

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CL14-6942
	)	
VIRGINIA WESLEYAN COLLEGE,	)	
	)	
Defendant/Third-Party Plaintiff.	)	
	)	
v.	)	
	)	
ROBERT ROE,	)	
	)	
Third-Party Defendant .	)	

**DEMURRER**

COMES NOW the Defendant/Third-Party Plaintiff, Virginia Wesleyan College (“VWC”), by counsel, without waiving the *Plea in Bar and Motion for a Bill of Particulars* filed contemporaneously herewith, and for its *Demurrer* respectfully states the following:

**BACKGROUND**

This action relates to a series of events that allegedly transpired on or about August 24, 2012. (Compl. ¶ 5). At this time, Plaintiff had just begun her first semester of college at VWC and, more specifically, had previously attended a mandatory orientation event, *Equalogy*. (Compl. ¶ 5). During this orientation event, VWC “conveyed to freshman VWC students that they were at risk of being raped and victimized through sexual assault.” (Compl. ¶ 5). VWC further cautioned that the risk of rape **on and off** campus increased when parties included alcohol, as “students could be provided drinks spiked with drugs to facilitate rape and other sexual assaults.” (Compl. ¶ 5).

Following the orientation event and after receiving the above warnings, Plaintiff attended a party and consumed alcohol. (Compl. ¶¶ 8, 12). Plaintiff believes she consumed an alcoholic beverage “spiked with an agent designed to incapacitate [her] and render [her] vulnerable to sexual assault.” (Compl. ¶ 17). In any event, while VWC believes Plaintiff exercised poor judgment in consuming any alcohol given her age, neither poor judgment nor any other shortcoming can justify the events that allegedly followed.

Specifically, as set forth in the *Complaint*, Plaintiff alleges she began to feel dizzy and lightheaded and returned to her dorm room in the accompaniment of several female friends. (Compl. ¶¶ 16, 21). It is further alleged that a fellow student and party attendee, Robert Roe (“Roe”), followed the group back and preyed on Plaintiff in her impaired state. (Compl. ¶¶ 19, 22, 24-25). Plaintiff goes on to allege that the encounter began with “fondling and kissing” but escalated to something much worse. (Compl. ¶¶ 25-27).

In response to this sequence of alleged events, Plaintiff has asserted negligence, gross negligence, and fraud claims against VWC. The negligence and gross negligence claims arise from VWC’s alleged failure to exercise reasonable care to protect Plaintiff from rape and sexual assault and VWC’s alleged failure to warn Plaintiff of the risk of rape and sexual assault. (Compl. ¶ 57, 63). The fraud claim arises from VWC’s alleged misrepresentations and omissions regarding campus safety – specifically, the number of rapes and sexual assaults occurring on campus. (Compl. ¶¶ 61-62, 65).

It goes without saying that VWC finds rape and sexual assault abhorrent. However, VWC vehemently denies playing any contributing role in the rape and sexual assault alleged by Plaintiff.

Moreover, for the reasons that follow, VWC respectfully requests that the Court dismiss this action with prejudice for failure to state a claim upon which relief can be granted.

## **ARGUMENT**

### **I. Standard of Review**

In ruling on a demurrer, a court should “consider as true all the material facts alleged in the . . . complaint, all facts impliedly alleged, and all reasonable inferences that may be drawn from such facts.” Concerned Taxpayers v. Cnty. of Brunswick, 249 Va. 320, 323, 455 S.E.2d 712, 713 (1995) (citing Krantz v. Air Line Pilots Ass’n, Int’l, 245 Va. 202, 204, 427 S.E.2d 326, 327 (1993)). However, a court does not have to accept as true any conclusions of law set forth in the complaint. Blake Constr. Co. v. Upper Occoquan Sewage Auth., 266 Va. 564, 571, 587 S.E.2d 711, 715 (2003) (citing Yuzefovsky v. St. John’s Wood Apartments, 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001)). A court should sustain a demurrer if it finds the complaint fails to state a cause of action upon which the requested relief may be granted. See Assurance Data, Inc. v. Malyevac, 286 Va. 137, 143, 747 S.E.2d 804, 807 (2013) (citing Dunn, McCormack & MacPherson v. Connolly, 281 Va. 553, 557, 708 S.E.2d 867, 869 (2011)).

### **II. Under Virginia Law, VWC Did Not Have a Legal Duty to Warn or Protect**

The existence of a duty to warn or protect is a pure question of law. Burns v. Gagnon, 283 Va. 657, 668, 727 S.E.2d 634, 642 (2012) (quoting Kellermann v. McDonough, 278 Va. 478, 487, 684 S.E.2d 786, 790 (2009)). In general, one does not have a duty to warn or protect another from third-party criminal acts. E.g., Thompson v. Skate Am., Inc., 261 Va. 121, 128-29, 540 S.E.2d 123, 127 (2001) (quoting Gupton v. Quicke, 247 Va. 362, 363, 442 S.E.2d 658, 658 (1994)). This is

particularly the case when the third-party criminal act is assaultive in nature, as such an act is not reasonably foreseeable. Burdette v. Marks, 244 Va. 309, 311-12, 421 S.E.2d 419, 420 (1992) (citing Marshall v. Winston, 239 Va. 315, 318, 389 S.E.2d 902, 904 (1990)). However, a narrow exception to this general rule exists where there is a special relationship between the plaintiff and the defendant or between the defendant and the third-party criminal actor. Id. at 312, 421 S.E.2d at 420 (citing Marshall, 239 Va. at 318, 389 S.E.2d at 904).

Depending upon the nature of the special relationship, courts apply one of two tests in determining the degree of foreseeability of harm that must be established to impose upon the defendant a duty to warn or protect. Commonwealth v. Peterson, 286 Va. 349, 357, 749 S.E.2d 307, 311 (2013). In some cases, such as those involving an innkeeper and guest, courts require a showing of “known or reasonably foreseeable harm.” Id. (citing Taboada v. Daly Seven, Inc., 271 Va. 313, 325-26, 626 S.E.2d 428, 434 (2006)). In other cases, such as those involving a business owner and invitee, courts require a showing of “imminent probability of harm” – i.e., “know[ledge] that criminal assaults against persons are occurring, or are about to occur, on the premises” based upon “notice of a specific danger just prior to the assault.” Id. at 357, 749 S.E.2d at 311-12 (quoting Thompson, 261 Va. at 128-29, 540 S.E.2d at 127)).

For the reasons that follow, the Court should find that no special relationship existed between Plaintiff and VWC by virtue of Plaintiff’s status as a student. Furthermore, to the extent a special relationship existed between Plaintiff and VWC on any basis, the Court should find that Plaintiff failed to allege sufficient facts to support a finding of either “known or reasonably foreseeable harm” or “imminent probability of harm.” Accordingly, the Court should dismiss Plaintiff’s failure to warn and protect claim with prejudice.



**A. VWC's Method of Business Does Not Attract or Provide a Climate for Assaultive Crimes**

A business attracts or provides a climate for assaultive crimes when it incorporates a criminal element into its method of business – i.e., when it benefits from the presence of criminal or assaultive behavior. Hatfield v. Tomcat, Inc., 47 Va. Cir. 285, 288-89 (Norfolk Cir. Ct. 1998) (quoting Godfrey v. Boddie-Noell Enters., Inc., 843 F. Supp. 114 (E.D. Va. 1994)). Here, Plaintiff alleges that “the nature and method of [VWC’s] business was such that it attracted and provided a climate for assaultive crimes.” (Compl. ¶ 47). However, Plaintiff failed to allege any facts sufficient to support this conclusory allegation. Indeed, Plaintiff failed to allege that VWC engages in criminal or assaultive activity or benefits from the presence of criminal or assaultive activity on its property (most likely because there would be no basis for such allegations). Accordingly, the Court should dismiss Plaintiff’s claim with prejudice to the extent it is based on the theory that VWC’s method of business attracts or provides a climate for assaultive crimes.

