damages. *See Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260–65 (reversing the judgment of the court below and clarifying that a suit *may* fall within § 702's waiver of immunity if it is one seeking *specific* relief, not money damages, and that the "interpretation of § 702 thus hinge[s] on the distinction between specific relief and substitute relief, not between equitable and nonequitable categories of remedies").

[7] Plaintiff's Amended Complaint contains no such claim. Accordingly, this argument is impermissibly raised, and the Court will not consider it for the purposes of the instant motion. *See Burgess v. Religious Tech. Ctr., Inc.*, 600 F. App'x 657, 665 (11th Cir. 2015) (per curiam) ("We repeatedly have held that plaintiffs cannot amend their complaint through a response to a motion to dismiss.").

Accordingly, the constitutional claims must be dismissed with prejudice as to the Federal Defendants for lack of subject matter jurisdiction under the principles of sovereign immunity. *Ishler*, 237 F. App'x at 398.

2. Counts IV, VII, VIII, IX, and X

The Federal Defendants assert several bases upon which Plaintiff's remaining tort claims against them also cannot proceed. Mem. in Supp. at 7–15. Specifically, the Federal Defendants argue that (1) neither the DOE nor the Secretary of Education are proper defendants in this action because "the exclusive remedy for a state law tort claim against a federal employee acting within the scope of his or her employment is an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2672" ("FTCA"); (2) Plaintiff failed to exhaust her administrative remedies under FERPA as is required under the FTCA because she "did not present the prerequisite administrative claim [to] the DOE"; (3) there is no basis for Plaintiff's intentional tort claims of fraud and civil conspiracy to commit fraud as the United States has not waived sovereign immunity; (4) FERPA does not provide a private right of action; (5) the "discretionary function" exception bars all of Plaintiff's potential FTCA claims; and (6) there is no private party analog to the alleged conduct, thus negating any government liability under the FTCA. *Id.*

Plaintiff argues that (1) the DOE and Secretary of Education are proper defendants because her claims "are not exclusively under the FTCA" as she "alleges violation of her rights under the U.S. Constitution as well as tort claims," and a possibility exists that the DOE and Secretary of Education "are not acting within the scope of their employment"; (2) Plaintiff was not required to exhaust her administrative remedies because "the exhaustion requirement does not apply to actions based on constitutional torts" and "Plaintiff is not requesting review of a final agency action"; (3) "Plaintiff intends to make a *Bivens* challenge because she does not have any adequate remedy for

the harm caused by the Federal Defendants' unconstitutional actions"[8]; (4) Plaintiff need not rely on FERPA to provide a private right of action because her "entire complaint is based on First and Fifth Amendment violations of unlawful discrimination"; (5) there is no "discretionary function" exception to the Federal Defendants' duty to issue a final determination letter to Plaintiff; and (6) Plaintiff has facially pled claims against Federal Defendants under both Federal and State law. *Id.* at 5–10.

"[T]he FTCA was designed to provide redress for ordinary torts recognized by state law." *Ochran v. United States*, 273 F.3d 1315, 1317 (11th Cir. 2001) (citation and internal quotation marks omitted). "An action against the United States under the FTCA is the exclusive remedy for employment-related torts committed by employees of the federal government." *Caldwell v. Klinker*, 646 F. App'x 842, 846 (11th Cir. 2016) (per curiam). The FTCA "makes clear that where a federal employee acts within the scope of his or her employment, an individual can recover only against the United States . . . ." *Burns v. United States*, 809 F. App'x 696, 699 (11th Cir. 2020) (per curiam) (quoting *Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169 (11th Cir. 1998)) (internal quotation marks omitted). "[W]here the United States Attorney General certifies that the employee-defendant was acting within the scope of his employment at the time of the alleged wrong, the burden shifts to the plaintiff to prove otherwise." *Small v. United States*, No. 13-cv-22836-UU, 2014 WL 12537139, at *2 (S.D. Fla. Mar. 3, 2014).

"The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113 (1993). As a prerequisite to filing suit, a "claimant shall first have presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. § 2675(a).

[8] Again, Plaintiff's Amended Complaint contains no such claim. Accordingly, this argument is impermissibly raised and the Court will not consider it for the purposes of the instant motion. *See Burgess*, 600 F. App'x at 665.

As an initial matter, the Court finds that DOE and Secretary of Education are not the proper parties here. *Burns*, 809 F. App'x at 699. The Court construes the Federal Defendants' argument that the United States is the proper party—submitted by the United States Attorney for the Southern District of Florida—as certification that the DOE and Secretary of Education were acting within the scope of their employment as it relates to the alleged conduct giving rise to this action. Plaintiff provides nothing more than the mere possibility that the DOE and Secretary of Education were not acting within the scope of their employment, with no facts in support of such a possibility. Thus, Plaintiff failed to meet her burden to prove that the DOE and the Secretary of Education were not acting within the scope of their employment when the alleged wrong occurred. *See Small*, 2014 WL 12537139, at *2. The Court finds it prudent to dismiss the DOE and Secretary of Education and substitute the United States as the proper party. *See Burns*, 809 F. App'x at 699.

Next, as to the exhaustion of remedies requirement, Plaintiff's argument that "filing a claim against the DOE would be futile" because the DOE has not yet issued a final decision on her FERPA complaint is without merit. Plaintiff cites to no authority establishing a futility exception. *See generally* Resp. to Federal Defs.' Mot. Further, DOE's purported delay in issuing Plaintiff a final decision on her FERPA complaint is inapposite to the requirement that she exhaust her administrative remedies under the FTCA prior to bringing suit. To the extent that Plaintiff is concerned about indefinite delay in responding to an administrative claim under the FTCA, the relevant statute provides that "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." § 2675(a).

