**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

ERICA KINSMAN,

Plaintiff,

CASE NO. 6:15-cv-00016-GAP-KRS

v.

Dispositive Motion

THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES,

Defendant.

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**DEFENDANT'S MOTION TO DISMISS**
**AND INCORPORATED MEMORANDUM OF LAW**

Defendant The Florida State University Board of Trustees ("the Board" or "FSU"), by and through the undersigned counsel, hereby respectfully moves this Court to dismiss Plaintiff's ("Kinsman") Complaint under Federal Rule of Civil Procedure 12(b)(6) because the Complaint fails to state a claim upon which relief can be granted. For the reasons more fully explained in the incorporated Memorandum of Law, the Board respectfully requests that the Court dismiss the Complaint.

## Preliminary Statement and Factual Background[1]

FSU in this case finds itself in the unusual and unwelcome position of being adverse to a former student and alleged sexual assault victim, Erica Kinsman. It is critical that the University community have full confidence in FSU's commitment to the safety and well-being of every one of its students. Accordingly, should this case proceed beyond this Motion to Dismiss, the University looks forward to demonstrating the record of extensive assistance the FSU Victim Advocate Program provided to Kinsman, most of which she has omitted from her Complaint.

But the Court does not need proof of this extensive care for and support of Kinsman to resolve this case: even accepting as true the allegations of the Complaint with no further facts, FSU is not liable to Kinsman under Title IX. Far from being deliberately indifferent to Kinsman, FSU provided her the services of its confidential Victim Advocate Program within hours of her alleged sexual assault and continuously thereafter, Compl. ¶¶ 53, 61, 64, 88, D.E. 1, and a University victim advocate informed Kinsman of the school's student-disciplinary process, *id.* ¶ 61. Title IX officials at FSU learned of Kinsman's alleged assault by Winston only days before the rest of the world, when the media broke the story of Kinsman's allegations in November 2013, which is consistent with her failure to allege that she ever spoke with any FSU official outside of the Victim Advocate Program prior to August 6, 2014. *Id.* ¶¶ 101, 129. Regrettably, the media's reporting of Kinsman's allegations led to an Internet and social media backlash—harassment that FSU did not cause, in an environment that FSU could not control. *Id.* ¶¶ 112–13. Kinsman left the University

[1] FSU accepts the allegations in the Complaint as true solely for purposes of the Motion.

when the news broke. *Id.* ¶13. At the same time, the State Attorney for Tallahassee conducted an investigation that resulted in a decision in December 2013 not to charge Winston. *Id.* ¶114. Having waited for the law enforcement investigation to conclude, FSU reviewed the record from that investigation, attempted unsuccessfully to interview Winston, and reached its own conclusion that the record did not support student-disciplinary charges at that time. *Id.* ¶¶ 118–20. After a great deal of correspondence between Kinsman's attorneys and the University, *id.* ¶¶ 122–26, Kinsman gave a Title IX interview in August 2014, *id.* ¶ 129. FSU then convened an investigative hearing, presided over by retired Florida Supreme Court Justice Major Harding, which included live testimony from Kinsman and Winston. *Id.* ¶ 135. Justice Harding concluded that the preponderance of the evidence did not support a finding that Winston had assaulted Kinsman. *Id.* Nothing about FSU's handling of this matter was unreasonable—much less clearly unreasonable, which Kinsman must prove to survive this Motion to Dismiss.

Kinsman's Complaint is remarkable in many ways. She does not allege identifying Winston as her assailant to anyone at FSU other than her confidential victim advocate before the media broke the story of her alleged assault, causing her to leave the University. She does not allege that FSU denied her a single request for remedial action. And—having seen her claims of an assault rejected by both the State Attorney and a University-appointed hearing officer—she seeks from this Court a third bite at the apple, essentially asking this Court to serve as a student-disciplinary appeal board. When her Complaint is stripped of its rhetorical flourish and legal conclusions, its failure to allege that FSU's deliberate

indifference caused her any harassment is clear, so Kinsman's Complaint should be dismissed.

## MEMORANDUM OF LAW

### Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a court must dismiss a complaint whenever the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To withstand a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Thus, "a complaint must present sufficient factual matter, accepted as true, to 'raise a right to relief above the speculative level.'" *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 708 (11th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555). Although a court must accept well-pled allegations as true at this stage, a court should not accept as true legal conclusions or threadbare recitals of the elements of a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, a court must read the complaint "as a whole," without "pars[ing] and read[ing] in isolation the allegations in the complaint." *Rosky ex rel. Wellcare Health Plans, Inc. v. Farha*, No. 8:07-CV-1952-T-26MAP, 2009 WL 3853592, at *2 (M.D. Fla. Mar. 30, 2009).

### Title IX

Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Sexual harassment is "discrimination" in the school context under Title IX, which

allows recovery of money damages for student-on-student harassment "in certain narrow circumstances." *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1293 (11th Cir. 2007); *see also Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). In a student-on-student sexual harassment case, a plaintiff must prove four elements.

*First*, the defendant must be a Title IX funding recipient. *Williams*, 477 F.3d at 1293. This element is undisputedly satisfied in this case.

*Second*, an appropriate school official must have actual knowledge of the harassment. *Id.* Because Title IX requires this actual knowledge be of "*known* student-on-student harassment in its schools," this standard necessarily requires that the school official must know that *both* the victim *and* the alleged assailant are students. *Davis*, 526 U.S. at 641 (emphasis added). Otherwise, the school official could not possibly know of "*student-on-student* harassment." *Id.* (emphasis added). Moreover, the actual knowledge must belong to an "appropriate person," who is, "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." *Williams*, 477 F.3d at 1293 (internal alterations omitted) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)). In other words, "the official with notice of the harassment must be 'high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct.'" *Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1255 (11th Cir. 2010) (quoting *Floyd v. Waiters*, 171 F.3d 1264, 1264 (11th Cir. 1999)).

*Third*, the defendant must have acted with "deliberate indifference" to known acts of harassment. Deliberate indifference "is an exacting standard." *Id.* at 1259. It is met "only

where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. Or put another way, it requires a plaintiff to show "an official decision by the recipient not to remedy the violation." *Gebser*, 524 U.S. at 290; *see also Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (10th Cir. 1999) ("That standard makes a school district liable only where it has made a conscious decision to permit sex discrimination in its programs . . . ."). Deliberate indifference is therefore a high bar—negligence or gross negligence falls far short of it. *See, e.g.*, *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012); *Baynard v. Malone*, 268 F.3d 228, 236 (4th Cir. 2001). Importantly, this deliberate indifference must subject the plaintiff to further harassment. *Davis*, 526 U.S. at 644. Thus, "a Title IX plaintiff at the motion to dismiss stage must allege that the Title IX recipient's indifference to the initial discrimination subjected the plaintiff to further discrimination." *Williams*, 477 F.3d at 1296; *see also Hill v. Madison Cnty. Sch. Bd.*, 957 F. Supp. 2d 1320, 1332 (N.D. Ala. 2013) ("[I]t must be the deliberate indifference of the [school] that is the causation of the harassment suffered by the victim.").

*Fourth*, the discrimination must have been "so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. Put differently, the discrimination must "be serious enough to have the *systemic effect* of denying the victim equal access to an educational program or activity." *Id.* at 652 (emphasis added).

The Supreme Court has cautioned that courts in Title IX student-on-student sexual harassment cases "should refrain from second-guessing the decisions of school

administrators." *Davis*, 526 U.S. at 648. The Court also stressed that Title IX does not give victims of peer harassment "the right to make particular remedial demands." *Id.* Rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Id.*

**The Complaint Fails to State a Claim**

The Complaint contains no allegation that FSU itself directly harassed Kinsman. As the Supreme Court has explained, "[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference 'subjects' its students to harassment." *Id.* at 644. Kinsman alleges that FSU subjected her to three distinct forms of harassment:

(1) being at school with Jameis Winston between January 10, 2013 (when she allegedly recognized him as her assailant) and November 14, 2013 (when she allegedly left campus), *e.g.*, Compl. ¶ 63, D.E. 1;

(2) being threatened on social media after the media on November 13, 2013, first reported news of her allegations against Winston, *e.g.*, *id.* ¶ 112; and

(3) as a result of her alleged fears for her safety, being forced to leave FSU on November 14, 2013, and being unable to return, *e.g.*, ¶ 113.

