

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:17-cv-21095-KMM

JANE DOE,

Plaintiff,

v.

BOARD OF TRUSTEES FLORIDA  
INTERNATIONAL UNIVERSITY,

Defendant.

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**ORDER GRANTING DEFENDANT’S MOTION TO DISMISS**

THIS CAUSE came before the Court upon Defendant Board of Trustees Florida International University’s (“FIU”) Motion to Dismiss for Failure to State a Claim (ECF No. 12). Plaintiff Jane Doe responded (ECF No. 13) and Defendant replied (ECF No. 19). For the reasons below, the Court grants FIU’s Motion to Dismiss and dismisses Plaintiff’s Complaint (ECF No. 1) without prejudice.

**I. BACKGROUND**

Plaintiff was a graduate student at the FIU’s School of Architecture and participated in a study abroad program in Italy during the Fall of 2014. *See* Compl. ¶¶ 10–11. Plaintiff alleges that a Senior Associate Dean participating in the program raped her during the last night of the program. *Id.* ¶ 12. Plaintiff immediately reported the rape to FIU, sought medical attention, and had a rape kit performed. *Id.* ¶ 22. FIU investigated Plaintiff’s allegation over the course of six to seven months and concluded the investigation in July 2015—after Plaintiff graduated from FIU. *Id.* ¶¶ 23–24.

Plaintiff claims that during the investigation, there were additional reports of the Senior Associate Dean committing sexual assault or engaging in otherwise inappropriate sexual conduct with a student. *Id.* ¶¶ 33–35. Plaintiff alleges that FIU deviated from its own policies by failing to provide “interim protective measures” for Plaintiff while the investigation was underway. *Id.* ¶¶ 28–29. Because of this lack of protective measures, Plaintiff states that the Senior Associate Dean’s presence—or threat of presence—at school events during this time caused her emotional distress. In particular, Plaintiff alleges that the Senior Associate Dean’s presence caused Plaintiff to have an anxiety attack at her final thesis presentation, which resulted in Plaintiff losing potential educational opportunities. *Id.* ¶¶ 37–40. The Court assumes the facts alleged by Plaintiff in the Complaint to be true in accordance with the standard for evaluating a motion to dismiss.

FIU argues that Plaintiff’s Complaint must be dismissed for two reasons. First, FIU asserts that Plaintiff has failed to comply with the mandatory pre-suit notice requirement under Florida’s state sovereign immunity statute, Fla. Stat. § 768.28(6). Second, FIU argues that Plaintiff has failed to state a claim under Title IX. This Motion is now ripe for review.

## II. STANDARD OF REVIEW

“When reviewing a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true.” *Recreational Design & Const., Inc. v. Wiss, Janney, Elstner Associates, Inc.*, 820 F. Supp. 2d 1293, 1296 (S.D. Fla. 2011). “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) (citations omitted). This standard “demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Id.* (citations omitted). This Court must look to

the standards set out by the substantive law at issue. “[A] court may grant a motion to dismiss when, ‘on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.’” *Pafumi v. Davidson*, No. 05-CV-61679, 2007 WL 1729969, at \*2 (S.D. Fla. June 14, 2007) (citing *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993)).

### III. ANALYSIS

Florida’s doctrine of sovereign immunity prohibits a lawsuit against the state or one of its agencies or subdivisions without the government’s consent. *Cauley v. City of Jacksonville*, 403 So.2d 379, 381 (Fla. 1981). In cases involving tort liability, however, Florida has waived sovereign immunity. *See Fla. Stat. § 768.28(1)*. To benefit from the state’s waiver of sovereign immunity, a claimant must provide the state or one of its agencies or subdivisions with written notice of any claim filing suit:

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, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing.

*Id.* § 768.28(6)(a).<sup>1</sup> Before maintaining a lawsuit against the state, not only must a claimant satisfy this notice requirement, but “the complaint must contain and allegation that such notice was given.” *Schaeffer v. Sch. Bd. of Broward Cty., Fla.*, 69 F. Supp. 3d 1327, 1329 (S.D. Fla. 2014) (citations omitted).

Plaintiff in her Response does not claim that any pre-suit notice was given; instead, she argues that the pre-suit notice requirement does not apply to her case. *See Pl.’s Resp.* at 1. Plaintiff argues that this is because FIU accepted federal funds, thereby waiving immunity. *Id.*

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<sup>1</sup> The statute goes on to state that claims for contribution or wrongful death are exceptions to this requirement—neither of which apply in the instant action. *See Fla. Stat. § 768.28(6)(a)*.