Accordingly, the tort claims against the Federal Defendants must be dismissed for Plaintiff's failure to exhaust her administrative remedies. *See Caldwell*, 646 F. App'x at 846–47. While this failure alone requires that the Court dismiss the tort claims against the Federal

Defendants, the Court briefly addresses some of the remaining arguments related to subject matter jurisdiction because they warrant dismissal with prejudice.[9]

The federal government's waiver of immunity from tort suits based on state court claims is not without bounds. *See Zelaya v. United States*, 781 F.3d 1315, 1321–22 (11th Cir. 2015) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)) ("[I]n offering its consent to be sued, the United States has the power to condition a waiver of its immunity as broadly or as narrowly as it wishes, and according to whatever terms it chooses to impose."). One such statutory exception is the intentional tort exception, which excludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." § 2680(h). "In determining whether the exception applies, it is the substance of the claim and not the language used in stating it which controls." *Alvarez v. United States*, 862 F.3d 1297, 1302 (11th Cir. 2017) (quoting *Zelaya*, 781 F.3d at 1334) (internal quotation marks omitted). Counts VII and VIII of the Amended Complaint allege fraud and civil conspiracy, respectively. *See generally* Am. Compl. Both fraud and civil conspiracy, as specifically pled here, fall squarely within the intentional tort exception as they contain elements of misrepresentation and deceit. *See id.* ¶¶ 922–946; *Omegbu v. United States*, 475 F. App'x 628, 629 (7th Cir. 2012).

Accordingly, Counts VII and VIII must be dismissed with prejudice as to Federal Defendants.

The remaining claims against the Federal Defendants—Counts IV (breach of legal obligation to properly enforce a student FERPA complaint), IX (breach of fiduciary duty), and X (negligence)—are rooted in DOE's purported failure to timely resolve Plaintiff's FERPA

[9] Finding several grounds to dismiss the claims based on a lack of subject matter jurisdiction, the Court declines to analyze the additional bases for dismissal under Rule 12(b)(6).

complaint. However, FERPA does not provide a private right of action. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289–90 (2002); *Martes v. Chief Exec. Officer of S. Broward Hosp. Dist.*, 683 F.3d 1323, 1326 n.4 (11th Cir. 2012) (quoting *Gonzaga*, 536 U.S. at 290) ("To be clear, *Gonzaga* declined to find a private right of action in FERPA because the relevant provisions 'contain no rights-creating language, they have an aggregate, not individual focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions.'"). Without citing any legal authority in support, Plaintiff's argument that *Gonzaga* and its progeny applies only to actions against educational institutions is unfounded.

Accordingly, Counts IV, IX, and X must be dismissed with prejudice as to the Federal Defendants.

B. State Defendants

The State Defendants first argue that Plaintiff's Amended Complaint is a shotgun pleading and must be dismissed. State Defs.' Mot. at 5–7. Further, the State Defendants argue that (1) the federal claims against them do not survive dismissal; (2) the official capacity claims against the individuals are redundant and must be dismissed; (3) the First Amendment claim (Count I) fails because Plaintiff has not alleged any protected activity or a causal connection between any activity and her dismissal; (4) the due process claim (Count II) fails because there is no recognized fundamental property right in continued post-secondary education and Plaintiff did not exhaust her administrative remedies; (5) the equal protection claim (Count III) fails because Plaintiff is not a member of a protected class and has not identified similarly situated comparators; (6) the FERPA claim (Count V) fails because no action in this Court can be maintained for violations related to FERPA under federal or state law; (7) the denial of assistance of counsel claim (Count VI) fails because Plaintiff was not entitled to counsel under any federal law; (8) sovereign immunity bars the state law tort claims (Counts VII, VIII, IX, and XI); and (9) the negligence claim (Count X)

fails because Plaintiff did not comply with statutory notice requirements, and educational malpractice claims are not recognized in Florida. *Id.* at 7–23.

In response, Plaintiff argues that the Amended Complaint places the State Defendants on sufficient notice with particularity. Resp. to State Defs.' Mot at 2–3. Next, Plaintiff argues that (1) the federal claims survive dismissal in equity, and her harm is ongoing; (2) the official capacity claims against the individuals are separate and distinct from the claims against the FIU BOT and the BOG and are therefore not redundant; (3) the First Amendment claim (Count I) survives because she has alleged protected speech and a causal connection between her political activity and her dismissal; (4) the due process claim (Count II) survives because she has a property right in her law school education, and FIU did not provide Plaintiff with procedural due process; (5) the equal protection claim (Count III) survives because Plaintiff identified similarly situated comparators; (6) the FERPA claim (Count V) survives because the Florida Statutes confer a private cause of action; (7) the denial of assistance of counsel claim (Count VI) survives because universities do not have the right to deny students assistance of counsel, and such assistance is permitted under federal law; (8) Florida has waived sovereign immunity in tort cases (Counts VII, VIII, IX, and XI); and (9) the negligence claim (Count X) survives because Plaintiff did satisfy statutory pre-suit notice requirements, and this claim is not based on educational malpractice.