Kinsman has not, however, stated a claim under any of these theories of liability.[2]

[2] Winston's alleged assault cannot be harassment for which FSU is legally responsible. Kinsman never alleges that FSU was aware that Winston posed a threat to Kinsman or anyone at FSU or even that Winston had any record whatsoever of posing a threat. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641 (1999) (holding that Title IX requires actual knowledge of "*known* student-on-student harassment in its schools" (emphasis added)).

**A. FSU is not liable for any alleged harassment caused by Kinsman's having to be on campus with Winston.**

FSU cannot be liable for this alleged harassment for three distinct reasons.

**1. No appropriate person at FSU had actual knowledge of Kinsman's allegation until November 2013.**

FSU cannot be liable for Kinsman's having to be on campus with Winston after the alleged December 7, 2012, assault, because the allegations of the Complaint show that no appropriate person at FSU had actual knowledge of the assault until November 8, 2013, when FSU Police Chief David Perry received the report of the Winston investigation from the Tallahassee Police and shortly thereafter shared it with the University official overseeing the school's Title IX and student-disciplinary functions. Compl. ¶¶ 95, 101, D.E. 1. Kinsman's initial report to the FSU Police on the night of the assault could not have given FSU actual notice because at that time Kinsman claimed not to know her alleged assailant's identity. *Id.* ¶¶ 48, 50. After allegedly learning her assailant's identity on January 10, 2013, Kinsman shared that information with the Tallahassee Police, *id.* ¶ 57, but she does not allege sharing it with the FSU Police or with any FSU administrator. Kinsman does allege that, on January 17, 2013, she discussed with victim advocate Kori Pruett that her perpetrator was a football player at FSU. *Id.* ¶ 61. But the Complaint itself acknowledges that FSU's Victim Advocate Program is confidential and exempt from any reporting requirement. *Id.* ¶ 68. And Kinsman never alleges that she directed any victim advocate to report her allegation to any other official at FSU.[3]

[3] Kinsman alleges in Paragraph 116 that Melissa Ashton told Patricia Carroll that Kinsman wanted the Title IX investigation and SRR proceedings to move forward in "the fall 2013 semester." Compl. ¶ 116, D.E. 1. But nowhere in the Complaint does she ever allege that she ever made this known. For instance, she never alleges when she made this known (whether before or after the media reported her allegations) or to whom she made it

Indeed, strikingly absent from the Complaint is any allegation that Kinsman herself reported her alleged assault—or the harassment she allegedly experienced as a result of being on campus with Winston after the assault—to any appropriate person at FSU. Instead, Kinsman's theory of FSU's actual notice hinges entirely on her allegation that football coach Jimbo Fisher and Senior Associate Athletics Director Monk Bonasorte in January 2013 learned from the Tallahassee Police that "Winston was suspected in a rape investigation." *Id.* ¶ 72. But for at least two reasons, this allegation is insufficient to establish actual knowledge on the part of FSU.

First, although it is axiomatic that Title IX liability only attaches for *known* student-on-student sexual harassment, Kinsman does not—and cannot—allege that Fisher and Bonasorte knew that Winston's alleged victim was an FSU student, much less that they knew the actual identity of Winston's alleged victim. This is a telling omission from a Complaint that is so lengthy, detailed, and carefully crafted.

Second, even construing the Complaint as alleging that Fisher and Bonasorte knew that Winston's alleged victim was an FSU student, neither is an "appropriate person" under Title IX. Kinsman does not—and cannot—allege that either Fisher or Bonasorte has any authority over FSU's student conduct or Title IX processes. *See Gebser*, 524 U.S. at 290 (providing that an "appropriate person" is an official who has "authority to take corrective action to end the discrimination"). Alleging that those men have "control over students on the football team" is not enough, Compl. ¶ 76, D.E. 1; sports-related discipline has nothing to

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known. Because the Complaint must be read as whole, this single allegation cannot overcome the lack of any particular factual allegations anywhere else in the Complaint about her meetings with victim advocates. *See Rosky ex rel. Wellcare Health Plans, Inc. v. Farha*, No. 8:07-CV-1952-T-26MAP, 2009 WL 3853592, at *2 (M.D. Fla. Mar. 30, 2009).

do with the types of discipline through which a university remedies sexual harassment (*e.g.*, academic accommodations, no contact orders, residential changes, suspension, or even expulsion), *see, e.g.*, *DeCecco v. Univ. of S.C.*, 918 F. Supp. 2d 471, 492 (D.S.C. 2013) ("To the extent [the plaintiff] relies on notice to [the head coach] as notice to USC, she fails to satisfy Title IX's actual notice requirement for several reasons. First, notice to [the head coach] is not notice to USC (for Title IX purposes) because [the head coach] had, at most, limited supervisory responsibility over [the assistant coach]. This limited authority is not enough in light of *Gebser*[ and] *Davis* . . . ." (internal citation omitted)); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1352 n.43 (M.D. Ga. 2007) (reasoning that "in a typical Title IX case, an appropriate individual might be a University President, a high school superintendent, or the chairman of an appropriate board of education and not a teacher, coach or employee" because these latter types of school officials do not have "the authority to fix 'certain *types*' of discrimination" (emphasis in original)).

Nor can Fisher's and Bonasorte's alleged reporting obligations make them "appropriate persons" in the Title IX sense. *See* Compl. ¶ 76, D.E. 1. The Complaint alleges that "*all* FSU employees must report student-on-student sexual misconduct to the Dean of Students Department." *Id.* ¶ 81 (emphasis added). Surely any theory that would convert *every* FSU employee into an "appropriate person" necessarily fails the standard set out in *Davis* and its progeny.

Indeed, it is quite telling that the Complaint faults Fisher and Bonasorte for failing to comply with their "duties to report and refer the rape accusations against Winston to *appropriate university officials*." *Id.* (emphasis added). One of the purposes of the "actual

notice by an appropriate person" standard is to ensure that Title IX liability attaches only when a plaintiff can show that there has been "an official decision by the recipient not to remedy the violation." *Gebser*, 524 U.S. at 290. Even accepting as true Kinsman's allegation that Fisher and Bonasorte failed to follow FSU's own reporting requirement, that alleged failure hardly constitutes an official decision by FSU on whether and how to remedy any harassment being suffered by Kinsman.

**2. Even if FSU had actual knowledge before November 2013, its response was not deliberately indifferent.**

Even assuming appropriate officials at FSU had actual knowledge of Kinsman's assault as early as January 2013, the allegations of the Complaint show that FSU was not deliberately indifferent to Kinsman's alleged assault. The Complaint itself alleges that FSU responded to Kinsman's alleged assault by placing Kinsman in the care of its Victim Advocate Program. Within hours of the alleged assault, a victim advocate, Sarah Groff, met Kinsman at Tallahassee Memorial Hospital. Compl. ¶ 53, D.E. 1. Then, another victim advocate, Kori Pruett, who would work with Kinsman through most of 2013, took over caring for Kinsman. Pruett met with Kinsman on January 17, 2013, February 7, 2013, October 25, 2013, and made a follow-up counseling center appointment for Kinsman on November 4, 2013. *Id.* ¶¶ 61, 64, 88. During their first meeting, Pruett explained the student-disciplinary process to Kinsman and explained Kinsman's options for changing classes. *Id.* ¶ 61. Kinsman makes much of the fact that she allegedly was not told about other options, *see, e.g.*, *id.* ¶¶ 62, 66, but these allegations merely attempt to mask a glaring omission: Kinsman *never* alleges that she requested any specific accommodation or other

action (including a specific request to initiate a disciplinary investigation of Winston) that FSU denied.

That it was not "clearly unreasonable" for FSU to respond to Kinsman's alleged assault through the services of the Victim Advocate Program is confirmed by the recommendations of the April 2014 White House report *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault.*[4] That report emphasizes that universities must "give survivors more control over the process" of responding to their assault, and it identifies providing a confidential victim advocate as a "key 'best practice'" toward achieving that goal. *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault* 3, 11, White House Task Force to Protect Students from Sexual Assault, April 2014.[5] The report observes, "If victims don't have a confidential place to go, or think a school will launch a full-scale investigation against their wishes, many will stay silent." *Id.* at 11. Closely mirroring what the Complaint says FSU's victim advocates did for Kinsman, the report adds that an advocate should "help get a victim needed resources and accommodations, explain how the school's grievance and disciplinary process works, and help navigate the process." *Id.* Ultimately, the report counsels that "[t]here is no one-size-fits-all model of victim care. Instead, there must be options." *Id.* at 12. As a matter of law, it could not possibly have been clearly unreasonable for FSU to have followed a White House-endorsed best practice in giving Kinsman the services of a victim advocate,

[4] The Court may of course take judicial notice of this White House report. *See, e.g., B.T. Produce Co. v. Robert A. Johnson Sales, Inc.*, 354 F. Supp. 2d 284, 285 (S.D.N.Y. 2004) ("Courts have frequently taken judicial notice of official government reports as being 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" (quoting Fed. R. Evid. 201(b) and citing *Tex. & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n.4 (1934))).

