Appendix B
District Court Omnibus Order
April 12, 2021

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

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).

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[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

Appendix C
Court of Appeals
Judgement, Order, and Decree
June 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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June 14, 2022

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 21-11453-BB
Case Style: Christina McLaughlin v. Florida International Univ., et al
District Court Docket No: 1:20-cv-22942-KMM

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court. The court's opinion was previously provided on the date of issuance.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lois Tunstall
Phone #: (404) 335-6191

Enclosure(s)

MDT-1 Letter Issuing Mandate

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-22942-KMM

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: April 22, 2022

For the Court: DAVID J. SMITH, Clerk of Court

Appendix D
State Appellant's 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

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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.

16. Lautenbach, Ned – Appellee/Defendant

17. Marrero, Oscar Edmund – Counsel for Appellees

18. Marrero & Wydler – Counsel for Appellees

19. Matzkin, Daniel – Counsel for Federal Appellees

20. McLaughlin, Christina – Appellant/Plaintiff

21. McLaughlin, Diana – Counsel for Appellant

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

23. Norberg, Scott – Appellee/Defendant

24. Leinicke, John Steven – Counsel for Federal Appellees

25. Puig, Claudia – Appellee/Defendant

26. Rosenberg, Mark – Appellee/Defendant

27. Rosenthal, Marci – Appellee/Defendant

28. Rubio, Lisa Tobin – Counsel for Federal Appellees

29. Schier, Rosario – Appellee/Defendant

30. Smachetti, Emily M – Counsel for Federal Appellees

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

33. Weisbord, Noah – 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

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).

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

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

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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ACADEMIC POLICIES AND REGULATIONS

Preface

These Academic Policies and Regulations were promulgated and codified by the Florida International University College of Law in February 2002, and have been periodically amended since that time.

Students should read these regulations carefully; all students are presumed to have full knowledge of their contents.

Introduction

These regulations are divided into 10 parts. Each part is designated by a roman numeral and a title in capital letters. These parts are divided into one or more subparts. Each subpart is designated by a capital letter and an underlined title in initial caps. The "ABA Appendix" lists those sections of these Policies and Regulations that are related to, based upon or compelled by regulations of the American Bar Association and the specific ABA regulation that is related to the contents of the listed section.

PART I. GENERAL PROVISIONS

A. Defined Terms

001. **Defined Terms**

Add/drop period – The period at the beginning of each semester designated in writing by the Registrar, during which students may, generally, change courses without obtaining permission of the Dean. (§ 802)

Administrative F – A grade of "F" entered on a student transcript for a course by the Records Office at the direction of the Dean because the student withdrew from the course after the add/drop period without permission of the Dean, the student initially received an incomplete in the course and did not follow the required procedures to remove the incomplete, or because, without prior authorization, the student failed to take a scheduled examination, or because the student violated the Code of Student Conduct. (See §§ 805, 1203, 2602, 2701, and 2807.) Administrative F grades may be accompanied by a notation on the transcript of the reason the student received the F grade.

College – The Florida International University College of Law.

Course – An offering of the College for which a student is authorized to receive credit which counts toward the minimum number of credit hours needed for graduation.

Course Credit Hours – A credit hour is an amount of work that reasonably approximates: (1) not less than 50 minutes of classroom or direct faculty instruction and 120 minutes of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time; or (2) at least an equivalent amount of work for other credit-bearing academic activities such as field placements, law review, trial advocacy, and board of advocates.

Dean -- The Dean of the College of Law or such person as the Dean may designate.

Faculty – The faculty of the College of Law.

Foundation course – A course required in the first year of the full-time division and the first three semesters of the part-time division. The foundation courses are Torts (4 credit hours), Contracts (4 credit hours), Property (4 credit hours), Civil Procedure (4 credit hours), Criminal Law (3 credit hours), Constitutional Law (4 credit hours), Introduction to International and Comparative Law (3 credit hours), and Legal Skills and Values I (3 credit hours) and II (2 credit hours). These foundation courses comprise the foundation curriculum. (See § 701)

Full-time student – Either a student enrolled in a minimum of 12 credit, or a student enrolled in less than 12 credit hours who qualifies for such enrollment under § 301, 303 or 304 and who is employed for fewer than 20 hours per week. (§ 301)

Good academic standing – Describes the status of a student whose cumulative grade point average is 2.00 or above. (§§ 1501, 1502, 1601, 1701)

Independent study – An arrangement between a faculty member and a student under which a student produces written work that has gone through multiple drafts under the supervision of the faculty member. Independent studies are graded on a credit/fail basis. (§§ 2301-2306)

Leave of absence – An absence of a semester or more permitted in writing by the Dean to an enrolled student that interrupts the normal course of a student's progress to graduation in consecutive semesters. (§§ 2601-2602)

Part-time student – A student who is enrolled in a minimum of six credit hours and who is not a full-time student; or a student who qualifies for enrollment in fewer than 8 credit hours under §§ 301, 303, or 305. (§301)

Records Office – The FIU College of Law Student Records Office.