1. Impermissible Shotgun Pleading—Counts I, II, III, V, VI, VII, VIII, IX, X, and XI

As an initial matter, Plaintiff's Amended Complaint is indeed an impermissible shotgun pleading and must be dismissed on that basis. There are several examples that highlight the deficiencies therein—*e.g.*, each cause of action is inherently vague in terms of which Defendant it specifically applies to, there are a number of factual statements that are wholly irrelevant to Plaintiff's claims, and it is unreasonably difficult to ascertain which causes of action apply to which Defendants, and specifically on what basis. One thing is abundantly clear—a short and plain

statement this is not. Accordingly, the Court finds sufficient grounds to dismiss the Amended Complaint in its entirety as a shotgun pleading. *See Pyatt*, 2020 WL 6945962, at *5. However, except as otherwise provided in this Order, the Amended Complaint is dismissed without prejudice on this basis. *See Hollis v. W. Acad. Charter, Inc.*, 782 F. App'x 951, 955 (11th Cir. 2019).

2. Constitutional Claims—Counts I, II, and III

The State Defendants argue that Plaintiff's constitutional claims must be dismissed because both the FIU BOT and the BOG are recognized arms of the State of Florida and they have not explicitly waived immunity. State Defs.' Mot. at 7–9. The State Defendants argue this holds true for Defendants Puig, Rosenberg, Acosta, Ansah, Brown, Schrier, Baker, Norberg, Weisbord, Rosenthal, Lautenbach, and Elijah to the extent that they are sued in their official capacities.[10] *Id.* at 8–9. Plaintiff argues that the State Defendants deprived her of her property rights under § 1983, and that she has properly pled that the State Defendants are "liable for the codified, facially unconstitutional 'FIU Law Regulations' and other pervasive actions done under official government policy." Resp. to State Defs.' Mot. at 3. Moreover, Plaintiff argues that she seeks both injunctive and monetary relief, and that "she continues to suffer the embarrassment and damage to her career for an unlawful academic dismissal." *Id.* at 4. Plaintiff argues that her "unlawful academic dismissal is an on-going constitutional violation." *Id.* Plaintiff argues that she "intends to have a jury declare FIU COL Regulations unconstitutional and deprive law students of basic procedural due process protection of their property right in continued enrollment . . . at a fair and unbiased law school." *Id.*

The Eleventh Amendment to the United States Constitution bars § 1983 claims against the State absent a waiver of immunity. *Gould v. Fla. Atl. Univ. Bd. of Trs.*, No. 10-81210-CIV-RYSKAMP/VITUNAC, 2011 WL 13227893, at *2 (S.D. Fla. June 14, 2011).

[10] Only Defendant Wasserman is sued in both his individual and official capacity.

"Section 1983 does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations for civil liberties." *Id.* at *3 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989)). "In Florida, sovereign immunity is the general rule, not the exception." *Fin. Healthcare Assocs., Inc. v. Pub. Health Tr. of Miami-Dade Cnty.*, 488 F. Supp. 2d 1231, 1235–36 (S.D. Fla. 2007). "Even if a state could consent to suit, Florida has not waived its § 1983 immunity." *Gould*, 2011 WL 13227893, at *3. Further, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will*, 491 U.S. at 71 (reasoning that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.").

"An exception to Eleventh Amendment immunity exists under the *Ex parte Young* doctrine, which permits suits against state officers seeking prospective relief to end continuing violations of federal law." *Nicholl v. Att'y Gen. Ga.*, 769 F. App'x 813, 815 (11th Cir. 2019) (per curiam) (citation and internal quotation marks omitted). "The *Ex parte Young* doctrine applies only when a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Id.* (citation and internal quotation marks omitted). "The *Ex parte Young* doctrine is inapplicable when a plaintiff seeks to adjudicate the legality of past conduct." *Id.* (citation and internal quotation marks omitted).

Plaintiff's constitutional claims against State Defendants FIU BOT and BOG, as well as those against the individual State Defendants sued in their official capacity, are not cognizable because they are subject to sovereign immunity. *See Pyatt*, 2020 WL 6945962, at *10 (dismissing with prejudice claims against FIU BOT and those sued in their official capacity as nonactionable). Further, Plaintiff's allegation that she suffers ongoing harm that entitles her to injunctive relief under the *Ex parte Young* doctrine is without legal support. *See Nicholl*, 769 F. App'x at 815–16 (affirming the district court's dismissal of the plaintiff's complaint and finding that the *Ex parte*

Young doctrine was not applicable where the plaintiff sought redress for an alleged violation of federal law resulting in a particular grade in a completed course). Plaintiff cites to no legal authority in support of her ongoing harm theory that warrants a different result here. *See generally* Resp. to State Defs.' Mot. Plaintiff has since completed law school at another academic institution, which makes her argument regarding alleged ongoing harm all the more speculative. To the extent that Plaintiff seeks to challenge FIU Law's policies and regulations as they apply to future law students, she lacks standing to do so. *See Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1283 (11th Cir. 2001) ("[T]o have standing to obtain forward-looking relief, a plaintiff must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future.").

Accordingly, Counts I, II and III must be dismissed with prejudice as to State Defendants FIU BOT, BOG, and the individual State Defendants sued in their official capacity.[11]

3. FERPA Claim—Count V

The State Defendants argue that FERPA does not provide a private right of action citing the same general principles argued by the Federal Defendants in reliance on *Gonzaga*. *See supra* Section III.A.2.; State Defendants' Mot. at 17–18. Further, to the extent Plaintiff seeks to assert a right pursuant to Florida Statutes § 1002.22, the State Defendants argue that statute does not apply to disputes involving state universities. *Id.* Plaintiff argues that § 1002.225(3) "confers a private cause of action in equity," and seeks leave to amend her complaint accordingly.