[5] Available at http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf.

informing Kinsman of the student-disciplinary process, and deferring to Kinsman's informed decision not to initiate that process between January and November 2013, when she left campus.

**3. Merely being on campus with Winston is not harassment under Title IX.**

Kinsman has not alleged that, during the period between the alleged assault and her departure from campus in November 2013, she was subjected to harassment "so severe, pervasive, and objectively offensive that it can be said to [have deprived her] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. The Complaint alleges that Kinsman saw Winston from across the room on the first day of class and at one midterm exam, Compl. ¶¶ 55, 65, D.E. 1, but otherwise the Complaint contains no allegation that Kinsman had any direct contact with Winston or with any of his friends or associates. Indeed, the only harassment the Complaint alleges during this period is Kinsman's fear of the *possibility* of seeing Winston.

Accepting as true the allegations of Kinsman's Complaint, FSU would in no way minimize the trauma an assault victim might feel at the thought of seeing her assailant. Nonetheless, Kinsman's own allegations belie the notion that she was suffering harassment so "severe, pervasive, and objectively offensive" as to deny her the opportunities or benefits of an education at FSU. Even if Kinsman alleges that others at the University should have initiated disciplinary proceedings on her behalf, Kinsman herself does not allege seeking any protection from Winston or discipline against him. Kinsman acknowledges in the Complaint that she chose to remain enrolled in the one class that she and Winston shared, and that she indeed kept going to class (the educational opportunity of being at FSU) through the rest of

her time at FSU. And the allegations in the Complaint make clear that Kinsman ultimately left campus in November 2013 because of the aftermath of the media's exposure of her allegations, not because of any fear of Winston himself. *See id.* ¶¶ 112–13.

FSU is aware of one case in the university setting in which the court held that "a reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university." *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003). But the facts in *Kelly* are easily distinguishable from those alleged here. In contrast to what Kinsman has alleged, the victim in *Kelly* lived in the same dormitory as her assailant, and "she repeatedly requested academic and residential accommodations after the assault. She related to administrators the discomfort and fear that she would feel if she encountered [the assailant]." *Id.* at *4.

More fundamentally, taken as a bright-line rule, the holding in *Kelly* conflicts with the Supreme Court's teaching in *Davis*. The *Davis* Court stressed that its holding did not require schools to engage in any particular disciplinary action to avoid liability under Title IX and that a Title IX plaintiff does not have the right to make particular remedial demands. *See Davis*, 526 U.S. at 648. But if simply being on the same campus as one's assailant without any specific request for accommodation necessarily constitutes "severe, pervasive, and objectively offensive harassment" for Title IX purposes, then expulsion would be the only remedy. *Davis* plainly forecloses such a result. *See id.* ("We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment,

nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages." (internal quotation mark omitted)).

**B. FSU is not liable for any harassment caused by alleged social media threats directed at Kinsman.**

As her second form of alleged harassment, Kinsman claims that she was subjected to social media threats and epithets after the media in November 2013 broke the story of her allegations against Winston. *See* Compl. ¶ 112, D.E. 1. FSU concedes that exposure to such comments can constitute harassment that is sufficiently severe for purposes of Title IX. *See, e.g., M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, No. 1:13-CV-2718, 2014 WL 4273300, at *14 (M.D. Pa. Aug. 29, 2014) (recognizing that being called "whore" and "slut" is sufficient harassment under Title IX to survive a motion to dismiss). Here, however, Kinsman does not allege and cannot establish that FSU subjected her to the harassment she allegedly endured through social media.

Kinsman does not—and of course cannot—allege that FSU itself threatened her in any way. Rather, Kinsman alleges that, "[i]n the wake of an ensuing media frenzy, [she] was relentlessly vilified and threatened on the Internet and in FSU football-friendly quarters, and her and her family's personal and work addresses were published on the Internet, along with false slurs on [her] character and threats on her life." Compl. ¶ 21, D.E. 1.

Even if these allegations are true, the holding of *Davis* is clear: "Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment." *Davis*, 526 U.S. at 644. Indeed, *Davis* emphasized the Court's intent to "limit a recipient's damages liability to circumstances

wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 645. Here, of course, FSU controls neither the Internet nor the vicious trolls who allegedly used it to harass Kinsman. Kinsman's attorneys admitted as much in their February 21, 2014, letter to FSU, when they told FSU that Kinsman did not envision any disciplinary proceeding against Winston that "could eliminate the . . . extreme *third party* harassment" that Kinsman had suffered after her allegation was reported by the media. *See* Ex. A (letter from John Clune and Baine Kerr to Carolyn Egan dated Feb. 21, 2014) (emphasis added); *see also infra* note 4 (discussing why this letter may properly be considered by the Court at the motion to dismiss stage).

As a matter of law, Kinsman also cannot establish that any alleged deliberate indifference on FSU's part increased her exposure to the likelihood of being subjected to this form of harassment. Although this Court must accept Kinsman's factual allegations as true, it may not accept Kinsman's purely speculative assertions. *See Simpson*, 744 F.3d at 708. Kinsman's Complaint hypothesizes that, had FSU investigated Winston earlier, "Winston would have been removed as a threat to [Kinsman] long before ever suiting up to play football in a Seminoles jersey, and [Kinsman] would be on campus progressing toward an FSU degree." Compl. ¶ 146, D.E. 1. Yet Kinsman's own Complaint acknowledges that a State Attorney investigation and a University investigative hearing (presided over by retired Florida Supreme Court Justice Major Harding) both resulted in the conclusion that Winston should not be charged with assaulting Kinsman. *Id.* ¶¶ 114, 135. Only rank speculation supports Kinsman's theory that an earlier investigation would have reached a different result imposing a sanction on Winston, derailed his college football career, and rendered Kinsman's

assault allegations un-newsworthy. Thus, Kinsman cannot establish that FSU's alleged deliberate indifference could have been the proximate cause of any harassment she suffered through social media and the Internet.

**C. FSU is not liable for Kinsman's alleged exclusion from school.**

Kinsman's third and final form of alleged harassment consists of not being able to return to school at FSU. Compl. ¶ 113, D.E. 1; *Davis*, 526 U.S. at 631 (recognizing that "physical deprivation of access to school resources" can constitute discrimination under Title IX). Yet, read as a whole, Kinsman's own Complaint demonstrates that her inability to return has not been caused by FSU's alleged deliberate indifference. In fact, as the letters referenced and quoted in the Complaint and attached here show,[6] FSU has worked diligently to try to investigate Kinsman's claim, take her statement, and resolve the situation.

*First*, FSU's actions in November and December 2013, after the media first reported Kinsman's allegations and during the pendency of the State Attorney investigation, were not

[6] *See* Ex. A (letter from John Clune and Baine Kerr to Carolyn Egan dated Feb. 21, 2014); Ex. B (letter from Melissa Nelson and Scott Cairns to John Clune and Baine Kerr dated Mar. 15, 2014); Ex. C (letter from John Clune and Baine Kerr to Melissa Nelson dated Mar. 25, 2014); Ex. D (letter from Melissa Nelson to John Clune dated Mar. 31, 2014); Ex. E (letter from John Clune and Baine Kerr to Melissa Nelson dated Apr. 1, 2014).