Student – Unless otherwise specified, a student of the FIU College of Law.

Upper level – Describes a student who has completed the foundation curriculum, or a course other than a course in the foundation curriculum.

Withdrawal – A voluntary termination of enrollment at the College of a student in good standing approved by the Dean, having the consequence that the student may not re-enroll at the College unless readmitted. (§§ 2701-2702) [Compare withdrawal from a course, §§ 804, 805]

B. General Principles

010. **Compliance with applicable law.** These Academic Policies and Regulations shall be interpreted and applied so as not to violate applicable law, including but not limited to laws establishing the rights of persons with disabilities.

011. **Disclaimer.** The College of Law reserves the right to modify these Academic Policies and Regulations. Nothing in these Academic Policies and Regulations may be considered as setting forth terms of a contract between a student or prospective student and the College of Law.

PART II. GENERAL ENROLLMENT REQUIREMENTS

A. Two Divisions: Full-Time/Day and Part-Time/Evening

101. **Two divisions; transfer from one division to the other.** The College of Law offers both a full-time/day division and a part-time/evening division. Ordinarily, full-time students will earn the J.D. degree in three years and part-time students in four years (including at least two summer sessions). Students are admitted to either the full-time/day division or the part-time/evening division, and may transfer from one division to the other only for good cause and with approval of the Dean, space permitting. Except for compelling reason and with written approval of the Dean, students must take the first 31 hours of law school course work in the division to which they were admitted.

B. Time for Completion of J.D. Requirements

201. The requirements for the J.D. degree may be completed no earlier than 24 months and not later than 84 months after a student has commenced law study at the College of Law or at a law school from which the College of Law has accepted transfer credit.

C. Minimum and Maximum Course Loads

301. **Minimum course load.** Except as provided in § 304, a student must be enrolled in a minimum of 12 credit hours each semester, and be employed for no more than 20 hours per week, to be considered a full-time student for purposes of these regulations. Except as provided in § 303 or 305, a student must be enrolled in a minimum of six credit hours in the fall/spring semester or a minimum of five credits

during the summer session to be considered a part-time student for purposes of these regulations.

302. **Maximum course load.** Except as provided in § 303, a full-time student may not enroll in more than 16 credit hours of courses, and a part-time student may not enroll in more than 11 credit hours of courses in one semester.

303. **Extraordinary circumstances.** In extraordinary circumstances, the Dean may grant permission for a part-time student to enroll in fewer than six credit hours of courses; for a part-time student to enroll in 12 hours of courses; and for a full-time student to enroll in more than 16 credit hours of courses in one semester.

304. **Exception to minimum course load requirement: full-time students.** A student may take fewer than 12 credit hours in the student's final semester of enrollment at the College and still be considered a full-time student, if the student needs fewer than 12 credit hours to complete the 90 credit hours required for graduation.

305. **Exception to minimum course load requirement: part-time students.** A part-time student may take fewer than six credit hours in the student's final semester of enrollment at the College if the student needs fewer than seven hours to complete the 90 credit hours for graduation.

[Sections 401 et seq. reserved.]

D. Attendance and Punctuality

501. **General rule.** A student enrolled in any course must regularly and punctually attend class. Except when an instructor has established more exacting attendance requirements pursuant to §502, a student who is absent for more than 15% of the class hours in a semester (one class hour equals 50 minutes) shall be deemed not to have regularly attended class, and shall receive a reduction of a letter grade (e.g., A- to B+) for every absence beyond 15% of the class hours in the course. The Dean shall grant exceptions to this policy for: (1) absences due to medical and other emergencies, or (2) absences, with two weeks advance notice to the course instructor, due to religious holidays or approved co-curricular activities. The Dean may grant exceptions to this policy in other extraordinary circumstances.

502. **Specific attendance and punctuality requirements.** An instructor may establish more exacting attendance, and punctuality, requirements in the instructor's course and, during the add/drop period, shall notify the students of those requirements in the course syllabus or by some other form of written notice.

503. **Record of attendance.** Faculty members shall keep records of attendance in their classes.

703. **Pro bono requirement.** All students must satisfy a pro bono service requirement through the College's Pro Bono Program. The requirement, to be completed by full-time students during the second year of law school and by part-time students during the fourth through seventh semesters of law school, entails 30 hours of useful legal-related community service in a program established or approved by the College.

704. **Experiential Course Requirement**

All juris doctorate candidates entering fall 2016 and thereafter must successfully complete, with a passing grade C or above, a minimum of six credits hours of experiential course work.