As discussed above, FERPA does not provide a private right of action. *See supra* Section III.A.2 at 19; *see also Gonzaga*, 536 U.S. at 289 (quoting 20 U.S.C. § 1232; 34 C.F.R. § 99.60 (a)–(b)) ("Congress expressly authorized the Secretary of Education to '*deal with violations*' of the

[11] Finding that dismissal without prejudice is warranted based on sovereign immunity, the Court declines to analyze the additional grounds for dismissal based on the substantive components of Plaintiff's constitutional claims.

Act, § 1232g(f) (emphasis added), and required the Secretary 'to establish or designate [a] review board' for investigating and adjudicating such violations, § 1232g(g). Pursuant to these provisions, the Secretary created the Family Policy Compliance Office (FPCO) 'to act as the Review Board required under the Act [and] to enforce the Act with respect to all applicable programs.'"). Plaintiff's FERPA claim is not actionable in this Court.

Plaintiff's attempt to assert jurisdiction under § 1002.225(3) fares no better. Section § 1002.225(3) provides in relevant part that "[i]f any public postsecondary educational institution refuses to comply with this section, the aggrieved student has an immediate right to bring an action in circuit court to enforce his or her rights by injunction." Thus, to the extent Plaintiff seeks to assert a claim under § 1002.225(3), she may do so in circuit court, but not before this Court.

Accordingly, Count V must be dismissed with prejudice as to the State Defendants.

4. Denial of Counsel Claim—Count VI

The State Defendants argue that "there is no caselaw recognizing a right to counsel in disciplinary- or academic-dismissal proceedings," and Plaintiff's reliance on FERPA "is again misplaced." State Defs.' Mot. at 18–19. Plaintiff argues that she "intends to challenge the legal axiom that law students can be pervasively and perniciously denied assistance of counsel in the face of an academic dismissal and in today's polarized and vitriolic educational environment." Resp. to State Defs.' Mot. at 11. Plaintiff argues that "FERPA law 23 C.F.R. [§] 99.22(d)[] states that students 'may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.'" *Id.* Plaintiff argues that "[t]his is a case of first impression to determine whether a university may deny the assistance of counsel under FERPA." *Id.* at 12.

Again, as discussed above in *supra* Sections III.A.2 and III.B.3., FERPA does not provide a private right of action and therefore this claim is not subject to redress before this Court. *See*

Gonzaga, 536 U.S. at 289–90. Accordingly, Count VI must be dismissed with prejudice as to the State Defendants.

5. Tort Claims—Counts VII, VIII, IX, and XI

a. Fraud, Civil Conspiracy, and Defamation

The State Defendants argue that "[a]lthough Florida has generally waived immunity for torts, it has retained immunity for torts allegedly committed in bad faith." State Defs.' Mot. at 19 (citing § 768.28(9)(a)). Specifically, the State Defendants argue that because the claims alleging fraud, civil conspiracy, and defamation all require an element of bad faith or malicious purpose, they must be dismissed as a matter of law. *Id.* 19–21. Plaintiff does not directly respond to the State Defendants' arguments regarding fraud, civil conspiracy, and defamation. Resp. to State Defs.' Mot. at 12–13. Rather, Plaintiff argues that "FIU's policy of not reviewing educational records and grades before final dismissal or upon a challenge of that dismissal intentionally negates the possibility that FIU could make a clerical error or [sic] records suffered through a technical 'glitch.'" *Id.* at 13. Plaintiff alludes to such a policy as creating a "known dangerous condition" which, if the state fails to remedy such a condition, would render sovereign immunity inapplicable. *Id.*

"Under Florida law, the state and its agencies have sovereign immunity and cannot be sued unless the Florida legislature has waived that privilege." *Zainulabeddin v. Univ. of S. Fla. Bd. of Trs.*, 749 F. App'x 776, 786 (11th Cir. 2018) (per curiam) (citing *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984)). "Although Florida has generally waived immunity for torts, it has retained immunity for torts committed in bad faith by its employee." *Id.* (citing § 768.28(9)). "Florida has not waived immunity for torts involving fraud." *Id.* Similarly, "[p]leading malice in a defamation action will bar recovery against a state agency pursuant to sovereign immunity under

[§] 768.28(9)(a)." *Boggess v. Sch. Bd. of Sarasota Cnty.*, No. 8:06-CV-2245-T-27-EAJ, 2008 WL 564641, at *5 (M.D. Fla. Feb. 29, 2008) (citation omitted).

Here, Plaintiff's claims of fraud, civil conspiracy predicated on fraud, and defamation all include elements of bad faith or malicious intent. In her claim of fraud, Plaintiff recites the elements of fraud under Florida law which requires, in part, knowledge that a statement is false and intent by the person making the false representation that it will induce another to act on it. Am. Compl. ¶ 923. In her claim of civil conspiracy, Plaintiff very specifically alleges bad faith and malice where she states that "FIU professors conspired with one another, as well as other individuals and entities, to perpetrate an unlawful act upon [Plaintiff] or to perpetrate a lawful act by unlawful means, to wit: Defendants conspired to devise a fraudulent and unconstitutional grading scheme to cause [Plaintiff] an academic expulsion." *Id.* ¶ 930. Finally, in her defamation claim, Plaintiff alleges, in part, that "FIU's publication of [Plaintiff's] expulsion had malicious intent or at least had reckless disregard for the truth because FIU intended to block [Plaintiff] from ever graduating from any law school." *Id.* ¶ 1059. Each of these claims very clearly asserts the type of bad faith and malice for which Florida has retained immunity. *See Zainulabeddin*, 749 F. App'x at 786 (11th Cir. 2018).