Each of these letters is cited (and some are even quoted) in the Complaint. *See* Compl. ¶¶ 122–26, D.E. 1. Therefore, the Court may consider them at this stage. *See Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). Here, not only are the three letters sent by Kinsman's counsel quoted in the Complaint (two of which expressly reference the letters sent by FSU's counsel that are not quoted), but they are integral to Kinsman's claim that FSU was deliberately indifferent to her allegations because the letters show the communications between the parties as FSU tried to investigate her claims and find a way for her to return to school. Moreover, the contents of these letters cannot be disputed, as Kinsman's lawyers either wrote or received each letter. Courts regularly consider letters attached to a motion to dismiss when a plaintiff has quoted from the letter in the complaint but has failed to attach the letter. *See, e.g., GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384–85 (10th Cir. 1997); *Langer v. George Washington Univ.*, 498 F. Supp. 2d 196, 202 n.1 (D.D.C. 2007); *Natural Res. Council of Maine v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 247–48 (D. Me. 2006); *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 913 n.3 (E.D. Va. 2004); *Pilchman v. Dep't of Def.*, 154 F. Supp. 2d 415, 419 n.2 (E.D.N.Y. 2001). Although the March 15 and March 31 letters from FSU's counsel are not quoted, they are specifically referenced in the Complaint and in the quoted letters from Kinsman's counsel, so fairness demands that they be considered alongside the letters from Kinsman's counsel because these letters were part of the same dialogue.

clearly unreasonable. Kinsman left school less than twenty-four hours after her allegations against Winston became public. Compl. ¶ 113, D.E. 1. After learning of the allegations, FSU officials met on November 15 and November 25. *Id.* ¶¶ 110, 111. During this time, State Attorney Willie Meggs was investigating the allegations, *see id.* ¶ 104, and he ultimately determined that no charges should be brought against Winston, *id.* ¶ 114. During this time, FSU was aware of the situation and monitoring it. *Id.* ¶¶ 110, 111. Under similar circumstances, a court has held that it was not "objectively unreasonable" for a school to hold off on its own investigation while a school was monitoring a pending criminal investigation. *See Seats v. Kaskaskia Coll. Cmty. Coll. Dist. No. 501*, No. 07-CV-843-JPG, 2008 WL 5235980, at *7 (S.D. Ill. Dec. 15, 2008).

*Second*, after the State Attorney concluded his investigation, FSU began its own investigation in January 2014, right as the new semester was starting. *See* Compl. ¶ 118, D.E. 1. FSU reviewed the materials from the Tallahassee Police Department. *Id.* FSU also attempted to interview Winston, who declined to answer questions. *Id.* ¶ 120. Notably, Kinsman refused to give FSU a statement—a convenient omission from her Complaint, but a point that is evident from the letters she cites in her Complaint. *Id.* ¶¶ 122–26. Based on FSU's investigation, it determined that it could not bring charges against Winston at that time—the exact same result that the Tallahassee Police and the State Attorney had reached. FSU left open the possibility of revisiting that decision, however, should additional information come to the school's attention. *See* Ex. B.

*Third*, in her Complaint, Kinsman specifically references (and even quotes) multiple letters exchanged between Kinsman's new Colorado-based lawyers and FSU. These letters

leave no doubt that FSU was far from "clearly unreasonable" in its actions related to holding a disciplinary hearing on Kinsman's allegations against Winston.

The earliest letter cited in the Complaint is dated February 21, 2014. Compl. ¶ 122, D.E. 1; *see* Ex. A. Two things from that letter stand out. First, Kinsman's counsel acknowledges in the letter that, "over the winter break," FSU inquired of Patricia Carroll (Kinsman's then-attorney) whether Kinsman wanted to pursue a student-disciplinary hearing. Ex. A. The letter explicitly acknowledges that Carroll demurred:

> I understand from Ms. Carroll that you inquired sometime over the winter holiday break as to whether Ms. Kinsman was interested in pursuing a disciplinary hearing regarding Mr. Jameis Winston's conduct on December 7, 2012. Ms. Carroll has indicated that she responded that your inquiry was likely too late but that she would discuss with her client.

*Id.*

Second, the February 21 letter from Kinsman's attorneys includes these remarkable sentences:

> Mr. Kerr and I have discussed with Ms. Carroll and Ms. Kinsman and it is hard to envision any scenario where any result of a disciplinary action could eliminate the hostile education environment and extreme third party harassment suffered by Ms. Kinsman. In fact, if Mr. Winston were found by a conduct board to have sexually assaulted Ms. Kinsman, and he were ultimately suspended or expelled, Ms. Kinsman would likely be in greater danger than if the conduct board ruled against her.

*Id.*

This letter demonstrates that, as of February 21, 2014, Kinsman had not only declined a student-disciplinary hearing, but had in fact communicated that holding such a hearing would be both pointless and potentially harmful to Kinsman. Accordingly, Kinsman cannot now complain that the timing of her hearing had anything to do with her alleged inability to

return to FSU. Indeed, the letter implicitly concedes that it was the "national media attention" and the resulting public outcry—not FSU's actions—that kept Kinsman from returning to school. *See* Compl. ¶¶ 108, 112, D.E. 1.

Another letter cited in Kinsman's Complaint—a letter dated April 1, 2014—evidences Kinsman's dramatic and unexplained about-face on the issue of a student-disciplinary hearing. *See* Ex. E. That letter shows Kinsman's attorney demanding a hearing and indicating that she would cooperate—but only *after* FSU filed charges against Winston. Coupling the state of the record before FSU as alleged in Kinsman's Complaint—including a State Attorney's decision not to charge Winston and Kinsman's own earlier rejection of a student-disciplinary hearing—and the demands of basic fairness and due process to a potentially accused student, it could not have been "clearly unreasonable" for FSU to wish to interview Kinsman directly before deciding whether to further investigate Winston. *See Davis*, 526 U.S. at 649 ("[I]t would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.")

As for FSU's correspondence to Kinsman, the Complaint cites a letter from FSU to Kinsman's attorneys dated March 31, 2014. That letter clearly expresses FSU willingness to meet with Kinsman for the purpose of obtaining information to consider in connection with the decision whether to initiate disciplinary proceedings. Specifically, the letter says:

> In any event, the University acknowledges Ms. Kinsman's offer to supplement the record with additional information pertaining to her allegations concerning Mr. Winston. Ms. Kinsman may provide that information in any format she desires, including in writing or through a phone or Internet conversation. An in-person meeting is usually the most effective means of gathering information, and the University's Title IX personnel would welcome such a meeting with Ms. Kinsman. If Ms. Kinsman is willing to meet in person with the University's Title IX

> personnel, we will arrange for the meeting to occur at a time and place of Ms. Kinsman's choosing, including at a reasonable location outside of Tallahassee. This accommodation should wholly alleviate any concerns for Ms. Kinsman's safety.
>
> Please let us know how you would like to proceed and we will coordinate with the appropriate departments to ensure that this information exchange occurs as soon as possible and in an environment in which Ms. Kinsman feels safe.

Ex. D.

Finally, the Complaint also indicates that FSU tried to have Kinsman give a statement on May 20, 2014, when Kinsman was on campus for the Student Conduct Code hearings of Chris Casher and Ronald Darby, but Kinsman's delay in responding to the offer made coordinating the interview that day impossible. Compl. ¶ 128, D.E. 1.

*Fourth*, Kinsman finally gave an interview to FSU on August 6, 2014. *Id.* ¶ 129. This was Kinsman's first statement to anyone at FSU outside of the Victim Advocate Program since the night of the alleged assault (when Kinsman claimed not to know the identity of her assailant).

FSU held an investigative hearing based on Kinsman's allegations on December 2, 2014. *Id.* ¶ 135. The hearing officer (former Florida Supreme Court Justice Major Harding) determined that the evidence was insufficient to warrant Student Conduct Code charges against Winston—or in other words, that a preponderance of the evidence did not support a finding that Winston raped Kinsman. *Id.* Thus, Justice Harding reached the same conclusion as every prior investigation.

FSU's attempts to investigate and hold a hearing are far from deliberately indifferent. Just like the victim advocates' care of Kinsman before she left Tallahassee, FSU's conduct

since the media reports of November 2013 cannot be described as "an official decision by [FSU] not to remedy" the situation, *Gebser*, 524 U.S. at 290, or "a conscious decision to permit sex discrimination," *Murrel*, 186 F.3d at 1246. Therefore, FSU was not deliberately indifferent such that its conduct subject Kinsman to the further harassment of being excluded from school.

**Conclusion**

For the foregoing reasons and authorities, Defendant respectfully submits the Court should dismiss the Complaint pursuant to Rule 12(b)(6) for failure to state a claim.