**B. Virginia Law Does Not Recognize a College-Student Special Relationship**

The Supreme Court has recognized special relationships in a number of cases, including the cases of a business owner and invitee, an innkeeper and guest, an employer and employee, and a common carrier and passenger. Burns, 283 Va. at 669, 727 S.E.2d at 642 (quoting Kellermann, 278 Va. at 492, 684 S.E.2d at 793). However, VWC is not aware of any instance in which the Supreme Court has acknowledged the existence of a special relationship between a college and its students. Moreover, the Supreme Court has cautioned against the recognition of additional special relationships and has expressly rejected the notion that a special relationship exists between a high

school principal and students. Id. at 669-70, 727 S.E.2d at 642-43 (citing Kellermann, 278 Va. at 492, 684 S.E.2d at 793).

Other jurisdictions considering this issue have refused to recognize a special relationship between a college and its students. See, e.g., Bradshaw v. Rawlings, 612 F.2d 135, 138-43 (3d Cir. 1979); Freeman v. Busch, 349 F.3d 582, 587-88 (8th Cir. 2003); Booker v. Lehigh Univ., 800 F. Supp. 234, 237-41 (E.D. Pa. 1992); Univ. of Denver v. Whitlock, 744 P.2d 54, 61 (Colo. 1987); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560-61 (Ill. Ct. App. 1987); Nero v. Kan. State Univ., 861 P.2d 768, 778 (Kan. 1993); Beach v. Univ. of Utah, 726 P.2d 413, 416 (Utah 1986). There is no reason for this Court to take a different stance on the issue. Rather, this Court should reject Plaintiff's argument that she enjoyed a special relationship with VWC by virtue of her status as a student.

### **C. There Was No "Imminent Probability of Harm"**

To the extent Plaintiff's negligence claim is based on a business owner-invitee special relationship, the appropriate foreseeability test is "imminent probability of harm" – i.e., "know[ledge] that criminal assaults against persons are occurring, or are about to occur, on the premises" based upon "notice of a specific danger just prior to the assault." Peterson, 286 Va. at 357, 749 S.E.2d at 311-12 (quoting Thompson, 261 Va. at 128-29, 540 S.E.2d at 127)). "Imminent probability of harm" is an extremely high standard. By way of example, in Yuzefovsky, a case discussed at length, *infra*, the Supreme Court held that, as a matter of law, the occurrence of 656 crimes, including 113 crimes against individuals, within the year immediately preceding the assault in question did not support a finding of imminent probability of harm. 261 Va. at 109, 540 S.E.2d at 141. The rate and frequency of alleged sexual assaults at VWC, which presumably has a

significantly larger population than the apartment complex in Yuzefovsky, do not come anywhere close to these numbers.

Furthermore, Plaintiff has not alleged any facts to suggest VWC had “notice of a specific danger just prior to the assault.” Plaintiff has not alleged that VWC knew or should have known she was drugged, or that VWC knew or should have known she was about to be raped and sexually assaulted. Rather, Plaintiff relies solely on statistics (which she claims are unreliable) to argue that rape and sexual assault of VWC students, in general, is foreseeable. Such a simplistic argument is not sufficient to carry Plaintiff’s burden. See Wright v. Webb, 234 Va. 527, 533, 362 S.E.2d 919, 922 (1987) (stating that previous criminal activity is not sufficient to impose liability on a business owner, and that “notice of a specific danger just prior to the assault” is necessary); see also Thompson, 261 Va. at 130, 540 S.E.2d at 128 (2001) (emphasizing the defendant’s knowledge of prior assaults by the third-party criminal actor, as opposed to prior assaults in general).

Moreover, Plaintiff’s allegations touch only on the frequency of alleged rapes and sexual assaults of VWC students. Plaintiff has not alleged any facts regarding the location of the prior rapes and sexual assaults, the nature of the prior rapes and sexual assaults, or the temporal proximity of the prior rapes and sexual assaults to her alleged rape and sexual assault. How many of the alleged prior rapes and sexual assaults occurred in campus dormitories? How many of the alleged prior rapes and sexual assaults involved the use of “date rape” drugs? How many of the alleged prior rapes and sexual assaults involved forcible intercourse, as opposed to an unwanted kiss on the cheek? Plaintiff’s *Complaint* is largely silent on these issues, which are clearly pertinent to the foreseeability inquiry. A.H. v. Rockingham Publ’g Co., Inc., 255 Va. 216, 224, 495 S.E.2d 482, 487 (1998) (citing Gen. Motors Corp. v. Lupica, 237 Va. 516, 521, 379 S.E.2d 311, 314 (1989))

(“When evidence of prior occurrences is sought to be introduced to establish foreseeability of an unreasonable risk of harm to others, a trial court must determine whether there is a ‘substantial similarity’ between the prior occurrences and the occurrence in question.”).

To simplify the foreseeability test in the manner suggested by Plaintiff would be bad public policy. The Supreme Court has repeatedly described the exceptions to the general rule of non-liability for third-party criminal conduct as “narrow.” See, e.g., Peterson, 286 Va. at 355, 749 S.E.2d at 311 (quoting Taboada, 271 Va. at 322-23, 626 S.E.2d at 432). These exceptions would be far from “narrow” if only a showing of foreseeability, in general, is required, as opposed to a showing of “notice of a specific danger just prior to the assault.” After all, “[i]t is . . . foreseeable that there will always be criminals among us.” Tanja H. v. Regents of the Univ. of Cal., 228 Cal. App. 3d 434, 438 (Cal. Ct. App. 1991).<sup>1</sup>

Accordingly, the Court should find that, as a matter of law, Plaintiff has not alleged sufficient facts to support a finding of imminent probability of harm. As such, the Court should hold that VWC did not have a duty to warn or protect Plaintiff from the alleged third-party criminal conduct at issue.

#### **D. There Was No “Known or Reasonably Foreseeable Harm”**

To the extent Plaintiff’s negligence claim is based on an innkeeper-guest special relationship, the appropriate foreseeability test is “known or reasonably foreseeable harm.” Peterson, 286 Va. at 357, 749 S.E.2d at 311 (citing Taboada, 271 Va. at 325-26, 626 S.E.2d at 434). To support her claim of known or reasonably foreseeable harm, Plaintiff compares her case to A.H. v. Rockingham Publishing Co., Inc. (Compl. ¶ 47). Plaintiff’s arguments in this regard are not

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<sup>1</sup> A copy of Tanja is attached hereto as Exhibit A.

persuasive. Indeed, as noted by Plaintiff, the foreseeability analysis in Rockingham involved consideration of an employer's knowledge of three sexual assaults in the five years immediately preceding the sexual assault in question. Id. at 222, 495 S.E.2d at 486. However, in holding that, as a matter of law, the prior sexual assaults did not give rise to known or reasonably foreseeable harm, the Supreme Court looked at more than just the frequency of the prior sexual assaults. Id. Rather, it also considered the similarity of the prior sexual assaults to the sexual assault at issue and the temporal proximity of the prior sexual assaults to the sexual assault at issue, issues Plaintiff's *Complaint* fails to address. Id.