(a) "Experiential course" means a clinical course, externship placement, trial advocacy course, or appellate advocacy course, or other simulation course.

(b) No student may enroll in more than twenty (20) credit hours of experiential courses, with a maximum of twelve (12) credit hours in trial advocacy courses, twelve (12) credit hours of clinical courses, or twelve (12) credit hours of externship placements, or twelve (12) credits hours in simulation courses.

(c) (1) Except as provided in sub-paragraph (c)(2), no student may enroll in any experiential course until completion of 45 credit hours towards graduation. (2) The requirements of paragraph (c)(1) shall not apply to the Judicial Externship Placement, trial advocacy course, or appellate advocacy course.

(d) Enrollment in any experiential course is subject to satisfaction of all requirements of the particular experiential course.

(e) The requirements of paragraphs (b), (c) and (d) of this section are non-waivable, except for good cause shown.

(f) The Associate Dean for Academic Affairs shall report to the faculty on all waivers granted of the requirements of paragraphs (b), (c), and (d).

B. Changes in Course Schedule

801. **Records Office requirement.** All changes in student schedules, including changes from one section of a course to another and any change pursuant to the procedures required or authorized in §§ 803 through 806, must be processed through the College of Law Records Office.

802. **Add/drop period.** The Dean shall designate in writing the "add/drop" period as well as any add/drop period policies and procedures in addition to those set forth in these Academic Policies and Regulations. Copies of such policies and procedures will be made available to all students.

803. **Requirements during add/drop period.** Except where the instructor has established limitations on dropping, a student may drop a course through the last day of the add/drop period without the permission of the instructor. Failure to attend class does not constitute a drop; however, a student who fails to attend each

class meeting of a course in which the student is enrolled during the add/drop period may be administratively dropped from the course by the Dean.

804. **Restrictions on changes after add/drop period.** The per credit hour tuition fee will be fully refunded for courses dropped during the official add/drop period. A student who withdraws from the College of Law after this deadline will receive WI grades and no tuition will be refunded. After the add/drop period, a student must receive written permission from the Dean upon a showing of good cause to withdraw from a course on the student's schedule. A student must obtain written permission of the Dean upon showing a compelling reason to add a course to the student's schedule after the add/drop period.

805. **Effects of late course withdrawal.** Except as provided in § 804, a student who withdraws from a course after the add/drop period shall receive an F in the course.

806. **Enrollment at overlapping times prohibited.** No student may enroll in courses scheduled to meet at the same hour or at overlapping times.

C. Auditing

901. **Auditing.** Students may audit courses in which space is available with permission of the instructor and the Dean. Permission should not be sought unless the student intends to attend class regularly for the entire semester. No record is kept of courses audited, and no fees are charged to students.

Auditing by non-College of Law students is generally not allowed, and may be allowed only in extraordinary circumstances with the approval of the Dean and the instructor, space permitting and under terms prescribed by them and upon payment of the required tuition and fees. Any certification of auditing of this type shall state that the College of Law makes no representation as to the individual's qualifications, attendance, or comprehension of the materials.

PART IV. STANDARDS FOR GRADING AND GRANTING CREDIT

A. Grading System

1001. **General rule.** Student performance in all courses offered by the College shall be graded in accordance with the grading curve set forth in §§ 1101-1104 below and counted in a student's cumulative grade point average.

1002. **Grading system and grade point equivalents.** All courses except those graded on a credit/fail basis will be graded on the following system: A = 4.00 grade points per credit hour; A- = 3.67; B+ = 3.33; B = 3.00; B- = 2.67; C+ = 2.33; C = 2.00; C- = 1.67; D = 1.00; and F = 0.00.

Other transcript grade notations are as follows: AF = administrative F; P = satisfactory (pass); IN = incomplete; IP = in progress; W = withdrawal; AW = administrative withdrawal; AU = audit.

1003(a). **Anonymous grading.** All examinations are graded anonymously. Papers submitted for credit in a course, seminar, or independent study and work involving evaluation of student performance during the course of the semester need not be graded anonymously.

1003(b). **Hybrid Courses.** A hybrid course is a course that offers the student the option of being graded anonymously based on the students examination performance, graded non anonymously based on the submission of a multi-draft research paper, or graded non anonymously based on a serial writing option, i.e, the submission of a minimum of four separate papers completed throughout the semester. The purpose of the hybrid course is to improve student writing by providing students with feedback on multiple drafts of a research paper or on several shorter papers. The requirements of the research paper are established by section 702 of the Academic Polices and Regulations. The requirements of the serial writing option, including the length of each paper and the degree of independent research to be conducted by the student, will be determined by the supervising faculty member.