McGUIREWOODS LLP

By */s/ Scott S. Cairns*

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(904) 798-3207 (fax)

*Attorneys and Trial Counsel for Defendant The Florida State University Board of Trustees*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 9, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

David B. King, Esquire
Thomas A. Zehnder, Esquire
Taylor F. Ford, Esquire
King, Blackwell, Zehnder & Wermuth, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
dking@kbzwlaw.com
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Baine Kerr, Esquire
John Clune, Esquire
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Hutchinson Black and Cook, LLC
921 Walnut Street, Suite 2
Boulder, CO 80302
kerr@hbcboulder.com
Obrien@hkcboulder.com
clune@hbcboulder.com
Patterson@hbcboulder.com
groth@hbcboulder.com

*Attorneys for Plaintiff Erica Kinsman*

*/s/ Scott S. Cairns*
Attorney

64736015v8

**DEFENDANT THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES MOTION TO DISMISS**

# EXHIBIT A

*Erica Klnsman v. The Florida State University Board of Trustees*
**United States District Court for the Middle District of Florida**
**Case No.: 6:15-cv-16-Orl-31KRS**

HutchinsonBlackandCookLLC
Attorneys at Law

John Clune
clune@hbcboulder.com

February 21, 2014

Via E-mail and United States Mail
Ms. Carolyn Egan
Office of the General Counsel
Suite 211 Westcott Building
222 South Copeland Street
Tallahassee, Florida 32306

RE: Representation of Erica Kinsman and your inquiry

Dear Ms. Egan:

Our office has been retained by Ms. Kinsman to assist her with her legal rights under Title IX of the Education Amendments as well as other matters pertaining to her rape at Florida State University in 2012. Please direct all further communication regarding this matter to either myself or Mr. Baine Kerr of our firm. Ms. Patricia Carroll is also counsel for Ms. Kinsman but to facilitate communications, please use me as your primary point of contact.

I understand from Ms. Carroll that you inquired sometime over the winter holiday break as to whether Ms. Kinsman was interested in pursuing a disciplinary hearing regarding Mr. Jameis Winston's conduct on December 7th, 2012. Ms. Carroll has indicated that she responded that your inquiry was likely too late but that she would discuss with her client.

As you are aware, since the time that Florida State University Police Department learned of this assault, fifteen months have passed. When that report was originally made, Mr. Winston was relatively unknown outside of his college football world. Since that time, Mr. Winston's accomplishment in athletics has launched him into heightened celebrity status. This increase in status was so significant that when the news broke about Ms. Kinsman's report to FSU Police, she was the subject of repeated death threats, her sorority received bomb threats, and someone slashed the tires of a car belonging to her sorority sister. Since that news, Mr. Winston's celebrity has grown to even greater proportions due to further athletic endeavors. While Ms. Kinsman remains enrolled at FSU, these events have forced her to leave campus and her friends due to grave fears for her personal safety.

Mr. Kerr and I have discussed the matter with Ms. Carroll and Ms. Kinsman and it is hard to envision any scenario where any result of a disciplinary action could eliminate the hostile education environment and extreme third party harassment suffered by Ms. Kinsman. In fact, if

Mr. Winston were found by a conduct board to have sexually assaulted Ms. Kinsman and he was ultimately suspended or expelled, Ms. Kinsman would likely be in greater danger than if the conduct board ruled against her. This is the harm caused and exacerbated by FSU's one year plus delay in responding. If you think otherwise, that a disciplinary sanction of Mr. Winston would somehow alleviate the hostile educational environment, it would be very important for you to explain that to us.

As you are aware, the school's obligation under Title IX is not necessarily to convene a conduct board hearing, but to respond promptly and effectively to sexual harassment and assault. Ms. Kinsman remains willing to cooperate and is open to hearing the school's thoughts as to what response the school believes would address the harassment and allow her to re-enroll in classes at Florida State. She cannot however, subject herself to any process that would only decrease her safety on campus.

Additionally, as you are no doubt aware, two other students, Chris Casher and Ronald Darby, have admitted to criminal conduct in committing voyeurism and video voyeurism. This behavior constitutes both sexual harassment and also criminal behavior which is prohibited in your school's Code of Conduct. Mr. Casher even went so far as to state that he watched the behavior, video recorded it, and then entered the room to attempt to have sex with Ms. Kinsman despite not having her consent to do so. Ms. Kinsman expects that you will proceed against these students accordingly and in a timely fashion.

Their sworn confessions to this conduct are attached to this letter so I trust that you don't need Ms. Kinsman to put herself in further harm's way for the school to address this harassment and bring code of conduct charges against them. Perhaps Mr. Winston will corroborate their account of voyeurism when you interview him as a part of your investigation that has been reported in the media. Please keep us apprised of these proceedings and any charges that are brought by the school.

We look forward to your response.

Sincerely,

John Clune, Esq.
Baine Kerr, Esq.
Counsel for Ms. Kinsman

JCC/tjp

Cc: Patricia A. Carroll (Via email)

STATE OF FLORIDA

COUNTY OF LEON

**AFFIDAVIT OF RONALD DARBY**

I, RONALD DARBY, hereby having been duly sworn and affirmed hereby state the following as true and correct:

1. My name is Ronald Darby. I am over 18 years in age. I am a resident of Leon County.
2. On December 6, 2012, I went with Chris Casher and Jameis Winston to Potbelly's. We arrived around 11:00 p.m. While there, I watched Jameis talking with a white female that had blonde hair. It appeared that the female was pursuing Jameis. In an effort to continue to hang out with Jameis she was trying to get her friend to go home with Chris Casher. As Jameis and this girl talked, she did not want him to leave.
3. Jameis Winston, Chris Casher and I decided to leave Potbelly's and the same blonde female followed us out of the club. This female did not appear intoxicated. She was able to walk out of the club, have a conversation with all of us and use her cell phone to text her friend to join us. She even got in the cab with us.
4. When we returned to our apartment building, she followed Jameis into his apartment and into his bedroom.
5. Jameis and the girl went into his bedroom. The lights were on and the door was cracked open. The door did not lock and did not close all the way because the lock was broken.
6. As the door was partially open, Chris looked through the opening and we could see her giving Jameis oral sex. Chris continued to watch Jameis and the girl through the cracked door. He was playing jokes on Jameis and trying to embarrass Jameis. Chris walked in Jameis' room and the girl told Chris to get out. She then got up turned off the light and shut the bedroom door. Chris and I could hear her and Jameis having sex. At no time did the girl ever indicate that she was not a willing participant. In fact, she wanted more privacy by closing the door and turning off the lights.
7. After approximately 20 minutes, I left the apartment and went upstairs to my apartment. As I was walking to my apartment I saw Jameis leave with the same girl on his scooter. Approximately five minutes later, Jameis returned on his scooter.
8. On November 13, 2013, I was interviewed by Monica Jordan. As a result of this interview she prepared this statement based on what I told her. This is a true and accurate statement. Ms. Jordan has presented the facts as I provided them to her. This statement is voluntary. I understand that Ms. Jordan is working on behalf of counsel for Jameis Winston.

FURTHER AFFIANT SAYITH NAUGHT

Ronald Darby

Sworn to and subscribed before me this 13th day of November 2013. Affiant provided the following identification: personally known

Notary Public

MONICA L. JORDAN
Commission # EE 084163
Expires August 1, 2015

STATE OF FLORIDA

COUNTY OF LEON

**AFFIDAVIT OF CHRISTOPHER CASHER**

I, CHRISTOPHER (CHRIS) CASHER, hereby having been duly sworn and affirmed hereby state the following as true and correct:

1. My name is Chris Casher. I am over 18 years in age. I am a resident of Leon County.
2. On December 6, 2012, I went with Ronald Darby and Jameis Winston to Potbelly's. We arrived around 11:00 p.m. I met a white female with blonde hair. She came up to me and asked if I played football. When I responded that I did play football she seemed more interested in me and gave me her telephone number. I went off and started mingling with other people in the club.
3. When Jameis Winston, Ronald Darby and I decided to leave Potbelly's and the same blonde female that gave me her telephone number followed us out of the club. This same female wanted to leave with us in the cab and virtually invited herself. She was not intoxicated. She was able to have a conversation with us. She was not slurring or stumbling. She was using her cell phone to try and invite her friend to join us.
4. When we arrived at Legacy Suites, she got out of the cab and followed Jameis to his apartment and into his bedroom.
5. Jameis and the girl went into his bedroom. The door was pulled shut but could not shut all the way because it was broken. The lights were on.
6. Since the door was partially open, I looked through the opening and we could see her giving Jameis oral sex. They had only been in the room a few minutes before I witnessed her giving him oral sex. Jameis was facing the door with his hands on his hips while she was in front of him on her knees. I witnessed them both take each other's clothes off and lay on the bed. Jameis and the blonde female began having intercourse. As a joke, I busted into the room to embarrass Jameis. The girl yelled at me, "get out." She got up off the bed and turned off the light and tried to close the door. I could hear them continuing to have sex. She never indicated that she was not a willing participant. From what I saw she was a more than willing participant.
7. After approximately 20 minutes, I went into my bedroom. I could hear Jameis and the girl leaving. They were talking to each other in a friendly manner.
8. On November 13, 2013, I was interviewed by Monica Jordan. As a result of this interview she prepared this statement based on what I told her. This is a true and accurate statement. Ms. Jordan has presented the facts as I provided them to her. This statement is voluntary. I understand that Ms. Jordan is working on behalf of counsel for Jameis Winston.