The case of Commonwealth v. Peterson is also informative on this issue. In Peterson, it was alleged that police had knowledge of a shooting in a Virginia Tech dormitory that left one student dead and another student critically injured. 286 Va. at 359, 749 S.E.2d at 313. It was further alleged that Virginia Tech had knowledge that the shooter had neither been identified nor apprehended. Id. The plaintiffs argued that this knowledge gave rise to a duty on the part of Virginia Tech to warn other students of the shooting and unapprehended shooter. Id. at 354, 749 S.E.2d at 310. The Supreme Court disagreed, finding that, as a matter of law, it was not known or reasonably foreseeable that other students would be shot or otherwise harmed by the shooter. Id. at 359, 749 S.E.2d at 313. As such, the Supreme Court held that Virginia Tech did not have to duty to warn students of the shooting or unapprehended shooter. Id. at 359-60, 749 S.E.2d at 313. The Virginia Supreme Court further affirmed that “**in only rare circumstances** has this Court determined that the duty to protect against harm from third party criminal acts exists.” Id. at 359, 749 S.E.2d at 312 (citing Taboada, 271 Va. at 325-26, 626 S.E.2d at 434) (emphasis added).

Here, Plaintiff argues that her alleged rape and sexual assault were reasonably foreseeable, citing prior rapes and sexual assaults of VWC students, alleged shortcomings on the part of VWC in enforcing its alcohol and hazing policies, the warnings issued by VWC during an orientation event, and the allegation that campus security saw drunk teenage girls just prior to the alleged rape and sexual assault at issue. (Compl. ¶¶ 47-49). Plaintiff's argument is not persuasive. As noted above, Plaintiff has not alleged any facts regarding the location of the alleged prior rapes and sexual assaults of VWC students, the nature of the alleged prior rapes and sexual assaults of VWC students, or the temporal proximity of the alleged prior rapes and sexual assaults of VWC students to her alleged rape and sexual assault. This information is clearly pertinent to the foreseeability inquiry. Rockingham, 255 Va. at 224, 495 S.E.2d at 487 (citing Lupica, 237 Va. at 521, 379 S.E.2d at 314).

Furthermore, Plaintiff's claims that sexual assaults were occurring at an "alarming rate" and "in grossly disproportionate numbers" are based upon the very statistics Plaintiff claims are unreliable. (Compl. ¶¶ 70-71). In addition, Plaintiff has not alleged that the statistics from other schools are reliable, and Frank LoMonte, Executive Director of the Student Press Law Center, has stated that "the problem of colleges underreporting sexual assaults is prevalent across the country." Nick Ochsner, *Student Sues College After Brutal Rape*, USA TODAY (Oct. 8, 2014), available at <http://usatoday.com/story/news/nation/2014/10/08/sex-assault-lawsuit/16906309/>. Moreover, the Clery Act affords institutions discretion with respect to the reporting of crimes reported to a pastoral or professional counselor, and Plaintiff has not alleged that VWC and other Virginia colleges exercise this discretion in the same manner. See 29 U.S.C. 1092(f) and 34 C.F.R. § 668.46(c)(6).<sup>2</sup>

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<sup>2</sup> A copy of 34 C.F.R. § 668.46 is attached hereto as Exhibit B.

Without comparable and reliable statistics from other Virginia colleges, Plaintiff's allegations regarding the relative rate and frequency of sexual assaults at VWC lack any credible basis.

Still further, any shortcomings on the part of VWC in enforcing its alcohol and hazing policies have no bearing whatsoever on the issues at stake.<sup>3</sup> For starters, consumption of alcohol is not an assaultive behavior, and individuals who consume alcohol do not always (or even regularly) engage in assaultive behavior. See Harrison v. Bittler, 72 Va. Cir. 7, 11 (Loudoun Cir. Ct. 2006) (“It is not reasonably foreseeable that criminal assaults will occur if underage persons are allowed to consume alcohol.”). Cf. Baldwin v. Zoradi, 123 Cal. App. 3d 275, 288 (Cal. Ct. App. 1981) (“Although the consumption of alcoholic beverages by persons under 21 years of age is proscribed by law, the use of alcohol by college students is not so unusual or heinous by contemporary standards as to require special efforts by college administrators to stamp it out.”) (citation omitted). Likewise, many forms of hazing, including streaking, are not assaultive in nature. As such, the likelihood of punishment and the likely severity of punishment for these non-assaultive behaviors does not support Plaintiff's allegation that VWC “attracted and provided a climate for assaultive crimes.” (Compl. ¶ 47). Any suggestion by Plaintiff that VWC lets assaultive behavior go unpunished is wholly unfounded.

Moreover, Plaintiff misconstrues the warnings issued by VWC during the mandatory orientation event on the evening of the alleged rape and sexual assault at issue. VWC did not warn Plaintiff that she, personally, was likely to be raped or sexually assaulted. Rather, VWC properly advised Plaintiff that she was a member of the “at risk” population and suggested a way to minimize the risk of rape or sexual assault – i.e., avoiding parties where alcohol was served. Unfortunately,

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<sup>3</sup> Interestingly, Plaintiff seems to take no issue with the fact that she was not reprimanded for admitting to underage consumption of alcohol at an on-campus party. (Compl. ¶¶ 8, 12).

Plaintiff did not heed VWC's advice and now seeks to take VWC to task for even providing such advice.

Finally, while intoxication might increase the susceptibility of a teenage girl to sexual predators, it is not in any way a reliable indicator of imminent sexual assault. Indeed, Plaintiff does not allege, and there is no evidence to indicate, that any of the other intoxicated teenage girls allegedly observed by campus security were sexually assaulted on the evening in question (or at any time). Therefore, like the Supreme Court in Rockingham and Peterson, this Court should find that, as a matter of law, Plaintiff's allegations are not sufficient to support a finding of known or reasonably foreseeable harm. Accordingly, the Court should hold that VWC did not have a duty to warn or protect Plaintiff from the alleged third-party criminal conduct at issue.

### **III. Plaintiff's Own Allegations Belie Her Failure to Warn Claim**

Plaintiff's negligence and gross negligence claims are based in part on the allegation that VWC "negligently fail[ed] to warn students and invitees of the risk of crime." (Compl. ¶ 57). However, Plaintiff contradicts herself by alleging that, during a mandatory orientation event she attended prior to the incident in question, VWC "conveyed to freshman VWC students that they were at risk of being raped and victimized through sexual assault." (Compl. ¶ 5). Plaintiff further contradicts herself by alleging that, during the orientation event, VWC cautioned that the risk of rape on and off campus increased when parties included alcohol, as "students could be provided drinks spiked with drugs to facilitate rape and other sexual assaults." (Compl. ¶ 5).

The Court should not permit Plaintiff to rise above her allegations of factual matters within her knowledge. Massie v. Firmstone, 134 Va. 450, 462, 114 S.E. 652, 656 (1922) (noting that a litigant's "statements of fact and the necessary inferences therefrom are binding upon him"). Cf.



Ward's Equip., Inc. v. New Holland N. Am., Inc., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (citing Fun v. Va. Military Inst., 245 Va. 249, 253, 427 S.E.2d 181, 183 (1993)) (“[A] court considering a demurrer may ignore a party’s factual allegations contradicted by the terms of authentic, unambiguous documents that are a part of the pleadings.”). Rather, the Court should dismiss Plaintiff’s failure to warn claim with prejudice.

#### **IV. Plaintiff Failed to Sufficiently Plead Her Scope of Employment Claim**

Plaintiff alleges that the peer advisor in question “invited numerous new teenage freshman students to an on-campus party at his townhouse in which he affirmatively permitted and/or encouraged the serving of alcohol to the freshman teenage girls.” (Compl. ¶ 8). Plaintiff further alleges that he did so while acting within the scope of his employment as an orientation peer advisor for VWC. (Compl. ¶¶ 7-8). However, Plaintiff does not allege that the party was sanctioned by VWC; that hosting parties was a typical duty of orientation peer advisors; or that hosting the party and/or permitting the service of alcohol to underage students was motivated, even in part, by a desire to further VWC’s interests or did so. Without these allegations, Plaintiff’s argument that the peer advisor acted within the scope of his employment simply defies logic. See Kensington Assocs. v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987) (noting that an act is within the scope of employment where (1) expressly or implied directed by the employer, or naturally incident to the employer’s business; and (2) performed, at least in part, out of a desire to further the employer’s interest).