1004. **Adjustment of grades based on class participation.** An instructor may make an adjustment of one grade level for a student's classroom performance during any course. Such grade is in addition to any examination grade, or grade derived from papers, projects, or other graded course work, and has the effect of increasing or decreasing the course grade to the next higher or lower grade (e.g., from C to C+ or C-). The instructor wishing to grade classroom performance under this section must announce the criteria for such grading within the first two weeks of class. At the conclusion of anonymous grading, the instructor will receive a grade adjustment sheet for all students in the course. If the instructor has complied with this section, the instructor may raise or reduce the grade of a student by one grade level (e.g., from C+ to B-). No grade may be decreased from a "C-" or "D."

A faculty member may calculate the distribution of grades prior to adjustments of grades based on class participation pursuant to this section and will be deemed to have satisfied the grading policy distributions, so long as the number of grades raised does not exceed the number of grades lowered by more than 10%. Otherwise, a faculty member must calculate the distribution of grades to include all of the adjustments to satisfy the grading policy.

1005. **Reporting of grades.** The cumulative grade point average of any student is determined by multiplying each grade given for every graded course taken at the College by the total number of semester hours assigned to that course, adding the products and dividing the total by the number of graded credits attempted. Grade point averages are calculated to the third or thousandth decimal place. Grade point averages are calculated for every student upon the submission of course grades for

each semester and summer session, where applicable. No course taken on a non-graded basis that is not failed shall be considered in computing a student's grade point average. No course taken at another law school shall be considered in computing a student's grade point average.

1006. **Class rank.** Full-time and part-time students shall be ranked separately in the division in which they completed the last semester. Class rankings are available only after the conclusion of the spring semester. At the request of the student, the student's class rank may be released to third parties.

B. Grade Normalization

1101. **Foundation curriculum:** In all foundation curriculum courses, the following four distributional requirements must be met: (i) between 40 and 50 percent of the grades shall be B or above; (ii) at least 20% of the grades shall be B+ or above; (iii) between 10 and 15 percent of the grades shall be A- or A; and (iv) between 10 and 15 percent of the grades shall be C- or below.

1102. **Upper level courses:** In all upper level courses with an enrollment of 15 or more students, the following three distributional requirements must be met: (i) between 45 and 55 percent of the grades shall be B or above; (ii) at least 25 percent of the grades shall be B+ or above; and (iii) between15 and 20 percent of the grades shall be A- or A.

1103 **Other grades.** After satisfaction of the grade normalization requirements set forth in §§ 1101-1102, the distribution of other grades of (B-, C+, C, C-, D, and F) is at the instructor's discretion.

1104. **Exceptions.** Departure from the grade normalization requirements set forth in §§ 1101-1103 may be permitted by the Dean upon written request of a faculty member explaining the reasons for the departure.

C. Changes in Grades

1201. **General rule: computation error as basis for grade change.** An instructor may change the grade for a course only in cases of computational error subsequently reported to the Records Office by the instructor. The instructor shall report all such changes to the Records Office no later than the conclusion of the semester following the course.

1202. **Exception: grade change involving re-enrollment.** Notwithstanding the provisions of § 1201, the grade for a course in which a student is required or permitted to re-enroll pursuant to the standards for continuation and graduation shall be averaged with the grade earned for the initial enrollment for the purpose of computing grade point average. Both the grade earned on the initial enrollment and the grade earned on the re-enrollment shall appear on the student's transcript.

the close of the first semester may enroll in the following semester at the College, but shall be on academic probation and must adhere to the following conditions: submission of the student's schedule to the Dean for approval; participation and regular attendance in any academic support program or course prescribed by the faculty; re-enrollment in any foundation course in which the student received a grade of F; [See § 1703. Required retaking of courses with grade of F]; regular attendance in all classes [See § 501. General rule]; prohibition against the student serving as a member of any faculty student committee or as an officer of a law school student organization; if the student's outside workload is determined to be a factor contributing to the student's academic performance, reduction of the student's outside workload as determined by the Academic Standards Committee; and such additional terms and conditions of probation as the Committee may establish. To continue to the second year, a student who has earned a grade point average below 2.00 at the close of the first semester must increase the student's cumulative grade point average to 2.00 or above by the end of the second semester.

1502. **Exclusion after First Semester.** A full-time J.D. student who fails to earn a cumulative grade point average of 1.60 or better upon completion of the first semester shall be excluded from the College subject to the provisions of § 1503. The Dean shall notify a dismissed student of the student's dismissal by letter sent to the student's last known address.

1503. **Readmission Standard and Procedure.** A student who is excluded under § 1502 may petition the Academic Standards Committee for readmission. There shall be a strong presumption against readmission and the Committee shall not grant readmission except under the most compelling and extraordinary circumstances, and then only if the Committee is clearly convinced that (a) the student will be able to successfully complete the curriculum and pass a bar examination, and (b) any personal problems or other factors that contributed to the student's poor academic performance are not likely to recur. The procedures stated in § 1604 shall govern petitions under this section. The excluded student may attend classes while the petition is pending.