FURTHER AFFIANT SAYETH NAUGHT

Chris Casher

Sworn to and subscribed before me this 13th day of November 2013. Affiant provided the following identification: FSU ID.

Notary Public

MONICA L. JORDAN
Commission # EE 094153
Expires August 1, 2015

# Tallahassee Police Department

Date of Report 12/05/2013 11:29

Incident Report

Case # 00 12 032755

| INCIDENT | | | | | |
|---|---|---|---|---|---|
| Case # 00 12 032755 | Date of Report 12/05/2013 11:29 | Occurred On/From | Occurred To | Report Type Supplemental - Follow-Up CI | |
| Incident Type Criminal Offense | | Department Case Status CID - Open/Active | Case Status Date | Cleared | |
| Business Name 415 Chapel Dr Apt. 130 Tallahassee, FL 32304 | | | | | |
| Reported Via 911? : No<br>Was Evidence Collected? : Yes<br>Evidence Collected From : Other Explain in Narrative<br>Photos/Video Taken? : No<br>Specific Location Type : Apartment<br>Hate Crime? : No | | | Confidentiality Req? : Yes - Sexual Battery<br>Juvenile Involved? : No<br>District/Zone : Alpha-7A<br>Total Damaged Property Value : $0.00<br>Total Stolen Property Value : $0.00<br>Total Recovered Property Value : $0.00 | | |

| PERSON 1 | | | | | |
|---|---|---|---|---|---|
| Person Type Suspect | Business/Person Name Jamaris L Winston | | | | Business Phone |
| Home Phone | Person Address | | | | Map Reference |
| Mobile Phone/Pager | Employer Address | | | | Map Reference |
| Race Black | Sex Male | SSN | DL Exp. Date | DL/ID Number 8291588 | |
| Birth Date 01/06/1994 | Birth City | | | | |
| Age : 19<br>Occupation Vocation : Student - College<br>DL/ID State : AL | | | School Attending : FSU<br>Min Height : 6'04"<br>Min Weight : 220 lbs | | |
| End of Person 1 | | | | | |

| NARRATIVE 1 | |
|---|---|
| Topic | Sexual Battery - Supplemental Report |

This case was left in suspended status because probable cause could not be established given the conflicting statements between what the victim told her friends and what was reported to police. In addition, the victim was unwilling to pursue criminal charges at that time. Based on these facts and the fact it did not meet statutory requirements for prosecutorial review (domestic related incidents), the case was not submitted to the Office of the State Attorney. My Sergeant and Lieutenant were both aware and in agreement with this decision in February 2013.

On November 12, 2013, we were made aware that a media source was inquiring about the investigation and was requesting documents pertaining to the case. On November 12, 2013 I was directed to notify the Office of the State Attorney of the case for the sole purpose of making them aware in case they were to receive requests for information. After discussing the case at length, I was asked by ASA Cappleman to send her the reports relating to the case.

On November 13, 2013, ASA Cappleman provided the Tallahassee Police Department scanned copies of "sworn statements" provided to their office by Jansen.

The statements were typed documents that each had eight (8) numbered paragraphs, six (6) of which address the night's events. The statements are consistent in their account of the night's events. In summary the statements relay the following:

1. Winston, Cashor and Darby went to Potbelly's and arrived around 11:00pm. While at the

| Reporting Officer | Department | Report Status: |
|---|---|---|
| Investigator S ANGULO 745 (04580) | Tallahassee Police Department | Approved |
| Secondary Officer Name | | Date/Time |
| Verifying Officer | Department | Date / Time |
| Sergeant ANNE JOHNSON 367 (05579) | Tallahassee Police Department | 12/05/2013 12:57 |

00-12-032755

**Tallahassee Police Department** Date of Report 12/05/2013 11:29

Incident Report Case # 00-12-032758

bar, a blonde female began speaking with Winston.

2. As Winston Casher and Darby left, the blonde female got into the cab with them (according to Casher, she invited herself). The statements indicated the female was not intoxicated and was able to carry on a conversation.

3. When they arrived at their apartment, the female followed Winston into his bedroom.

4 The door was pulled closed but was partially open because it was broken.

5. Casher and Darby watched as the female performed oral sex on Winston through Winston's broken bedroom door. They then saw the female and Winston engage in oral sex. As a joke Casher went into the room. In response the female told him to get out. She then got up and closed the door and turned off the lights. According to the statements, there were no indications that the female was not a willing participant.

6. Approximately 20 minutes later the female left with Winston on his scooter.

ASA Cappleman asked that we attempt to re-interview the victim and her friends. She also asked that we interview Casher and Darby as well. It should be noted that Casher was not initially interviewed due to the fact the victim advised she was familiar with him and did not believe he was present when the incident took place. Additionally, Casher did not meet the description the victim provided for the subject who she said entered the room.

On November 14, 2013, Inv. Osborn and I went to the Moore Athletic Office in an attempt to locate and interview Darby and Casher. As is common practice, contact was made with FSUPD to advise them we were going to be on campus to conduct follow-up regarding an investigation.

Upon our arrival at the Moore Athletic Center, we were met by Monk Bonasorte. According to Bonasorte, the Florida State University Police Department had been requested to direct all law enforcement officers to his office if they were seeking to contact football players regarding this investigation. Bonasorte then stated he believed Jansen had already arranged legal representation for Casher and Darby.

While we were present, Bonasorte made phone contact with who he said was Attorney Jansen. Following the phone call, Bonasorte informed us that Darby had obtained an attorney, but that Casher had not. Bonasorte had staff summon Casher to the Moore Athletic Center. Bonasorte then stated he would be Casher's representative. Bonasorte is not an attorney so we explained that, in order to protect the integrity of the case, he would not be allowed to be present. We then explained if Casher wished to have legal representation, he could request an attorney and the interview would be re-scheduled for a later date.

When Casher arrived, I explained to him that he was just a witness in the case, but was still allowed to have an attorney if he wished. I also explained that we could schedule the interview at a later date to allow him to consult an attorney if he wished. Casher stated he did not want an attorney and consented to an interview.

| Reporting Officer | Department | Report Status: |
|---|---|---|
| Investigator S ANGULO 746 (Author) | Tallahassee Police Department | Approved |
| **Secondary Officer Name** | | **Date/Time** |
| **Verifying Officer** | **Department** | **Date / Time** |
| Sergeant ANNE JOHNSON 667 (Supervisor) | Tallahassee Police Department | 12/5/2013 12:42 |



00-12-032758

**Tallahassee Police Department** Date of Report 12/05/2013 11:29

Incident Report Case # 00-12-032758

Casher stated he, Darby and Winston went to Potbelly's the night in question. He stated he met a blonde female there but cannot remember her name. After getting her phone number he went off the talk to some other people. Later in the evening he saw the same female talking to Winston.

As he, Darby and Winston were leaving, the female got into the cab with them. Casher stated the female repeatedly tried to call her friend so that she could hang out with Casher; however, apparently did not speak to that person.

Once back at their apartment (Casher and Winston were roommates), the female and Winston went into Winston's bedroom. After about 10 minutes Casher and Darby peeked in the room and saw the female performing oral sex on Winston. Casher stated the door to Winston's room was broken and did not latch closed. A few minutes later he watched as the female and Winston removed their own clothing and climbed on the bed and began to engage in sexual activity. Casher stated he went into the room to see if the female would engage in sexual activity with him as well (as has happened with other females he and Winston have brought back to their apartment); however, the female saw him and told him to get out. A little while later, Casher stated he tried to video tape Winston and the female; however, when the female saw him she again told him to leave. The female then turned off the light and went with Winston into the bathroom.

Casher stated a little while later he heard Winston and the female leave and get on Winston's scooter.

Casher's statements during the interview were consistent with the statement provided to the police by Attorney Jansen. The only discrepancy was when Casher stated he went into the room to surprise Winston. When asked about this discrepancy, Casher stated he did indeed go into the room to try to have sex with her as well.

Bonasorte stated he would contact Darby to obtain the name of his Attorney and then let us know so that we could follow-up with an interview.

On November 14, 2013, Winston consented to providing a DNA sample via a Buccal (cheek cell) swab. Before making Winston available to provide the swab, Jansen again stated, he was not going to allow Winston to be interviewed by police.