(citing *Pederson, et al. v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000)). Furthermore, Plaintiff argues that even if FIU had not waived immunity, Title IX preempts Florida's state law notice requirement. *Id.* (citing *Felder v. Casey*, 487 U.S. 131 (1988)).

The Supreme Court of Florida has held that “claims filed under the Florida Civil Rights Act are not subject to the pre-suit notice requirements” of § 768.28(6). *Maggio v. Florida Dept. of Labor and Employment Security*, 899 So.2d 1074 (Fla. 2005). Plaintiff, however, is bringing her suit under Title IX, which does invoke the pre-suit notice requirement. In *Doe ex. rel. Doe's Mother v. Sinrod*, Florida's District Court of Appeal for the Fourth District rejected the plaintiff's argument that § 768.28(6) did not apply to her Title IX claims against the Palm Beach County School Board. *Sinrod*, 90 So.3d 852, 853 (Fla. 4th DCA 2012). The court instead “agree[d] with the position of the School Board” that “a state agency can only be sued to the extent that sovereign immunity is waived, as noted in section 768.28.” *Id.* at 854. *See also Janie Doe 1 ex. rel. Miranda v. Sinrod*, 117 So.3d 786, 790, n.5 (Fla. 4th DCA 2013) (finding that plaintiff's Title IX claims related back to the original complaint, and that therefore the original complaint's “pre-suit notice gave the school board sufficient notice of the newly-alleged claim”).

FIU also cites to a previous order from this Court in the case *Doe v. Charter Sch. USA, Inc.* to support the proposition that FIU is entitled to pre-suit notice pursuant to § 768.28(6)(a). 1:15-cv-22282-KMM, 2016 WL 111364, at \*2 (S.D. Fla. Jan. 11, 2016). FIU claims that in that case, the Court “dismissed the Title XI claims against multiple defendants because of the plaintiff's failure to allege that she satisfied the pre-suit notice requirements” of § 768.28(6). *See* Def.'s Reply at 2. This characterization is somewhat misleading, as the parties that the Court dismissed from the case—Charter Schools USA, Inc. and Charter Schools USA at Keys Gate L.C.—had filed a motion to dismiss that went unanswered by the plaintiff. *See Doe*, 2016 WL

111364, at \*1. As plaintiff did not respond to the motion, the Court found “sufficient cause for granting the motion by default” on the basis of Local Rule 71(c), which states that “a party’s failure to serve an opposing memorandum of law within fourteen days after service of the motion ‘may be deemed sufficient cause for granting the motion by default.’” *Id.* at \*2. Nevertheless, the Court’s granting of the motion does serve as further persuasive authority in favor of the argument that § 768.28(6) applies in Title IX cases.

The Court also agrees with FIU that plaintiff appears to be conflating the concepts of Eleventh Amendment sovereign immunity and state sovereign immunity. These are two separate principles. *See Connor v. Halifax Hosp. Medical Center*, 135 F. Supp.2d 1198 (M.D. Fla. 2001) (citing *Hamm v. Powell*, 874 F.2d 766, 770, n.3 (11th Cir. 1989) (noting that “[t]he Eleventh Circuit has held that § 768.28 does not waive Florida’s Eleventh Amendment immunity”), *aff’d* 2002 WL 1423597 (11th Cir. 2002)). Plaintiff relies on *Pederson, et al. v. Louisiana State University* to argue that by receiving federal funds, FIU waived its Eleventh Amendment immunity. 213 F.3d 858 (5th Cir. 2000). However, as FIU notes in its Reply, “the issue of Eleventh Amendment immunity is distinct from Florida’s sovereign immunity” under § 768.28(6).

The Court finds that Plaintiff failed to meet the pre-suit notice requirement established in Fla. Stat. § 768.28(6). The Court therefore dismisses Plaintiff’s Complaint without prejudice on that basis, and need not address whether Plaintiff has pleaded sufficient facts to establish a Title IX claim. Plaintiff may re-file her Complaint once she has complied with § 768.28(6).

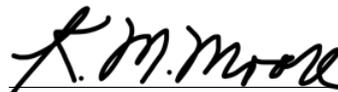
#### **IV. CONCLUSION**

UPON CONSIDERATION of the Motion to Dismiss, the Response, the Reply, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion is GRANTED. Plaintiff's Complaint is hereby DISMISSED WITHOUT PREJUDICE. Plaintiff may re-file the Complaint upon fulfilling the requirements of Fla. Stat. § 768.28(6).

The Clerk of Court is instructed to CLOSE this case. Any pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of September, 2017.



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K. MICHAEL MOORE  
UNITED STATES DISTRICT JUDGE

cc: All counsel of record