It should also be noted that the peer advisor in question was not Plaintiff’s peer advisor. As such, he was not “tasked with assisting [Plaintiff] with acclimating to the College environment.” Moreover, Plaintiff has not alleged that she knew the peer advisor in question even was a peer

advisor when he allegedly invited her to the party at his townhouse. As such, Plaintiff has not alleged any facts from which this Court can infer that the peer advisor in question held a “position of trust” with respect to Plaintiff. Accordingly, the Court should dismiss Plaintiff’s negligence and gross negligence claims with prejudice to the extent they are based on a theory of vicarious liability for the alleged negligence or gross negligence of the peer advisor in question.

**V. Plaintiff Failed to Sufficiently Plead Her Breach of Assumed Duty Claim**

Virginia law follows the Restatement (Second) of Torts § 323 with respect to liability for breach of an assumed duty:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other’s reliance upon the undertaking.

See Kellermann, 278 Va. at 489, 684 S.E.2d at 792 (quoting Didato v. Strehler, 262 Va. 617, 629, 554 S.E.2d 42, 48 (2001)). As such, failure to exercise reasonable care in the performance of an assumed duty is not necessarily negligence. Rather, the failure to exercise reasonable care must increase the risk of harm, or the harm must be suffered as a result of the plaintiff’s reliance on the defendant’s assumption of the duty. See id. (quoting Didato, 262 Va. at 629, 554 S.E.2d at 48).

Here, Plaintiff alleges that VWC assumed a duty to protect her from third-party criminal acts by hiring and deploying security officers. (Compl. ¶ 50). However, Plaintiff failed to allege that VWC’s hiring and deployment of security officers increased the risk that she would be raped or sexually assaulted. Likewise, Plaintiff failed to allege that she was raped and sexually assaulted as a

result of her reliance on VWC's hiring and deployment of security officers. As such, even if we assume VWC assumed a duty of care by hiring and deploying security officers, and even if we assume VWC failed to exercise reasonable care in the hiring and deployment of security officers (which VWC vehemently denies), Plaintiff has not alleged sufficient facts to impose liability on VWC for breach of an assumed duty. Accordingly, the Court should dismiss Plaintiff's negligence and gross negligence claims with prejudice to the extent they are based on a theory of breach of an assumed duty of care.

#### **VI. The Peer Advisor's Alleged Conduct Was Not a Proximate Cause**

"The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produced the event, and without which that event would not have occurred." Beale v. Jones, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970) (citations omitted). "To impose liability upon one person for damages incurred by another, it must be shown that the negligent conduct was a necessary physical antecedent to the damages." Id. (citing Wells v. Whitaker, 207 Va. 616, 622, 151 S.E.2d 422, 428 (1966)). Where the evidence of proximate causation is nothing more than speculation or conjecture, a trial judge may decide the issue of proximate causation. Id. (quoting Hawkins v. Beecham, 168 Va. 553, 561, 191 S.E. 640, 643 (1937); Wilkins v. Sibley, 205 Va. 171, 174, 135 S.E.2d 765, 767 (1964)).

Here, Plaintiff alleges that the peer advisor in question acted negligently in "organizing a party at which alcohol would be served illegally," "inviting teenage freshman girls he was supposed to be advising to that party," and "failing to at least control the dispensing of alcohol to his teenage advisees to prevent spiking of drinks." (Compl. ¶ 57). Even if these allegations are true, and even if they constitute negligence imputable to VWC, the conduct of the peer advisor in question was not a

proximate cause of Plaintiff's alleged rape and sexual assault. For starters, Plaintiff could have declined the invitation to the party or refused any beverage offered to her at the party. There is no allegation that the peer advisor in question, or any employee or agent of VWC, coerced Plaintiff to attend the party or consume alcohol underage. Rather, these decisions were the product of the adult Plaintiff's free will.

Furthermore, Plaintiff's allegation that she consumed a spiked beverage is only made "[u]pon information and belief," suggesting Plaintiff has no concrete evidence that she was drugged. (Compl. ¶ 17). In any event, Plaintiff has not alleged that the peer advisor in question spiked her drink or knew spiked drinks were being served at the party. As such, we are left to assume that an unidentified third-party **might** have served a spiked beverage, which Plaintiff voluntarily consumed in violation of Virginia law and VWC's alcohol policy, unbeknownst to the peer advisor in question or any employee or agent of VWC. Such an independent criminal act would supersede any negligence on the part of the peer advisor in question, breaking the chain of proximate causation.

Finally, it has not been alleged that everyone who attended a party and consumes alcohol and/or a spiked drink was raped or sexually assaulted. Likewise, individuals who have not attended parties and consumed alcohol and/or "date rape" drugs sometimes and tragically get raped or sexually assaulted. In other words, hosting this party was not a "necessary physical antecedent" to rape or sexual assault. Rather, the criminal act of raping or sexually assaulting someone is an intervening criminal act of violence that supersedes any negligence on the part of the party giver and/or drink server, breaking the chain of proximate causation. Accordingly, the Court should dismiss Plaintiff's negligence and gross negligence claims with prejudice to the extent they are

based on a theory of vicarious liability for the alleged negligence or gross negligence of the peer advisor in question.

## **VII. VWC's Hiring and Retention of the Peer Advisor Was Not a Proximate Cause**

For the reasons stated in Section VI, *supra*, any negligence or gross negligence on the part of the peer advisor in question was not a proximate cause of Plaintiff's alleged rape and sexual assault. It necessarily follows that any negligence or gross negligence on the part of VWC in hiring and retaining the peer advisor in question (which VWC vehemently denies), which was even further removed in the causal chain, was not a proximate cause of Plaintiff's alleged rape and sexual assault. Accordingly, the Court should dismiss Plaintiff's negligence and gross negligence claims with prejudice to the extent they are based on a theory of negligent hiring and retention of the peer advisor in question.

## **VIII. The Security Officer's Alleged Conduct Was Not a Proximate Cause**

As noted above, "[t]he proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produced the event, and without which that event would not have occurred." Beale, 210 Va. at 522, 171 S.E.2d at 853 (citations omitted). "To impose liability upon one person for damages incurred by another, it must be shown that the negligent conduct was a necessary physical antecedent to the damages." Id. (citing Wells, 207 Va. at 622, 151 S.E.2d at 428). Where the evidence of proximate causation is nothing more than speculation or conjecture, a trial judge may decide the issue of proximate causation. Id. (quoting Hawkins, 168 Va. at 561, 191 S.E. at 643; Wilkins, 205 Va. at 174, 135 S.E.2d at 767).

Here, Plaintiff alleges that campus security officers acted negligently in ignoring danger signs at the peer advisor's party, failing to stop the peer advisor's party, and failing to help Plaintiff back to her dormitory following the peer advisor's party. (Compl. ¶ 57). VWC denies that any campus security officers were aware of or appeared at the peer advisor's party. However, even if Plaintiff's allegations are true, and even if they constitute negligence imputable to VWC, the alleged conduct of the campus security officers was not a proximate cause of Plaintiff's alleged rape and sexual assault. For starters, Plaintiff could have declined the invitation to the party, refused any beverage offered to her at the party, left the party voluntarily at any time, or requested a security escort back to her dormitory. There is no allegation that the campus security officers, or any employee or agent of VWC, coerced Plaintiff to attend the party, consume alcohol underage, remain at the party against her wishes, or return to her dormitory without a security escort.