In a report dated November 19, 2013, the FDLE Biology Section provided the analysis of their comparison of Winston's Buccal swab with the DNA referenced in their report dated August 27, 2013. According to the report, the partial foreign DNA profile from the victim's underwear matched the DNA profile of Winston. Winston was excluded as the source of the DNA profile from the victim's shorts and could not be either included or excluded as a contributor to the foreign DNA profile recovered from the victim's face (based on the limited nature of the profile obtained from the victim's face).

I had to leave town for several days on a pre-scheduled, work related trip to another part of the state; therefore, Inv. Osborn interviewed Darby and witness Jenna Weisberg. Weisberg was the individual who first contacted FSUPD. These interviews took place on November 15, 2013. See Inv. Osborn's supplement for details. Sgt. Baldwin re-interviewed witness Bria Henry in my absence. See her supplement for details.

On November 18, 2013, Inv. Osborn advised he attempted to contact witness Monique Kessler.

| Reporting Officer | Department | Report Status: |
|---|---|---|
| Investigator S ANGULO 746 (11/5/13) | Tallahassee Police Department | Approved |
| **Secondary Officer Name** | | **Date-Time** |
| **Verifying Officer** | **Department** | **Date / Time** |
| Sergeant ANNE JOHNSON 247 (12/5/13) | Tallahassee Police Department | 12/05/2013 [illegible] |

00-12-032758

**Tallahassee Police Department** Date of Report 12/05/2013 11:29

Incident Report Case # 00-12-032756

Kessler, however, told Inv. Osborn she would need to call him back because she was in the process of speaking with investigators with the Office of the State Attorney. The content of that interview has not been shared with this agency.

In addition, I was made aware that ASA Cappleman scheduled an appointment to speak with the victim's attorney later that morning. Inv. Osborn and I requested to be present at that meeting but our request was denied. The victim was later interviewed by members of the Office of the State Attorney. The specific details of that interview have not been shared with this agency.

At the request of the Office of the State Attorney, the blood and urine samples taken from the victim were sent to Dr. Goldberg, with the University of Florida for additional analysis. Dr. Goldberg confirmed the findings of the FDLE lab that there were no drugs found.

Witnesses Darby and Marcus Jordan (the person with whom the victim shared drinks earlier in the night), voluntarily submitted Buccal swabs to be compared with the unknown foreign DNA profile on the victim's shorts. In a report dated November 22, 2013, both men were excluded as possible contributors to that foreign DNA profile.

Witness Casher was contacted to see if he would voluntarily provide a buccal swab to compare against the foreign DNA profile found on the victim's shorts. Casher initially stated he would meet to provide the sample. Inv. Osborn was later contacted by Casher's Attorney, Adam Ellis. Ellis advised he wanted time to review the facts of the case before deciding whether he would allow Casher to provide a sample. The Office of the State Attorney served a search warrant to obtain a DNA sample from Casher. On December 5, 2013, I received the FDLE report regarding the comparison of Casher's DNA sample to the other items previously submitted in this case. Casher's sample was excluded as the source of the foreign DNA located on the victim's shorts, underwear, and face.

The previously unidentified sample found on the victim's shorts was determined to belong to a known acquaintance of the victim, Jamal Roberts. Due to concerns voiced by the victim's attorney that the blood submitted which showed no drugs did not actually belong to the victim, the State Attorney's Office requested that the blood sample be re-submitted for blood typing. The FDLE reported obtained on December 5, 2013 confirmed the blood initially submitted did, in fact, belong to the victim.

End of Narrative: I

| Reporting Officer | Department | Report Status: |
|---|---|---|
| Investigator B ANGELO 746 (6406) | Tallahassee Police Department | Approved |
| **Secondary Officer Name** | | **Date/Time** |
| **Verifying Officer** | **Department** | **Date, Time** |
| Sergeant ANNE JOHNSON 207 (6502) | Tallahassee Police Department | 12/5/2013 11:29 |



00-12-032756

**DEFENDANT THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES MOTION TO DISMISS**

# EXHIBIT B

***Erica Kinsman v. The Florida State University Board of Trustees***
**United States District Court for the Middle District of Florida**
**Case No.: 6:15-cv-16-Orl-31KRS**

McGuireWoods LLP
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Suite 3300
Jacksonville, FL 32202-3661
Phone: 904.798.3200
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www.mcguirewoods.com

Melissa W. Nelson
Direct: 904.798.2684

McGUIREWOODS

mnelson@mcguirewoods.com
Fax: 904.360.6332

March 15, 2014

**VIA E-mail and U.S. Mail**

Blaine P. Kerr, Esquire
John C. Clune, Esquire
Hutchinson Black and Cook LLC
921 Walnut Street
Suite 200
Boulder, CO 80302

***CONFIDENTIAL***
RE: *Erica Kinsman*

Dear Messrs. Kerr and Clune:

Florida State University has retained McGuireWoods LLP to represent its interests regarding any claims asserted by your client, Erica Kinsman. We ask that you address all future communications from you and your co-counsel regarding Ms. Kinsman to our attention. Ms. Kinsman remains welcome personally to avail herself of any University resources or services she desires. As has always been the case, the University wants to ensure that Ms. Kinsman has the full benefit of the University's programs, resources and activities, and we stand ready to work with you in that regard.

The University's general counsel has forwarded to us your letters of February 21, 2014 regarding Ms. Kinsman. It is unclear from those letters whether you are requesting any particular action regarding Ms. Kinsman or simply indicating that a claim will be asserted in the future.

We are unaware of any basis you might have for suggesting that the University has legal liability in connection with Ms. Kinsman. Contrary to the insinuations of your letter, the University did not delay in acting on this matter. Indeed, since Ms. Kinsman first reported an off-campus alleged sexual assault to the Florida State University Police Department on December 7, 2012, the University has done everything possible under the circumstances to address her needs; to ensure that she has full access to the University's programs, resources, and activities; and to comply with its obligations under applicable laws. In particular, in the immediate aftermath of the alleged assault, the University promptly engaged a victim advocate to assist Ms. Kinsman. From that moment on, the

Victim Advocate Program (on behalf of the University) has provided Ms. Kinsman extensive, ongoing support, including but not limited to arranging multiple and significant academic and social accommodations for her as well as advising her on steps she might take to avail herself of the remedies available to her

As you well know, throughout the period following the alleged assault, the University has labored under numerous constraints in its effort to help Ms. Kinsman. First, although fully advised that the University stood ready to investigate and take action on her allegations, Ms. Kinsman made an informed decision not to avail herself of the University's formal sexual misconduct complaint process. Instead she chose to confine her communications to the Victim Advocate Program. Second, and relatedly, Ms. Kinsman chose to eventually reveal the identity of her alleged assailant only to the victim advocate, knowing that the victim advocate was obligated to keep that information confidential from others at the University absent a specific waiver of confidentiality. Finally, the University received from your co-counsel, Patricia Carroll, an unequivocal directive that no one from the University have contact with Ms. Kinsman.

Ultimately, after nearly an entire year of ongoing confidential communication between Ms. Kinsman and the Victim Advocate Program, it was the media that disclosed the alleged assailant's identity and, in the process, broadly publicized Ms. Kinsman's allegations. In response, the University took further steps to protect Ms. Kinsman's identity and her well-being. And, although it was still handicapped by the absence of direct participation by Ms. Kinsman, the University took steps to investigate the alleged assault.

Because you have indicated that Ms. Kinsman now seeks notification of the results of that process, we have enclosed here the University's February 10th letter summarizing the current status of the University's investigation. As the enclosed document indicates, the Title IX investigator has left open the possibility of receiving any additional information that anyone may wish to provide her. To be clear, the University could not provide this information to your client previously because of Ms. Carroll's clear instruction that no one from the University have contact with Ms. Kinsman. Please be advised that you may not disclose to any other person the confidential information in the enclosed document, as it constitutes student record information protected under the Family Education Rights and Privacy Act.

Finally, as to students Ronald Darby and Christopher Casher, the University is reviewing the allegations contained in your February 21st letter and would like to better understand your client's position regarding her potential participation in an investigation and any related proceedings. Specifically, the University would like to explore—either through you or with Ms. Kinsman directly—both Ms. Kinsman's willingness to provide additional information or otherwise participate in the complaint resolution process, and potential steps the University can take to address Ms. Kinsman's related concerns.

Since Ms. Kinsman's arrival in 2012, Florida State has wanted Ms. Kinsman to succeed and feel welcome on campus, as it does with all students. The University's actions in this matter have confirmed Florida State's commitment to Ms. Kinsman's health, safety, welfare and academic success. Consistent with its demonstrated care for Ms. Kinsman to date, the University remains willing to support Ms. Kinsman in her pursuit of a degree from Florida State.