Accordingly, Counts VII, VIII, and XI must be dismissed with prejudice as to the State Defendants.

b. Breach of Fiduciary Duty

The State Defendants argue that Plaintiff's allegations fail to show the breach of an express written contract, as is required to sustain a breach of fiduciary duty claim. State Defs.' Mot. at 21–22. In her response, Plaintiff does not directly respond to the argument that there be an express written contract. Resp. to State Defs.' Mot. at 13–14. Rather, Plaintiff argues that "Florida courts

may still recognize a fiduciary duty based on the specific action of parties where there is no specific fiduciary duty established under the law." *Id.*

"[W]here the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of contract." *Pan-Am Tobacco Corp.*, 471 So. 2d at 5. The absence of the sovereign immunity defense applies "only to suits on express, written contract into which the state agency has statutory authority to enter." *Id.* at 6.

Plaintiff fails to assert the existence of an express written contract upon which a breach of fiduciary duty claim can stand. Plaintiff's status as a student is not sufficient to sustain this cause of action. *See Morrison v. Univ. of Miami*, No. 1:15-cv-23856-UU, 2016 WL 3129490, at *7 (S.D. Fla. Jan. 19, 2016) (finding that "a fiduciary duty does not simply arise out of students' status"). Accordingly, Count IX must be dismissed with prejudice as to the State Defendants.

6. Negligence Claim—Count X

The State Defendants argue that Plaintiff's negligence claim fails because she did not comply with pre-suit notice requirements set forth in § 768.28. State Defs.' Mot. at 22–23. Specifically, the State Defendants argue that Plaintiff's notices of intent to commence litigation are insufficient to satisfy statutory pre-suit notice requirements. *Id.* Further, the State Defendants argue that even if Plaintiff had complied with the statutory pre-suit notice requirements, the negligence claim still fails because educational malpractice is not a cognizable cause of action. *Id.* at 23. The State Defendants argue the negligence claim should be dismissed with prejudice because the allegations "are generally premised on academic decisions and conduct relating to Plaintiff's enrollment or the evaluation of her complaints related to her education at FIU." *Id.* Plaintiff argues that she did in fact comply with pre-suit notice requirements, citing to the Amended Complaint ¶ 130 and Exhibit 28. Resp. to State Defs.' Mot. at 14. Plaintiff further argues that

State Defendants are "mischaracterizing" her negligence claim and it "is not exclusively based on discretionary academic decisions such as grading or academic placement." *Id.* at 14–15. Specifically, Plaintiff argues that she "properly pled a breach of the duty to supervise employees, maintaining accurate record-keeping and comply with their own policies and regulation as published [sic]." *Id.* at 15.

"To maintain a claim in tort against the State or one of its agencies, a plaintiff must meet the requirements of § 768.28, which waives the government's sovereign immunity with respect to tort actions." *Woodburn v. State of Fla. Dep't of Child. & Fam. Servs.*, 854 F. Supp. 2d 1184, 1207–08 (S.D. Fla. 2011). "The statute sets out mandatory procedures that one must follow before suing pursuant to the waiver." *Id.* at 1208. Specifically, the statute provides in relevant part:

> An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also . . . presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services of the appropriate agency denies the claim in writing. . . . The failure of the Department of Insurance or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section.

§ 768.28(6)(a), (d). Satisfaction of the requirements set forth above "is a condition precedent to maintaining a lawsuit." *Fletcher v. City of Miami*, 567 F. Supp. 2d 1389, 1393 (S.D. Fla. 2008) (citation and internal quotation marks omitted).

Here, Plaintiff sent a letter to the Florida Department of Financial Services on February 6, 2018. Am. Compl. ¶ 130, Ex. 28. That letter included (1) a copy of Plaintiff's notice of intent to initiate litigation, (2) a copy of the complaint Plaintiff sent to the BOG, (3) responses from the BOG's Inspector General and FIU's General Counsel, and (4) Plaintiff's rebuttal to their findings. *Id.* Ex. 28. On the face of the exhibit presented, and as State Defendants argue, Plaintiff's letter to the Florida Department of Financial Services was missing certain components required by § 768.28(6)(c)—specifically, date of birth, place of birth, social security number, or information

regarding any unpaid prior adjudicated claim against the State. *See id.* Moreover, the letter seems less like a claim seeking relief from the appropriate agency under § 768.28, and more like what it is specifically characterized as therein—a notice of pending litigation. *See id.* ("The purpose of this letter is to place your department on notice of pending litigation."). Plaintiff's reliance on *Wagatha v. City of Satellite Beach* is misplaced. *See Wagatha*, 865 So. 2d 620, 622 (Fla. Dist. Ct. App. 2004) ("A plaintiff must plead compliance with the statute, although a general averment will suffice."). While a "general averment" in a complaint may suffice to overcome a motion to dismiss, it does not serve as a waiver of the otherwise applicable statutory requirements. Here, Plaintiff's flaw is not that she has said too little in the Amended Complaint, but that she has said too much by way of the exhibits attached thereto which demonstrate that the statutory pre-suit notice requirements have not been met. The Eleventh Circuit has consistently held that "when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (per curiam) (quoting *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007)) (internal quotation marks omitted). And, because the time to comply with the pre-suit requirements has expired, this claim must also be dismissed with prejudice. *See Fletcher*, 567 F. Supp. 2d at 1393 (quoting *Wagatha*, 865 So. 2d at 622) (internal quotation marks omitted) ("[W]here the time for such notice has expired so that it is apparent that the plaintiff cannot fulfill the requirement, the trial court has no alternative but to dismiss the complaint with prejudice.").