Furthermore, it has not been alleged that everyone who attended a party and consumes alcohol and/or a spiked drink was raped or sexually assaulted. Likewise, individuals who have not attended parties and consumed alcohol and/or "date rape" drugs sometimes and tragically get raped or sexually assaulted. In other words, the failure to stop a party and the failure to escort all party attendees back to their residences are not "necessary physical antecedent[s]" to rape or sexual assault. Rather, the criminal act of raping or sexually assaulting someone is an intervening cause that supersedes any negligence on the part of the individual who fails to stop the party and escort all party attendees back to their residences, breaking the chain of proximate causation. Accordingly, the Court should dismiss Plaintiff's negligence and gross negligence claims with prejudice to the extent they are based on a theory of vicarious liability for the alleged negligence or gross negligence of campus security officers.

**IX. VWC's Hiring and Retention of the Campus Security Officers Was Not a Proximate Cause**

For the reasons stated in Section VIII, *supra*, any negligence or gross negligence on the part of campus security officers was not a proximate cause of Plaintiff's alleged rape and sexual assault. It necessarily follows that any negligence or gross negligence on the part of VWC in hiring and retaining campus security officers (which VWC vehemently denies), which was even further removed in the causal chain, was not a proximate cause of Plaintiff's alleged rape and sexual assault. Accordingly, the Court should dismiss Plaintiff's negligence and gross negligence claims with prejudice to the extent they are based on a theory of negligent hiring and retention of campus security officers.

**X. In the Alternative, Plaintiff Assumed the Risk or Was Contributory Negligent**

As noted above, VWC finds rape and sexual assault abhorrent and vehemently denies playing any contributing role in the rape and sexual assault alleged by Plaintiff. Furthermore, by raising this defense, VWC does not mean to imply that poor judgment or any other shortcoming on Plaintiff's part justified the rape and sexual assault she alleges. Rather, as VWC's *Third-Party Complaint* should make clear, VWC takes the position that Robert Roe is the party who should be on trial, not Plaintiff and not VWC. Indeed, VWC takes the position that the allegedly tortious conduct of Robert Roe is quite different from that alleged but in any event, it was superseded any negligence on the part of Plaintiff or VWC, breaking the chain of proximate causation. However, for the reasons that follow, to the extent the Court would otherwise permit Plaintiff's negligence and

gross negligence claims against VWC to proceed, it should find that Plaintiff either assumed the risk of harm or was contributory negligent.

The law on contributory negligence and assumption of risk is clear and well-settled. If a plaintiff has knowledge of a danger and voluntarily elects to encounter it, she has assumed the risk of injury. See Arndt v. Russillo, 231 Va. 328, 332, 343 S.E.2d 84, 86 (1986) (quoting Arrington v. Graham, 203 Va. 310, 314, 124 S.E.2d 199, 202 (1962)). If instead a plaintiff has knowledge of a danger and fails to exercise ordinary care to avoid it, she is guilty of contributory negligence. See id. (quoting Arrington, 203 Va. at 314, 124 S.E.2d at 202). Both assumption of risk and contributory negligence are complete bars to recovery. See, e.g., Thurmond v. Prince William Professional Baseball Club, Inc., 265 Va. 59, 64, 574 S.E.2d 246, 249 (2003) (citing Arndt, 231 Va. at 332, 343 S.E.2d at 86; Landes v. Archart, 212 Va. 200, 202-03, 183 S.E.2d 127, 129 (1971)); Watson v. Va. Elec. & Power Co., 199 Va. 570, 575, 100 S.E.2d 774, 778 (1957).

Here, Plaintiff alleges that, during a mandatory orientation event, VWC “conveyed to freshman VWC students that they were at risk of being raped and victimized through sexual assault.” (Compl. ¶ 5). Plaintiff further alleges that VWC cautioned that the risk of rape on and off campus increased when parties included alcohol, as “students could be provided drinks spiked with drugs to facilitate rape and other sexual assaults.” (Compl. ¶ 5). As such, Plaintiff knew or should have known that she was at risk of being raped or sexually assaulted, and that the risk would increase if she consumed alcohol at parties, particularly if she left her drink unattended or accepted a drink she did not see prepared. Nevertheless, Plaintiff voluntarily accepted the risk, choosing to attend a party, consume alcohol underage, and presumably accept a drink she did not see prepared. (Compl. ¶ 12).



While VWC does not believe Plaintiff's conduct was a proximate cause of the alleged rape and sexual assault, it was at least as much of a proximate cause as the negligence Plaintiff has alleged on the part of VWC. Accordingly, if the Court finds that any negligence on the part of VWC was a proximate cause of Plaintiff's alleged rape and sexual assault, it should also find that Plaintiff's choices to attend the party at the peer advisor's townhouse, to consume alcohol underage, and presumably to accept a drink she did not see prepared, in complete disregard of VWC's warnings earlier in the previous day, constituted an assumption of risk or contributory negligence or both that bar her negligence and gross negligence claims.

#### **XI. The Alleged Fraud Was Not a Proximate Cause**

Similar to the case before this Court, the matter of Yuzefovsky v. St. John's Wood Apartments involved allegations of fraud, negligent failure to warn, and negligent failure to protect from a third-party criminal assault. 261 Va. at 101, 540 S.E.2d at 136. In Yuzefovsky, the plaintiff moved to Richmond and began looking for housing, with a desire to find something "in a safe and crime-free environment." Id. at 102, 540 S.E.2d at 137. The plaintiff discussed this desire with several employees of the defendants, which owned, operated, and/or managed an apartment complex. Id. These employees informed the plaintiff that the apartment complex was safe, that there had been no crimes at the apartment complex, and that police officers lived in and patrolled the apartment complex. Id. In reliance on these statements, the plaintiff signed a lease and took possession of a unit at the apartment complex. Id. at 103, 540 S.E.2d at 137. Some time thereafter, while at the apartment complex, an unidentified third-party shot the plaintiff with a sawed-off shotgun and stole the plaintiff's vehicle. Id.

The plaintiff subsequently filed suit against the defendants, alleging that the defendants' employees knowingly misrepresented facts regarding the safety of the apartment complex, the lack of any crimes at the apartment complex, and the police presence at the apartment complex. Id. The plaintiff further alleged that, in the year prior to the signing of his lease, there had been 656 crimes, including 113 crimes against persons, in the vicinity of the apartment complex, and that there had been no significant change in the crime rate during the period of his tenancy. Id. Still further, the plaintiff alleged that, during the 3-year period immediately preceding his assault, there had been 257 crimes, including 5 robberies, 8 aggravated assaults, 13 simple assaults, and 26 motor vehicle thefts, reported to have occurred at the apartment complex. Id. Finally, the plaintiff alleged that he relied on the misrepresentations made by the defendants' employees and suffered damages – i.e., was the victim of a criminal assault and motor vehicle theft – as a result. Id.

The defendants demurred to the plaintiff's fraud claim on grounds that the allegedly fraudulent statements were statements of opinion and therefore not actionable, and that the plaintiff's reliance on the statements was not justified. Id. at 104, 540 S.E.2d at 138. The trial court agreed, sustaining the demurrer on grounds that any statements regarding the safety of an area are statements of opinion and therefore not actionable, and that the plaintiff failed to establish a "causal nexus" between the statements at issue and criminal assault or motor vehicle theft. Id. at 105, 540 S.E.2d at 138. The plaintiff appealed. Id.

As part of its analysis, the Supreme Court noted that, "[i]n determining whether a cause of action for fraud sounds in contract or tort, and the damages that will arise therefrom, the source of the duty to abstain from making the fraudulent representation must be ascertained." Id. at 112, 540 S.E.2d at 142 (citing Richmond Metropolitan Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553,

558, 507 S.E.2d 344, 347 (1998)). The Supreme Court went on to state that the allegedly fraudulent statements at issue related to the lease plaintiff was induced to sign. Id. Therefore, the statements at issue did not arise from any common law duty. Id. This finding, coupled with the third-party criminal acts, led the Supreme Court to conclude that the plaintiff's claimed damages were not proximately related to the allegedly fraudulent statements. Id. at 112, 540 S.E.2d at 142-43. Accordingly, the Supreme Court affirmed the trial court's ruling. Id. at 112, 540 S.E.2d at 143.