We look forward to hearing from you.

Sincerely,

Melissa W. Nelson
Scott S. Cairns

MWN/sj
Enclosure

cc: Carolyn Egan, General Counsel, Florida State University w/ enclosure (via E-mail)

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**DEFENDANT THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES MOTION TO DISMISS**

**ENCLOSURE OMITTED PURSUANT TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT 20 U.S.C. § 1232g**

*Erica Kinsman v. The Florida State University Board of Trustees*
United States District Court, Middle District of Florida
Case No.: 6:15-cv-16-Orl-31KRS

**DEFENDANT THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES MOTION TO DISMISS**

# EXHIBIT C

*Erica Kinsman v. The Florida State University Board of Trustees*
**United States District Court for the Middle District of Florida**
**Case No.: 6:15-cv-16-Orl-31KRS**

**HutchinsonBlackandCook**LLC
Attorneys at Law

John C. Clune
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March 25, 2014

VIA EMAIL AND US MAIL

Melissa W. Nelson
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50 North Laura St.
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Re: Erica Kinsman/ Florida State University

Dear Ms. Nelson:

Thank you for your letter of March 15, 2014 and your inquiry into Ms. Kinsman's willingness to participate in FSU disciplinary matters. Although this request unfortunately comes fifteen months after FSU learned of her assault, she remains willing to provide information in any investigation if sufficient protections for her safety are in place and the process is compliant with Title IX.

As stated in our letter of February 21, 2014, Ms. Kinsman is unable to attend classes or otherwise be on or near campus due to threats against her life and well-being. It would be especially unreasonable to expect her to appear in person on campus for interviews or a Code of Conduct hearing in light of these dangers. Title IX, as you know, requires the University to protect students like Ms. Kinsman from further sexual harassment or retaliation. *See* Dear Colleague Letter, pp. 4 and 15-17.

Although we requested, in our February 21st letter, information about how the University proposed to protect Ms. Kinsman, no such information has been forthcoming. Ms. Kinsman of course cannot return even briefly to the Tallahassee area, much less to her classes and residence, so long as the perpetrators of her sexual assault, their friends, teammates, and fierce supporters remain in the area and unrestricted.

It is incumbent on the University to conduct proper investigations and hearings in ways that fully safeguard Ms. Kinsman. This can be accomplished without her coming to Tallahassee, however. For example, meetings and hearing can be held in other locations or telephonically, or by Skype or Google+.

It is apparent from your letter that no actual investigation into the rape has taken place. The meeting with Mr. Winston and the Associate Athletic Director on January 23, 2014, with no notice to, or similar meeting with, Ms. Kinsman, not only failed to rise to the level of an investigation, the meeting itself violated Title IX. *See* Dear Colleague Letter p.11. Contrary to suggestion in your letter, Mr. Winston could have readily been identified within minutes of notice of the assault to the University on December, 7, 2012, and his identity was in any case known to the University in short order thereafter. Also contrary to your letter's assertions, Ms. Kinsman did not make "an informed decision not to avail herself of the University's formal sexual misconduct complaint process." Indeed, when asked about participating in a formal process she unequivocally agreed. Moreover, the directive to communicate with Ms. Kinsman through her counsel in no way prevented such communication or "handicapped" the investigation.

Finally, your letter asked about Ms. Kinsman's participation in an investigation and related proceeding regarding Mssrs. Casher and Darby. First, she is willing to provide information under the same needed safeguards set forth above for the Winston investigation and hearing. Second, the criminal misconduct of these gentleman has been admitted by them. The record is already replete with more than sufficient information for severe Code of Conduct sanctions.

As you are aware, FSU's obligations under Title IX belong to the school and are not a burden to be placed on a rape victim. Ms. Kinsman will provide further information as needed for any safe and Title IX compliant process the school initiates but will wait, as she has for fifteen months, for the school to act in compliance with their obligations.

Please keep Ms. Kinsman apprised, through us as her counsel, as the investigation and disciplinary proceedings progress.

Very Truly Yours,

Baine P. Kerr
John C. Clune

JCC/tjp

Cc: Patricia Carroll

**DEFENDANT THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES MOTION TO DISMISS**

# EXHIBIT D

*Erica Kinsman v. The Florida State University Board of Trustees*
United States District Court for the Middle District of Florida
Case No.: 6:15-cv-16-Orl-31KRS

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March 31, 2014

***Via E-Mail and U.S. Mail***

John C. Clune
Hutchinson Black and Cook LLC
921 Walnut Street
Suite 200
Boulder, CO 80302

***Confidential***
Re: *Erica Kinsman*

Dear Mr. Clune:

Thank you for your March 25, 2014 letter. At the outset, there is no basis for any suggestion that the University's treatment of Ms. Kinsman and its response to her allegations have failed to comply with Title IX or any other applicable law. Moreover, your assertion that Ms. Kinsman previously sought to participate in the University's disciplinary process is refuted by the record in this matter; indeed, she affirmatively declined to do so.

In any event, the University acknowledges Ms. Kinsman's offer to supplement the record with additional information pertaining to her allegations concerning Mr. Winston. Ms. Kinsman may provide that information in any format she desires, including in writing or through a phone or Internet conversation. An in-person meeting is usually the most effective means of gathering information, and the University's Title IX personnel would welcome such a meeting with Ms. Kinsman. If Ms. Kinsman is willing to meet in person with the University's Title IX personnel, we will arrange for the meeting to occur at a time and place of Ms. Kinsman's choosing, including at a reasonable location outside of Tallahassee. This accommodation should wholly alleviate any concerns for Ms. Kinsman's safety.

Please let us know how you would like to proceed and we will coordinate with the appropriate departments to ensure that this information exchange occurs as soon as possible and in an environment in which Ms. Kinsman feels safe. The University will carefully evaluate any information provided and keep you fully apprised of its response.

Finally, enclosed herein is a separate letter from the University's Dean of Students Department pertaining to Messrs. Casher and Darby. We also enclose a copy of the Student Conduct Code, which outlines the procedures applicable to these charges and Ms. Kinsman's rights under the Student Conduct Code as a complainant. Specifically, Ms. Kinsman is entitled to attend an information session, at which time she can view all the materials related to the case and receive further information regarding the disciplinary process. As you will note, these procedures provide for a variety of means by which Ms. Kinsman can participate in this process.

We are available to discuss in further detail the options available to Ms. Kinsman. We look forward to your response.

Sincerely,

Melissa W. Nelson

MWN/sj

cc: Carolyn Egan, General Counsel (w/o Enclosures)
Patricia Carroll, Esquire (w/o Enclosures)

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**DEFENDANT THE FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES MOTION TO DISMISS**

# EXHIBIT E

***Erica Kinsman v. The Florida State University Board of Trustees***
**United States District Court for the Middle District of Florida**
**Case No.: 6:15-cv-16-Orl-31KRS**

**HutchinsonBlackandCook LLC**
Attorneys at Law

John C. Clune
clune@hbcboulder.com

April 1, 2014

VIA EMAIL AND US MAIL

Melissa W. Nelson
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Re: Erica Kinsman/ Florida State University

Dear Melissa:

Thank you for your letter dated March 31, 2014. Please keep us posted on the progression of the disciplinary matters against Messrs. Casher and Darby. Although the credibility of their delayed input on "consent" is highly suspicious, I'm sure you would agree that this type of behavior furthers a sexually hostile environment at Florida State and must be treated seriously by the University.

What is conspicuously missing though is disciplinary charges against Mr. Winston. It is now fifteen months since Ms. Kinsman provided a report to Florida State University Police Department about being raped. The identity of the offender is known to FSU and the school is aware that the accused student is still under the control of and enrolled at Florida State University. Furthermore, my client has repeatedly expressed her willingness to cooperate with the University.

Ms. Kinsman has provided detailed accounts of her assault to Florida State University Police Department, Tallahassee Police Department, and the State's Attorney's Office. She has also submitted to a sexual assault examination at Tallahassee Memorial Hospital. All of those records are readily available online and are no doubt already in your possession. You have recently provided a letter to us that indicated that, by contrast, the offender is refusing to cooperate with FSU's investigation.

If charges against Mr. Winston are forthcoming, please advise. If they are not, perhaps you can explain why that is.

Sincerely,

Baine P. Kerr
John C. Clune

JCC/tjp
Cc: Patricia Carroll