Accordingly, Count X must be dismissed with prejudice as to the State Defendants. Finding sufficient grounds to dismiss the negligence claim for failure to strictly comply with § 768.28, the Court does not reach the remaining basis for dismissal—*i.e.*, whether this claim amounts to anything more than an allegation of educational malpractice.

C. Defendant Wasserman

Defendant Wasserman first argues that Plaintiff's Amended Complaint is a shotgun pleading and must be dismissed. Wasserman Mot. at 6–7. Further Defendant Wasserman argues that (1) as to the First Amendment claim (Count I), Plaintiff has not shown protected conduct or violation of a clearly established right to support a First Amendment claim; (2) as to the due process claim (Count II), Plaintiff has not shown clearly established due process rights that she was deprived of; (3) as to the equal protection claim (Count III), Plaintiff is not a member of a protected class and has not identified a similarly situated comparator; (4) as to the denial of assistance of counsel claim (Count VI), Plaintiff did not have a right to counsel; (5) as to the fraud claim (Count VII), the elements necessary to support a fraud claim are not satisfied with any particularity; (6) as to the civil conspiracy claim (Count VIII), the underlying tort requirement bars civil conspiracy and the intra-corporate conspiracy doctrine precludes liability; (7) as to the breach of fiduciary duty claim (Count IX), no fiduciary duty exists; (8) as to the negligence claim (Count X), educational malpractice is not a cognizable claim and, as a public employee, Defendant Wasserman is shielded by § 768.28; (9) as to the defamation claim (Count XI), absolute immunity bars defamation; and (10) the official capacity claims are redundant.[12] *Id.* at 6–20.

Plaintiff argues that the Amended Complaint is not a shotgun pleading, and that it places Defendant Wasserman on sufficient notice with particularity. Resp. to Def. Wasserman Mot. at 3–4. Plaintiff further argues that (1) Plaintiff has alleged protected speech and a causal connection between her political activity and dismissal in support of the First Amendment claim; (2) Plaintiff has a property right in continuing her law school education and FIU provided no procedural due process in connection with her dismissal; (3) Plaintiff has identified similarly situated comparators

[12] For the same reasons set forth in *supra* Section III.B., all claims against Defendant Wasserman in his official capacity must be dismissed with prejudice. Thus, the redundancy argument is moot.

in support of the equal protection claim; (4) no case law exists that affirmatively grants a university the right to deny a student's discretion to avail herself of the assistance of counsel; (5) Plaintiff's claim of fraud is pled with particularity and specificity; (6) as to the civil conspiracy claim Defendant Wasserman's intra-corporate conspiracy doctrine fails; (7) Defendant Wasserman breached his fiduciary duty to Plaintiff; (8) Plaintiff's negligence claim is not based on educational malpractice; and (9) absolute immunity does not bar the defamation claim because Wasserman is sued personally and is not a public official.

1. Impermissible Shotgun Pleading—Counts I, II, III, VI, VII, VIII, IX, X, and XI

As discussed above in *supra* Section III.B.1., Plaintiff's Amended Complaint is an impermissible shotgun pleading and must be dismissed accordingly. However, except as otherwise provided in this Order, the Amended Complaint is dismissed without prejudice on this basis. *See Hollis v. W. Acad. Charter, Inc.*, 782 F. App'x 951, 955 (11th Cir. 2019).

2. Qualified Immunity—Counts I, II, and III

Defendant Wasserman argues that he is subject to qualified immunity as to Counts I, II, and III. Def. Wasserman Mot. at 5. Plaintiff disputes Defendant Wasserman's qualified immunity defense, arguing that "Plaintiff clearly asserts the infringement of several constitutional rights in her complaint, particularly her liberty right in her First Amendment right to free speech," and Defendant Wasserman's "unlawful acts were well beyond the scope of his discretion and authority as a professor." Resp. to Def. Wasserman Mot. at 3.

"Qualified immunity provides complete protection for government officials sued in their individual capacities where their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Quinette v. Reed*, 805 F. App'x 696, 701 (11th Cir. 2020) (per curiam) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A government official "is entitled to qualified immunity where his actions would be

objectively reasonable to a reasonable [official] in the same situation." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 638–41 (1987)). To assert a qualified immunity defense, a government official must have been acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Id.* (citation omitted). Once the government official establishes that they were acting within the scope of their discretionary authority, the burden shifts to the plaintiff to show that the defendants violated a clearly established constitutional right. *See Carter v. Butts Cnty., Ga.*, 821 F.3d 1310, 1319 (11th Cir. 2016) (citation omitted). Courts employ a two-step inquiry to determine whether government officials are entitled to qualified immunity: (1) the facts alleged in the complaint show the official's conduct violated a constitutional right, and (2) the right was clearly established at the time of the alleged misconduct. *See Pearson v. Callahan*, 555 U.S 223, 232 (2009). Courts need not address these steps in sequential order. *See id.* at 236.

Further, it is proper for courts to dismiss a complaint because the defendants are entitled to qualified immunity. Indeed, the Supreme Court has urged courts to apply qualified immunity at the earliest possible stage of litigation because the defense is immunity from the burdens of defending a lawsuit, not just immunity from damages or liability. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991). As such, "[a]lthough the defense of qualified immunity is typically addressed at the summary judgment stage of a case, it may be . . . raised and considered on a motion to dismiss." *Corbitt v. Vickers*, 929 F.3d 1304, 1311 (11th Cir. 2019) (citation omitted). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citation omitted).