The instant case presents a highly similar set of operative facts:

<b><u>Yuzefovsky</u></b>	<b>Plaintiff's Allegations</b>
The plaintiff asked employees of the defendants whether the apartment complex was safe and whether there had been any reported crimes at the apartment complex	Allegedly, plaintiff's mother asked VWC about crime in general, prior sexual assaults, etc. (Compl. ¶ 67)
Employees of the defendants told the plaintiff that the apartment complex was safe, that there had been no crimes at the apartment complex, and that police officers lived in and patrolled the apartment complex	Allegedly, VWC told Plaintiff's mother that campus was safe and provided information about reported crimes and sexual assaults (Compl. ¶ 68)
Employees of the defendants misrepresented facts regarding the safety of the apartment complex, the lack of any crimes at the apartment complex, and the police presence at the apartment complex	Allegedly, VWC failed to disclose true and accurate statistics regarding sexual assault (Compl. ¶ 71)
Employees of the defendants had knowledge of the criminal activity occurring at the apartment complex	Allegedly, VWC had knowledge of the high rate of sexual assaults on campus (Compl. ¶ 72)

Therefore, this Court should follow the Supreme Court's decision in Yuzefovsky. Specifically, this Court should find that the allegedly fraudulent statements made by VWC did not arise from any

common law duty, but were intended to induce Plaintiff to enroll at VWC. (Compl. ¶ 75).

Furthermore, the Court should find that any such fraudulent inducement (which VWC expressly denies) is too far removed from Plaintiff's alleged rape and sexual assault to establish proximate causation. See Beale, 210 Va. at 522, 171 S.E.2d at 853 (defining proximate causation). Cf. Burdette, 244 Va. at 311-12, 421 S.E.2d at 420 (citing Marshall, 239 Va. at 318, 389 S.E.2d at 904) (stating that third-party assaultive criminal acts are not foreseeable). Accordingly, the Court should dismiss Plaintiff's fraud claim with prejudice.

WHEREFORE the Defendant, Virginia Wesleyan College, respectfully requests that the Court dismiss this action with prejudice and award it the costs incurred in defense of this action and any additional relief the Court deems just and appropriate.

VIRGINIA WESLEYAN COLLEGE

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was sent via U.S. mail,  
postage prepaid, on this 29<sup>th</sup> day of October, 2014 to:

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A handwritten signature in dark ink, appearing to read 'S. Plotnick', is written over a horizontal line.



**TANJA H., Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents**

**No. A046913**

**Court of Appeal of California, First Appellate District, Division Two**

*228 Cal. App. 3d 434; 278 Cal. Rptr. 918; 1991 Cal. App. LEXIS 228; 91 Cal. Daily Op. Service 1809; 91 Daily Journal DAR 2978*

**March 12, 1991**

**PRIOR HISTORY:** [\*\*\*1] Superior Court of Alameda County, No. 630775-4, Dawn B. Girard, Judge.

Classified to California Digest of Official Reports, 3d Series

**DISPOSITION:** The judgment of dismissal is affirmed.

**SUMMARY:**

**CALIFORNIA OFFICIAL REPORTS SUMMARY**

A university student who was raped and sexually assaulted by fellow students following a party in a university dormitory they shared, filed an action against the university and certain of its officials for damages. The trial court sustained defendants' demurrer to plaintiff's second amended complaint without leave to amend and entered a judgment of dismissal. (Superior Court of Alameda County, No. 630775-4, Dawn B. Girard, Judge.)

The Court of Appeal affirmed, holding the trial court correctly sustained the demurrer of defendants, since they were not bound by a legal duty which would make them responsible for the crimes of students. It held a university is not liable as an insurer for the crimes of its students. The court also held plaintiff's claims based in part on the premises liability theory also failed to state a cause of action. (Opinion by Peterson, J., with Benson, J., concurring. Separate concurring opinion by Kline, P. J.)

**HEADNOTES**

**CALIFORNIA OFFICIAL REPORTS HEADNOTES**

**(1) Negligence § 9.4--Elements of Actionable Negligence--Duty of Care--Special Relationship--University and Officials--Student Raped by Other Students in Coed Dormitory.** -- --In an action against a university and its officials by a student alleging defendants were liable for her being raped and sexually assaulted by other students in plaintiff's coed dormitory following a party, the trial court properly sustained defendants' demurrer to plaintiff's second amended complaint without leave to amend and entered a judgment of dismissal. A university is not liable as an insurer for the crimes of its students. If the university were liable for damages caused by third parties, it would be required to impose onerous conditions on the freedom and privacy of resident students, and such restrictions are incompatible with a recognition that students are generally responsible for their own actions and welfare. Neither was the university liable under a premises liability theory, predicated on the existence of a shattered light bulb on a landing in the stairwell, where there was no meaningful causal connection between the broken light bulb and the sexual assault, which began in one dormitory room, continued on the landing, and continued in two other rooms. Neither could liability be imposed upon the university for allowing males, including football players, and females to have their rooms on the same floor of the dormitory.

[See 5 **Witkin**, Summary of Cal. Law (9th ed. 1988) Torts, § 869.]

**COUNSEL:** Tesler & Sandmann, Pauline H. Tesler and Eve T. Contente for Plaintiff and Appellant

**EXHIBIT**

**A**

tabbies

Crosby, Heafey, Roach & May, Peter W. Davis, Ned N. Isokawa, Joseph P. Mascovich and Howard A. Janssen for Defendants and Respondents.

**JUDGES:** Opinion by Peterson, J., with Benson, J., concurring. Separate concurring opinion by Kline, P. J.

## **OPINION BY: PETERSON**

### **OPINION**

[\*435]    [\*\*919] Appellant Tanja H. contends respondents, a university and its officials, are liable because appellant's fellow students raped her in a university dormitory after a party. Despite the outrageous and reprehensible conduct of the perpetrators, we must affirm the trial court's action in dismissing appellant's claims against respondents, the university and its officials. A university is not liable as an insurer for the crimes of its students.

#### **I. Facts and Procedural History**

For purposes of this appeal, we assume the truth of the facts as appellant has pleaded them; they do not portray activities at an elite institution of higher learning in a favorable light.

[\*436] Appellant was a young person in her first year of college in September of [\*\*\*2] 1986; she had been assigned to live in a dormitory in the Clark Kerr Campus of the University of California at Berkeley. Despite university regulations forbidding the use of alcohol by minors in university dormitories, and the requirement that students residing in dormitories sign an agreement to abide by this policy, there were parties in appellant's building where appellant and other students did substantial drinking. University officials or residence hall staff stopped some parties where persons under 21 had access to liquor, but not all of them. After one such party where appellant and other partygoers drank alcohol unhindered by university employees, she walked to the room of an acquaintance, Donald, at around midnight to borrow a cassette tape. She encountered Donald's twin brother, Ronald, who made sexual overtures. Appellant decided she wanted to go back to her own room. Ronald, however, forced appellant down the interior stairs of the building, to a dark landing where a light bulb had been shattered; Ronald forced appellant to orally copulate him and have intercourse with him.

Ronald then took appellant to a room occupied by John and Christian, where appellant's friend [\*\*\*3] Donald soon joined them. Appellant said she was upset

and wanted to go back to her own room. Donald suggested they go to his room instead, and appellant agreed.

At Donald's room, appellant was compelled to orally copulate Ronald, John, and Christian; appellant's friend Donald encouraged this. When appellant became more forceful in asserting her lack of consent, Donald told the others to leave but told appellant that if she didn't stop yelling he would beat her. Donald then forced appellant to have intercourse with him. Donald's friends reentered and watched, laughing. Appellant was then permitted to leave.