1504. **Start-over for students readmitted after dismissal at the end of the first semester.** There shall be a presumption that a student who is readmitted pursuant to § 1503 must start over, that is, return to law school as an entering first-year student. The grades earned by the student before readmission and start-over shall be excluded from the student's grade point average after starting over. In unusually compelling and extraordinary circumstances, the Academic Standards Committee may permit a student to continue to the second semester of law school subject to § 1501.

B. <u>Exclusion and Readmission After Second or Any Subsequent Semester</u>

1601. **Exclusion – lower than 2.00 grade point average.** A student (full-time or part-time) who fails to earn a cumulative grade point average of 2.00 or better upon completion of the second or any subsequent semester shall be excluded from the College subject to the provisions of § 1602. The Dean shall notify a dismissed student of the student's dismissal by letter sent to the student's last known address.

1602. **Readmission standard.** A student who is excluded under § 1601 but has earned a cumulative grade point average of 1.80 or above may petition the Academic Standards Committee for readmission. There shall be a strong presumption against readmission and the Committee shall not grant readmission except under the most compelling and extraordinary circumstances, and then only if the Committee is clearly convinced that (a) the student will be able to successfully complete the curriculum and pass a bar examination, and (b) any personal problems or other factors that contributed to the student's poor academic performance are not likely to reoccur.

1603. **Start-over for students readmitted after dismissal at the end of the first year.** There shall be a presumption that a student who is readmitted after the first year (and before the beginning of the second year) must start over, that is, return to law school as an entering first-year student, no earlier and no later than the calendar year following the calendar year in which the student was dismissed and readmitted. The grades earned by the student before readmission and start-over shall be excluded from the student's grade point average after starting over. In unusually compelling and extraordinary circumstances, the Academic Standards Committee may permit a student to continue to the third semester of law school subject to §§ 1701 and 1703 regarding probation and retaking of courses in which the student earned a grade of F.

1604. **Readmission procedure.** All requests for readmission shall be made to the Dean, who shall refer them to the Academic Standards Committee. Requests must be made in writing and mailed or delivered to the Dean's office within such time specified by the Dean. The request for readmission must set forth evidence suggesting satisfaction of the readmission standards stated in this section.

The Academic Standards Committee shall adhere to the following procedures with readmission decisions:

1. All petitioners who have a right to petition for readmission shall, upon request in the petition, be given a hearing on a date set by the Committee.

2. The hearing shall not substitute for or excuse the written petition. The hearing will be informal. The petitioner should briefly outline points not made in the petition, present any written or oral evidence

grade of F [See § 1703. Required retaking of courses with grade of F]; and regular attendance in all classes [See § 501. General rule]. If the student's outside workload is determined to be a factor contributing to the student's academic performance, the student shall make every reasonable effort to reduce such workload.

1703. **Required retaking of courses with grade of F.** Any student who earned an F in a foundation course but who is permitted to continue in the College is required to re-enroll in that course. Grading and credit for the re-enrollment shall be governed by the provisions of §§ 1202 and 1302.

[Sections 1801 et seq. reserved.]

D. Graduation Requirements

1901. **General requirements.** In order to graduate from the College of Law, a student must:

1. earn a cumulative grade point average of 2.00 or greater for all graded course work;

2. pass all required courses, and earn a grade of C or better in Professional Responsibility;

3. complete at least 90 credit hours of law school course work with passing grades, of which at least 78 credit hours were in graded courses. No more than 13 credit hours of "D" grade work can be applied to the 90 credit hours of course work.

4. in the event the student has either been subject to continuation requirements imposed under these regulations or been subject to readmission requirements imposed under these regulations, either have satisfied those requirements, or have been excused from doing so by the Dean, who may excuse the satisfaction of such requirements in compelling circumstances;

5. satisfy the pro bono service requirement established by § 703.

6. satisfy all requirements for the degree within the time periods specified in § 201.

1902. **Additional semester to meet 2.00 grade point requirement.** Subject to § 201 regarding maximum years to qualify for degree, a student who fails to earn a cumulative grade point average of 2.0 upon completion of 90 credit hours of course work may petition the Academic Standards Committee for permission to continue his or her studies for an additional semester. To be permitted to continue, the

2102. **Transfer students – maximum transferable hours.** A student may transfer to the College after completing the first-year curriculum in good academic standing at an ABA accredited law school. Except as permitted by the Dean for good cause, a transfer student may transfer a maximum of 32 credit hours.