As an initial matter, the Court finds that Defendant Wasserman was acting within the scope of his discretionary authority because all the allegations against him relate to him carrying out his professorial duties—instructing a classroom, grading exams, and serving on an academic dismissal

committee. Accordingly, the burden shifts to Plaintiff to show that Defendant Wasserman violated clearly established constitutional rights. *Carter*, 821 F.3d at 1319.

a. First Amendment Claim—Count I

Defendant Wasserman argues that "[u]nder an education-setting First Amendment theory, Plaintiff has not alleged any protected expression or conduct." Def. Wasserman Mot. at 8. Specifically, Plaintiff "admittedly did not engage in any on-campus speech" and Plaintiff "failed to allege any speech that is constitutionally protected because she has not alleged what that speech was." *Id.* According to Defendant Wasserman, at most Plaintiff alleges that "she felt intimidated to speak up in [Defendant Wasserman's] class." *Id.* Plaintiff argues that she "clearly alleges that [Defendant] Wasserman's use of the classroom as a leftist propaganda machine was an intimidating suppression of [Plaintiff's] freedom to express her conservative, Republican speech." Resp. to Def. Wasserman Mot. at 4. Plaintiff further argues that she has "clearly pled that [Defendant] Wasserman's fraudulent grading to result in [sic] a fraudulent academic dismissal was meant to infringe her right to be a lawyer that would likely defend conservative values in the courts and in the public arena." *Id.*

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* "To state a retaliation claim, the commonly accepted formulation requires that a plaintiff must establish first that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that here is a causal connection between the retaliatory actions and the adverse effect on speech." *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005) (citation omitted). "A plaintiff suffers adverse action if the defendant's allegedly

retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *Id.* at 1254.

Here, Plaintiff's raises two possible ways in which her First Amendment rights were violated. First, Plaintiff alleges that Defendant Wasserman's actions had a chilling effect on her right to free speech, inasmuch as she alleges that she "felt intimidated to freely express an opposing political viewpoint in his classroom." Am. Compl. ¶ 275. However, Plaintiff's subjective discomfort sharing her political viewpoints during her first year of law school does not a constitutional violation make. Plaintiff cites to no authority in support of this vaguely asserted proposition. *See generally* Resp. to Def. Wasserman Mot. Thus, Plaintiff fails to meet her burden to show that any of Defendant Wasserman's actions in the classroom were violative of Plaintiff's clearly established constitutional rights in this context.

Second, Plaintiff alleges that Defendant Wasserman retaliated against her for exercising her First Amendment rights by "using non-academic standards to grade her exams," grading her exams "unblinded," and intentionally lowering her grades "to retaliate and politically engineer the student body class"—all of which was apparently done because Defendant Wasserman "was aware of [Plaintiff's] support of President Trump and the Republican Party." *Id.* ¶¶ 276–280. The flaw in Plaintiff's argument, however, is that her allegations are wholly conclusory and lack any factual support. Plaintiff does not specifically plead what constitutionally protected speech resulted in the retaliation that allegedly followed. In her response, Plaintiff argues that "she was punished for her very public advocacy of Republican candidates and then-candidate Trump on social media, in her hometown, and other off-campus activities during her 1L year." Resp. to Defendant Wasserman Mot. at 4. She then leaps to the conclusion that Defendant Wasserman—now in the on-campus setting—was aware of such advocacy and thus retaliated against her because of it. Plaintiff's "public advocacy," whether on social media, in her hometown, or during other off-campus

activities, is far too vague to allow the Court to determine whether Plaintiff's speech was constitutionally protected. Thus, the Court cannot find that the first prong of the retaliation analysis is satisfied, *see Bennett*, 423 F.3d at 1250, and Plaintiff fails to meet her burden to show that any of Defendant Wasserman's actions in the classroom were violative of Plaintiff's clearly established constitutional rights in this context as well. *See Carter*, 821 F.3d at 1319.

Accordingly, Count I is dismissed without prejudice as to Defendant Wasserman.

b. Count II—Due Process Claim

Defendant Wasserman argues that Plaintiff does not have a liberty or property interest in a continuing law school education, and thus there is no substantive due process violation. Def. Wasserman Mot. at 9–10. As to any procedural due process violation, Defendant Wasserman argues that Plaintiff's claim is premature as she has not exhausted her State remedies. *Id.* at 10–11. Further, Defendant Wasserman argues that "[t]here is no requirement for a pre-dismissal hearing at which [a] student may contest the basis for an academic dismissal." *Id.* at 1. Plaintiff argues that she does have a property interest in her law school education, citing to a case involving a Georgia university. Resp. to Def. Wasserman Mot. at 5–6. Plaintiff does not discuss her failure to exhaust State remedies, however she argues that the "Procedural Due Process Clause grants [Plaintiff] the opportunity to present her case and have its merits fairly judged." *Id.* at 7.

"The substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is, rights that are 'implicit in the concept of ordered liberty.'" *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). "[S]tudents at a public university do not have a fundamental right to continued enrollment." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1235 (11th Cir. 2018) (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution.")). "No court has recognized a substantive property or liberty interest in a college

education." *Ellison v. Bd. of Regents of Univ. Sys. of Ga.*, No. CV 105-204, 2006 WL 664326, at *1 (S.D. Ga. Jan. 12, 2006).