The four perpetrators were all members of the university football team and were much stronger, bigger, and heavier than appellant. Appellant was intimidated by them and feared they would harm her further if she did not comply with their demands.

In September 1987, exactly one year after these events, appellant filed an action asserting numerous tort claims against the [\*\*920] four perpetrators and against respondents, the Regents of the University of California and various university officials. She retained new counsel and filed an amended complaint in December 1988; her second [\*\*\*4] amended complaint, which is in issue here, was filed in March 1989.

[\*437] In May 1989, respondents filed a demurrer. After opposition and hearing, the trial court granted the demurrer as to respondents without leave to amend and entered a judgment of dismissal, from which this appeal proceeds.

#### **II. Discussion**

(1) Relevant authority indicates universities are not generally liable for the sometimes disastrous consequences which result from combining young students, alcohol, and dangerous or violent impulses.

In *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275 [176 Cal.Rptr. 809], the plaintiff was a young student at a state university. She became a quadriplegic in an auto collision which occurred when other inebriated, underage students engaged in an auto race after drinking on campus. (*Id.* at p. 279.) Despite the egregious misconduct of the plaintiff's fellow students -- and the terrible nature of her injuries, the Fifth District concluded the university was not legally responsible. "Since the turbulent '60s, California colleges and universities have been in the forefront of extension of student rights with a concomitant [\*\*\*5] withering of faculty and administrative omnipotence. Drug use has proliferated. Although the consumption of alcoholic beverages by persons under 21 years of age is proscribed by law [citation], the use of alcohol by college students is not so unusual or heinous by contemporary standards as to require special efforts



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by college administrators to stamp it out. Although the university reserved to itself the right to take disciplinary action for drinking on campus, this merely follows state law. [Citation.] The same may be said of the [dormitory rental] agreement prohibiting alcoholic beverages. We do not believe they created a mandatory duty." (*Id.* at p. 288.)

In the recent case of *Crow v. State of California* (1990) 222 Cal.App.3d 192 [271 Cal.Rptr. 349], the plaintiff was another student at a state university, and was badly beaten by a member of the football team whose violent propensities were apparently activated by alcohol served at a dormitory party. The Third District agreed with the Fifth that the university would not be liable for such a student's attack on another student, observing that the "distinction [\*\*\*6] between young, immature schoolchildren in grammar and high schools on the one hand and adult students in colleges and universities on the other was highlighted in *Baldwin v. Zoradi* . . . ." (*Id.* at p. 209.) "The [*Baldwin*] court held that the relationship between the trustees and the university students did not create a special relationship imposing a duty of care to prevent the injuries sustained by plaintiff." (*Ibid.*)

[\*438] College students are generally young adults who do not always have a mature understanding of their own limitations or the dangers posed by alcohol and violence. However, the courts have not been willing to require college administrators to reinstitute curfews, bed checks, dormitory searches, hall monitors, chaperons, and the other concomitant measures which would be necessary in order to suppress the use of intoxicants and protect students from each other. "Given these realities of modern college life, the university does not undertake a duty of care to safeguard its students from the risks of harm flowing from the use of alcoholic beverages . . . . Moreover, imposition of such a duty would be unwarranted [\*\*\*7] and impracticable . . . . We agree with the assessment of [the university] that it could 'not have prevented this [violent] incident from taking place except possibly by posting guards in each dorm room on a 24-hour, 365-day per year basis.' (Italics in original.) All these factors militate against the imposition of a legal duty upon [the university] under these circumstances." (*Id.*, 222 Cal.App.3d at p. 209; accord, *Bradshaw v. Rawlings* (3d Cir. 1979) 612 F.2d 135, 138 ["Our beginning point is a recognition that [\*921] the modern American college is not an insurer of the safety of its students."].)

In this respect, a university in its residual role as the operator of a dormitory used as living quarters by students is more akin to an innkeeper, who does not have a duty to search guests for contraband, separate them from each other, or monitor their private social activities. (

*Gray v. Kircher* (1987) 193 Cal.App.3d 1069, 1075 [236 Cal.Rptr. 891].) As campuses have, thus, moved away from their former role as semimonastic environments subject to intensive regulation of student lives by college authorities, [\*\*\*8] they have become microcosms of society; and unfortunately, sexually degrading conduct or violence in general -- and violence against women in particular -- are all too common within society at large. College administrators have a moral duty to help educate students in this respect, but they do not have a legal duty to respond in damages for student crimes.

We agree with appellant that it may be -- in some sense not relevant here -- foreseeable that a group of football players could rape a fellow student after a party where alcohol was served. The problem of gang rape, rape by acquaintances, and alcohol abuse on campuses is heinous. It is also foreseeable that there will always be criminals among us. The relevant issue here, however, is the one posed by the courts in *Baldwin*, *Crow*, and *Bradshaw*: Should a duty be imposed which would make colleges liable for damages caused by third parties, unless colleges impose onerous conditions on the freedom and privacy of resident students -- which restrictions are incompatible with a recognition that students are now generally responsible for their own actions and welfare? We note in this context it has even been held by one court [\*\*\*9] that university officials cannot interfere with the private [\*439] lives of students in order to prevent illegal substance abuse. (Cf., e.g., *Hill v. National Collegiate Athletic Assn.* (1990) 223 Cal.App.3d 1642 [273 Cal.Rptr. 402], review granted Dec. 20, 1990 (S018180) [University officials could not enforce a testing program in order to prevent substance abuse among college athletes, due to the privacy guaranty of the California Constitution.].) In these circumstances, the courts can establish the criminal and civil liability of the perpetrators of crimes; but the courts with good reason have been unwilling to shift moral and legal responsibility away from student perpetrators and onto the heads of college administrators.

Appellant also attempts to assert a claim based in part upon a premises liability theory: She claims respondents are liable for the rapes because there was a shattered light bulb on a landing in the stairwell. We can certainly agree respondents might be liable if appellant had stumbled in a darkened stairway, or even if she had been assaulted by someone lying in wait in the darkness. (Cf. *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 812-813 [205 Cal.Rptr. 842, 685 P.2d 1193] [\*\*\*10] [A college might be liable for a sexual assault where untrimmed foliage around a stairway allowed an assailant to lie in wait for victims.].) However, there was no meaningful causal connection here between failing to more quickly



fix a shattered light bulb and the sexual assault which began in one dormitory room, continued on the landing, and continued in two other rooms. No assailant was lurking in the dark; appellant's attackers were acquaintances she first encountered in their lighted rooms, where they overcame her resistance. As a matter of law, respondents' alleged failure to fix a light bulb on the stairs was not the legal cause of the assault on appellant. (Cf. *Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 212 [223 Cal.Rptr. 645] ["If we are unwilling as a matter of policy to insure against losses occasioned by crimes, we ought not foist that burden haphazardly on persons not at fault for criminal misbehavior. We conclude that the lighting condition was not a proximate cause of the assault."].)

In connection with her premises liability allegations as to the shattered light bulb, appellant also contends that respondents [\*\*\*11] violated express or implied promises concerning the safety and [\*\*922] security of the dormitory premises. However, again, it was not the lack of safe illumination on the stairs, or the lack of security from outside intruders, which caused appellant to be assaulted by acquaintances. (See 178 Cal.App.3d at p. 212.)

Further, on appeal, appellant attacks the university for allowing males, including football players, and females to have their rooms on the same floor of the dormitory; she contends that dorms which have coed floors are more likely to be the sites of sexual assaults by students. This propinquity [\*440] argument fails, however, because (1) no court has held that a university has a legal duty to segregate students in dormitories, according to their sex or any other personal characteristic; and (2) in this specific case, segregation by floor would plainly not have helped. Appellant's assailants obviously knew how to use the stairs; appellant could just as easily have gone to her friend's room where the assaults began if the room had been on another floor; and there was no meaningful causal connection between the assaults and the layout of the premises.