2103. **Students with foreign degrees.** A student who has earned a professional degree from a foreign institution that is equivalent to a J.D. in the United States may apply to the Dean for advanced standing. On a case-by-case basis, the Dean may award transfer credit for work completed at the foreign institution. The Dean may waive enrollment in a required course only on a showing that the course substantially duplicates work already completed. [See §§ 701-702.] Required Courses.] In no event may a student receive credit for more than 30 hours of course work at a foreign law school.

2104. **Transfer credit for course work in other law school programs.** On a case-by-case basis, the Dean may award transfer credit for course work taken at another law school, law school summer program, foreign summer law program, or foreign law school. A student wishing to receive transfer credit for such work must seek the Dean approval in advance of enrolling in the other law school program. In making a determination regarding whether to approve such enrollment, the Dean shall consider, among other factors, the rigor of the course work and the student's grade point average. The Dean may waive enrollment in a required course only on a showing that the course substantially duplicates work already completed. In no event will the Dean approve transfer credit in an amount greater than 44 credit hours.

2105. **Students visiting foreign law schools.** With the permission of the Dean, a student who has completed the foundation curriculum may visit at a foreign law school under terms and conditions approved by the Dean and by the Office of the Consultant on Legal Education of the American Bar Association. A student who visits at a foreign law school may transfer a maximum of 16 credit hours.

2106. **Students enrolled in courses in another graduate program.** With the advance written approval of the Dean, a student may receive up to six hours of credit toward the J.D. degree for appropriate and relevant graduate level courses taken in another graduate program, provided that the student earns a B or above in such course or courses. The credit for such course or courses will be entered on the student's College transcript as a "pass" with the designation "P." No credit will be given for a course in which the student earned a grade of B- or below.

2107. **Joint degree students.** A student who is admitted to a joint degree program may transfer a maximum of nine credit hours from the other graduate school unit participating in the joint degree program.

2108. **Designation of transfer credit on transcript.** Transfer credit for a course in which a student earned a grade of C or better (or the equivalent) at the other law school

will be entered on the student's College transcript as a "pass" with the designation "P." No transfer credit will be given for a course in which the student earned a grade of C- or below.

VIII. CREDIT FOR NONCLASSROOM WORK

A. Independent Study

2201. **General description.** An upper level student may earn credit for independent study supervised by an instructor in accordance with the provisions in §§ 2202-2206 below.

2202. **Eligibility.** To be eligible for an independent study, a student must have a cumulative grade point average of at least 2.40, unless the supervising instructor and the Dean jointly approve the independent study project in advance. To enroll in an independent study, the student must present to a faculty member a prospectus describing in detail the project, the resources to be consulted, and the final product that student will be produce. The faculty member must review and approve the proposal prior to the student's enrollment.

2203. **Maximum credit.** A student may earn credit toward the J.D. degree for no more than two independent study projects. A student may receive no more than two hours of credit for a single independent study project.

2204. **No duplication of credit or credit for paid work.** A student shall not receive independent study credit if the student is otherwise receiving or has received credit for the project. A student shall not receive independent study credit if the student is receiving monetary consideration for the project.

2205. **Grading.** Independent studies shall be graded on a pass/fail basis.

2206. **Faculty supervision.** Except with the approval of the Dean, only full-time faculty members may supervise independent study projects. A faculty member should supervise no more than three independent study projects in a single semester, and all projects must be in an area in which the faculty member is or has been teaching or working unless there are no other faculty members possessing that expertise.

B. Moot Court

2301. **Credit for moot court competitions.** An upper level student may earn up to two credits for satisfactory participation in a moot court, trial or other intercollegiate competition approved by the Dean.

2302. **Credit for Moot Court Board of Advocates.** A student may earn one credit hour per semester on a pass/fail basis, up to a maximum of two credit hours, for

satisfactory participation as a member of the Board of Advocates. Students should register for credit in the semester they serve as a member of the Board of Advocates. In addition to other sanctions authorized by written Board of Advocates procedures, a member may receive a grade of "F" in a semester of unsatisfactory service. The Board of Advocates faculty advisor will determine, with the advice of the chairperson of the Board of Advocates, whether credit is to be received for Board of Advocates service.

2303. **Eligibility.** Subject to the following exceptions, a student must have a cumulative grade point average of at least 2.50 at the time of selection in order to serve with or without academic credit as a Board member or to participate in an intercollegiate competition. With the prior joint approval of the Dean and the faculty supervisor, a student with a cumulative grade point average below 2.50 may participate in a competition. The faculty advisor to the Board of Advocates, at the Director's discretion, may invite a student with a cumulative grade point average below 2.50 but not less than 2.20 at the time of selection to become a member of the Moot Court Board if the student has otherwise demonstrated exceptional qualifications.