"[A] violation of procedural due process is not complete 'unless and until [a] State fails to provide due process.'" *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007) (quoting *McKinney*, 20 F.3d at 1557). "Only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation become actionable." *Id.*

Plaintiff relies on *Barnes v. Zaccari* for the proposition that she held a property interest in her law school education. *Barnes*, 669 F.3d 1295 (11th Cir. 2012). However, Plaintiff's reliance on *Barnes* is misplaced. In *Barnes*, a university policy imposed a "for cause" requirement for the imposition of disciplinary sanctions, and the student in question was dismissed on disciplinary, not academic, grounds. *Id.* at 1304–05. Plaintiff cites to no other authority, or any corollary FIU Law policy, that shows she had a clearly established property interest in continuing her law school education at FIU Law. Further, Plaintiff ignores entirely her failure to exhaust State administrative remedies. Plaintiff has failed to meet her burden to show that Defendant Wasserman violated Plaintiff's clearly established due process rights. *See Carter*, 821 F.3d at 1319.

Accordingly, Count II is dismissed without prejudice as to Defendant Wasserman.

c. Count III—Equal Protection Claim

Defendant Wasserman argues that Plaintiff's equal protection claim fails because Plaintiff has not alleged that she is part of a protected class, and Plaintiff did not identify any comparators or similarly situated individuals who were treated more favorably. Def. Wasserman Mot. at 11–13. Plaintiff first reasserts arguments related to Counts I and II—First Amendment and due process violations. Resp. to Def. Wasserman Mot. at 7. Next, Plaintiff argues that she "suspects certain identifiable students received [] favorable treatment, but refrains from naming them until such time as evidence is verified." *Id.* at 8.

"In order to state an equal protection claim, the plaintiff must prove that he was discriminated against by establishing that other similarly-situated individuals outside of his protected class were treated more favorably." *Amnesty Int'l, USA v. Battle*, 559 F.3d 1170, 1180 (11th Cir. 2009). Courts generally look to race, religion, gender, or national origin to determine whether the plaintiff is a member of a protected class. *See Rollins v. Bd. of Trs. of Univ. of Ala.*, 647 F. App'x 924, 938 (11th Cir. 2016) ("To maintain an equal protection claim, a plaintiff must allege that, through state action, similarly situated persons have been treated disparately. Further, the plaintiff must present evidence that the state actor's conduct was motivated by the plaintiff's race or sex.") (internal citations and quotation marks omitted); *Alford v. Consol. Gov't of Columbus, Ga.*, 438 F. App'x 837, 839 (11th Cir. 2011) (per curiam) ("In a traditional employment case brought under the Equal Protection Clause, an employee asserts that he was discriminated against on account of his membership in an identifiable or protected class, such as race, religion, sex, or national origin."). "If a plaintiff fails to show the existence of a similarly-situated [individual], judgment as a matter of law is appropriate where no other plausible allegation of discrimination is present." *Arafat v. Sch. Bd. of Broward Cnty.*, 549 F. App'x 872, 874 (11th Cir. 2013) (per curiam).

Here, Plaintiff does not identify membership in a protected class, nor does she allege with any particularity that similarly-situated individuals were treated more favorably. Plaintiff has failed to meet her burden to show that Defendant Wasserman violated Plaintiff's clearly established equal protection rights. *See Carter*, 821 F.3d at 1319.

Accordingly, Count III is dismissed without prejudiced as to Defendant Wasserman.

3. Remaining State Law Claims

A district court may decline to exercise supplemental jurisdiction over a claim if the district court dismisses all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). "It has

consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). The Eleventh Circuit encourages district courts to dismiss any remaining state claims when the federal claims are dismissed prior to trial. *See, e.g., Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296 (11th Cir. 2018); *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088–89 (11th Cir. 2004) (per curiam). Dismissal of state-law claims should usually be done without prejudice so that plaintiff may seek relief in state court. *See Vibe Micro, Inc.*, 878 F.3d at 1296 (citing *Crosby v. Paulk*, 187 F.3d 1339, 1352 (11th Cir. 1999)).

Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining claims at this juncture and will dismiss those claims without prejudice.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Federal Defendants' Motion to Dismiss, the State Defendants' Motion to Dismiss, and Defendant Wasserman's Motion to Dismiss are GRANTED IN PART and DENIED IN PART.

Plaintiff's Amended Complaint is DISMISSED WITH PREJUDICE in its entirety as to the Federal Defendants and the State Defendants, including Defendant Wasserman in his official capacity. Plaintiff's Amended Complaint is DISMISSED WITHOUT PREJUDICE in its entirety as to Defendant Wasserman in his individual capacity. The Clerk of Court shall TERMINATE the Department of Education, the Secretary of Education, Florida International University Board of Trustees, Board of Governors for the State University System of Florida, Claudia Puig, Mark

B. Rosenberg, R. Alex Acosta, Tawia Baidoe Ansah, Joycelyn Brown, Rosario L. Schrier, Thomas E. Baker, Scott F. Norberg, Noah Weisbord, Marci Rosenthal, Ned C. Lautenbach, and Iris Elijah as parties to this case.

The Clerk of Court is INSTRUCTED to administratively CLOSE THIS CASE. All pending motions, if any, are DENIED AS MOOT. Should Plaintiff choose to file a second amended complaint, she may do so within twenty-one (21) days of the date of this Order. Any such amended complaint shall remove all extraneous information related to the parties terminated herein.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of April, 2021.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record