2304. **Grading.** Credit for work as a Board member shall be granted on a ~~credit~~pass/fail basis.

C. Law Review

2401. **General.** A student invited to join the FIU Law Review may earn credit for participation on the staff of that journal in accordance with the provisions of this Subpart VIII C.

2402. **Eligibility: prerequisites.** Successful completion of the foundation curriculum, in accordance with rules established in the Law Review Bylaws, is a prerequisite to participation on the staff of the FIU Law Review. Successful participation in law review work for at least two semesters shall be a prerequisite to a student's serving as an editor of the Law Review.

2403. **Eligibility: grades.** The Law Review may grant membership to students who have earned above a cumulative GPA of 2.67 and a combined GPA of 2.67 in LSV I and II, in accordance with rules established in the Law Review Bylaws. In order to serve as an editor on the Law Review, a student must have earned above a cumulative GPA of 2.67 at the time of election.

2404. **Credit hours for Law Review participation.** A student may earn credit for participation on the Law Review, service on the editorial board, and by writing a note or comment, in accordance with rules established in the Law Review Bylaws.

2405. **Grading.** Credit for participation on the Law Review shall be granted on a pass/fail basis.

2602. **Effect of withdrawal.** A student who has withdrawn from the College may re-enroll only after application and readmission to the College.

X. EXAMINATIONS.

A. Examination Schedule

2701. **Taking examination: general rule.** All examinations must be taken on the date and at the time set forth in the examination schedule, except when a delayed or rescheduled examination is authorized under §§ 2702-2706. No examination may be administered prior to the time set forth in the examination schedule.

2702. **Delayed taking: compelling reasons.** The Dean may authorize a delay in a student's examination if the student submits compelling reasons for the delay based upon health reasons, accident, personal emergency, or other extraordinary circumstances.

2703. **Delayed taking for health reasons: required procedure.** A student who seeks a delay in an examination for health reasons must be seen by the FIU Health Care and Wellness Center. If it is not possible for the student to be seen by Health Care and Wellness Center prior to the examination, the student must either report to the Center as soon as practical or be seen by a private physician who will contact the Center. The Center will submit a memorandum to the Records Office that confirms the student's visit to the Center or a private physician and that sets forth a medical opinion about the student's condition.

2704. **Delayed taking for non-health reasons: required procedure.** All requests for delays in examinations for extraordinary circumstances other than health must be approved by the Dean.

2705. **Delayed taking: final date.** All delayed examinations must be taken by the close of the examination period for that semester, unless otherwise authorized by the Dean.

2706. **Rescheduled taking.** A student may reschedule an examination only when that student has two exams on the same day or one exam each day for three consecutive days.

2707. **Failure to take examination: administrative F.** A student who, without authorization, fails to take an examination shall receive an administrative F for the examination.

B. Rules Applicable During Examinations

2801. **Assigned rooms.** Except for take-home examinations, all students shall write their examinations in the room(s) assigned by the Records Office. Each student shall sign in and sign out of the examination room as directed by the examination proctors.

2802. **Use of materials by examinees.** Students shall not consult any materials during an examination, including but not limited to books, notes, outlines, papers, computer files, prior examinations or answers prepared for prior examinations; provided, that when an instructor authorizes the use of outside materials during an examination, the student may consult the outside materials specifically designated by the instructor.

2803. **Beginning and ending writing.** No student may begin writing or typing an examination until the proctor or the instructor has issued an instruction to begin. Every examinee will stop writing or typing immediately upon announcement by the proctor or instructor that the examination has ended.

2804. **Communication only with proctor or Office of the Registrar.** All questions and requests for clarification during an examination shall be directed to the proctor or the Office of the Registrar. No student shall converse with another for any purpose in an examination room after an examination has begun.

2805. **Leaving room during examination.** After an examination has begun, a student may leave the examination room for the purpose of going to a restroom or relaxing in a nearby corridor. Under no circumstances may a student leave the building during the course of an examination until his or her examination materials have been turned in to the proctor.

2806. **Delayed takers: no communication regarding examination.** A student who is authorized to take a delayed examination shall not ask any student who has taken the examination about the contents thereof and shall take all necessary measures to avoid overhearing discussions about the contents of the examination.

2807. **Past examinees: no communication with delayed takers.** A student who has taken an examination shall not reveal or discuss the contents of the examination with any student in the class whom the former knows has not yet taken the examination.

2808. **Violations of regulations: discipline.** A student who violates §§ 2806-2807 or who violates one of the examination rules promulgated by the Records Office or the Dean has also violated the Code of Student Conduct and therefore is subject to discipline in accordance with the provisions of that Code.

2809. **Additional policies and procedures.** The Records Office and the Dean shall have authority to publish other procedures to govern the administration of examinations and shall make such rules available in writing to all students.

C. Special Accommodations

2901. **Special accommodations.** Students in need of special accommodations because of a physical or learning disability must obtain approval from the designated University office. To be eligible for special arrangements, students must complete and submit a request to the Dean, who will forward it to the designated University office, by the end of the fifth week of the semester in which accommodation is sought. The Dean shall determine and administer the accommodation to be given on account of any disability.

XI. RECORDING

Definitions

For purposes of Part XI, "record" or "recording" means the act of capturing audio and/or still images and/or moving images, or streaming audio and/or still images and/or or moving images through the use of any device; "actual recordings" means the resulting product, including any copies of the first recording, that can be seen and/or heard at a later date with the assistance of a device.

A. Prohibitions Against Recording by Students

3000. **Classes.** A student must not record an FIU Law class or externship placement (or any part of a class or externship placement) without the express written permission of the professor.

3001. **Events.** A student must not record any FIU Law event (or any part of an event) at FIU Law unless otherwise permitted by the event organizer.

3002. **Meetings.** A student must not record a professor, staff member, or administrator of FIU Law during an out-of-class meeting or conference without the express written permission of the professor, staff member, or administrator.

3003. **Violations of regulations: discipline.** A student who violates §§ 3000-3002 has also violated the Code of Student Conduct and therefore is subject to discipline in accordance with the provisions of that Code.

B. Recording by FIU Law Professors, Staff Members, or Administration

3004. **Classes.** A professor may record his/her FIU Law class (or any part of the class), or permit the recording of his/her FIU Law class, including student participation

in that class, for professional-development purposes, pedagogical purposes, to comply with the recommendations of the FIU Disability Resource Center, or for any other purpose the professor deems appropriate. The professor may store, reproduce, post, or share the actual recordings.

3005. **Events.** A professor, staff member, or administrator may record any event (or any part of an event) at FIU Law, including student participation in that event. FIU Law may store, reproduce, post, or share the actual recordings for any reason.

C. Recording of FIU Law First-Year Classes for Major Religious Holidays

3006. **Requests to record first-year classes.** FIU Law, through the Office of Student Services, will arrange for the recording of all first-year classes that are held during major religious holidays. A student who wants to request a recording under this section must email the Office of Student Services at least two weeks before the class meeting and provide the course name(s), professor name(s), date(s), time(s), and room number(s) for the class(es) to be recorded. The Office of Student Services will contact the professor for permission to record his/her class; the professor has sole discretion to grant or deny permission. Classes missed due to travel will not be recorded.

3007. **Availability of actual recordings.** The actual recordings made under § 3006 will be available for a period of ten (10) days following the class meeting, and will be available only to the requesting student(s). Once the actual recordings are taken down, there will be no further student access to them. If a professor uses classroom management software that has media-streaming capabilities, the actual recording may be uploaded to the professor's classroom management software, and the professor has discretion on how long and to whom to make that actual recording available.

3008. **No other classes will be recorded by FIU Law.** Other than the recordings made under § 3006, FIU Law will not record any classes at the request of a student under any circumstances. If a student wants to request a class recording for a medical or other disability-related reason, the student must make the request to the FIU Disability Resource Center, which will make a recommendation to FIU Law. A professor may adopt a different standard for recording requests in his/her class, and provide notice of that standard in his/her syllabus. If a professor's syllabus is silent on this topic, then the rules in Part IX apply.

D. Use of Actual Recordings

3009. **Actual recordings cannot be shared.** A student who has access to an actual recording of an FIU Law class cannot make a copy of the recording, share, post

on a website, or distribute the actual recording or professional transcript of the actual recording in any way.

3010. **Written use agreement.** A professor may request that a student who has access to an actual recording or professional transcription of an FIU Law class or event submit a written use agreement that he/she will comply with these rules and any other rules that the professor may impose on the use of the actual recording or professional transcription.

3011. **Violations of regulations: discipline.** A student who violates § 3009 or the terms of the written use agreement executed under § 3010 has also violated the Code of Student Conduct and therefore is subject to discipline in accordance with the provisions of that Code.

E. Students with Disabilities

3012. **Special Accommodations.** If the Disability Resource Center recommends that a student receive an accommodation that includes recording of a class or professional transcription of a class, § 3000 will not apply to that student; that student must comply with the remainder of Part XI, including §§ 3009-3011.

ABA APPENDIX

Academic Policy/Regulation	ABA Standard
§ 010	Standard 213
§ 201	Standard 304
§ 302	Standard 304
§ 501	Standard 304
§ 601	Standard 304(f)
§§ 701-702	Standard 302(a)-(b)
§§ 804, 806	Standard 304
§§ 1501-1903	Standard 303(a), (c)
§ 1901	Standard 304(b)
§§ 2201-2405	Standard 305(a), (b)