[\*\*\*12] While appellant also cites in her appellate brief certain statistics which appear to show that the problem of rape by acquaintances is widespread on college campuses, those statistics certainly do not show that rapes are caused by shattered light bulbs or any particular method of room assignments; they would seem to show that the problem is so widespread that it cannot properly be related to any particular campus, living situation, or degree of illumination.<sup>1</sup>

1 Further, quite aside from the fact that it is unclear why these statistics would support the imposition of liability on the university for having students of both sexes in proximity on its

premises, these statistics also would not be the proper subject of our judicial notice in any event, since it is impossible for us to determine their scientific validity or relevance. (See *Galloway v. Moreno* (1960) 183 Cal.App.2d 803, 808-809 [7 Cal.Rptr. 349] [proper to refuse judicial notice of debatable statistical evidence regarding premature births]; *Comings v. State Bd. of Education* (1972) 23 Cal.App.3d 94, 101-102 [100 Cal.Rptr. 73, 47 A.L.R.3d 742] [refusing to take judicial notice of alleged scientific principle gleaned from selected medical and statistical studies, to the effect that the use of marijuana causes no ill effects on the human body]; *Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180 Cal.App.3d 152, 162 [225 Cal.Rptr. 364] [declining to take judicial notice for the first time on appeal of the contents of certain treatises on appraisal practices, since "we have no way of knowing if they are indisputably accurate sources"].)

[\*\*\*13] Appellant's inventive arguments for the imposition of vicarious liability on respondents for the actions of students also fail to acknowledge the force of existing contrary authorities. In *Baldwin v. Zoradi, supra*, the plaintiff had alleged, as here, that a university was liable because it had a policy against the consumption of alcohol by minors, required residents of dormitories to sign an agreement to abide by this policy, and told dormitory staff to enforce the policy. (123 Cal.App.3d at pp. 279-280, 284-285, 295-300.)

The plaintiff in *Baldwin* further argued that the university's efforts to lessen the problem of underage drinking on campus meant the university was liable for her crippling injuries in an auto accident, which occurred after students became drunk on campus; but the *Baldwin* court disagreed: "We do not believe [these university actions] created a mandatory duty. As [\*441] stated in *Bradshaw v. Rawlings, supra*, 612 F.2d at page 141: '[Plaintiff] has concentrated on the school regulation imposing sanctions on the use of alcohol by students . . . . We are not impressed [\*\*\*14] that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case . . . . A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship with its students so as to [impose a duty of protection].'" (123 Cal.App.3d at p. 288.)

More recently, in *Crow v. State of California, supra*, the plaintiff alleged the university [\*\*923] was liable because, in derogation of its duty to maintain its dormi-

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tory in safe condition, it allowed a student football player to enter the dormitory for a party, where he became inebriated and attacked the plaintiff. (222 Cal.App.3d at pp. 204, 197.) Relying on *Baldwin*, supra, 123 Cal.App.3d 275, and *Bradshaw*, supra, 612 F.2d 135, the Third District held the university was not vicariously liable for the assault by one student upon another, [\*\*\*15] under any state of facts. "[S]ince the flaws in plaintiff's theories -- the lack of a dangerous condition of public property or special relationship imposing a duty -- cannot be cured, there was no abuse of discretion in denying the plaintiff a continuance for further discovery." ( *Id.* at pp. 209-210.)

Even more recently, this court (Division Two) in analogous circumstances resisted similar inventive arguments in favor of the imposition of vicarious liability or premises liability for an assault by a third party: "To hold as appellant urges in this case would simply improperly impose a remote and insubstantial factor, or a cause out of natural and continuous sequence, as the legal basis for recovery . . . . We find no reason of precedent or policy justifying such unwarranted extension of vicarious tort liability." ( *Martinez v. Pacific Bell* (1990) 225 Cal.App.3d 1557, 1569-1570 [275 Cal.Rptr. 878].)

We conclude the trial court correctly sustained the demurrer of respondents, since they were not bound by a legal duty which would make them responsible here for the crimes of students. Our resolution of the appeal on these grounds [\*\*\*16] makes it unnecessary for us to address the other basis of respondents' demurrer: the asserted lack of timeliness of the amended claims against respondents. If we were to address this contention, we would likely reject it. The claims asserted in the amended complaint were sufficiently closely related to the claims in the original timely complaint, and concerned the same general set of facts, so that the doctrine of relation [\*442] back would apply. ( *Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 940 [136 Cal.Rptr. 269, 559 P.2d 624, 85 A.L.R.3d 121].)

However, even though the claims against respondents may be timely, the trial judge acted correctly when she sustained their demurrer. (See *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1013 [272 Cal.Rptr. 222] ["A complaint which lacks facts to show that a duty of care was owed is fatally defective."].)

### III.

The judgment of dismissal is affirmed.

**CONCUR BY: KLINE**

**CONCUR**

**KLINE, P. J., Concurring.**

"[A]n indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the wrongdoer to the person injured [\*\*\*17] . . . ." ( *Routh v. Quinn* (1942) 20 Cal.2d 488, 491 [127 P.2d 1, 149 A.L.R. 215].) I concur with my colleagues that there is no duty in this case chiefly because I do not believe University of California (the University) placed plaintiff in a position of danger or materially contributed to the harm she suffered; nor do I believe the University should reasonably have anticipated plaintiff would rely on it to protect her against the harm she suffered.

In seeking to establish a duty, plaintiff emphasizes that the University either knew or should have known of the high risk of sexual assaults upon its female students. In her brief she sums up her contention as follows: "[T]he information available to respondents at or about the time plaintiff was raped, in mass media, social science research, and professional educators' publications, reveals that by the early to mid-1980's, the danger to young women in plaintiff's position of precisely the injury she alleges -- gang rape by male student acquaintances -- had been clearly documented in publications of which respondents could not reasonably have been unaware." <sup>1</sup>

1 My colleagues are unwilling to take judicial notice of these numerous studies and articles because "it is impossible for us to determine their scientific validity or relevance." (Maj. opn., ante, at p. 440, fn. 1.) I do not share this concern. Plaintiff claims the academic studies and other reports showing high levels of sexual violence on campus were so numerous that university administrators could not claim this danger was unforeseeable, entirely apart from the "scientific validity" of any particular study. Furthermore, defendant University has not claimed that any of the cited studies are scientifically invalid or factually misleading.

[\*\*\*18] [\*443] [\*\*924] It is indisputable that a large body of recent empirical studies documents an alarming level of sexual assaults against female students at American colleges and universities. In one of the most impressive studies, based on a national sample of 6,159 male and female students enrolled in 32 institutions of higher education across the United States, 12.1 percent of the women respondents said they had been the victim of at least 1 attempted rape; 15.4 percent said they actually had been raped; and 53.7 percent said they had experienced some form of "sexual victimization." (Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. of Consulting & Clinical Psych. 162, 166 (1987).) Other studies report

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similar findings. (See, e.g., Rapaport & Burkhart, *Personality and Attitudinal Characteristics of Sexually Coercive College Males*, 93 J. of Abnormal Psych. 216, 220 (1984); Lott et al., *Sexual Assault and Harassment: A Campus Community Case Study*, 8 Signs: J. of Women in Culture & Society 296, 306 (1982); Fenstermacher, *Acquaintance Rape on Campus: Responsibility and Attributions* [\*\*\*19] of Crime, in Pirog-Good & Stets (eds.) *Violence In Dating Relationships: Emerging Social Issues*, at pp. 257-271 (1989).)

However, none of the studies just cited, nor others brought to our attention by plaintiff, suggest that the incidence of sexual assault occurring on college and university campuses is any different from that occurring elsewhere in American society or that female college or university students are a particularly vulnerable group because they reside on or near a campus or due to the consumption of alcohol in campus dormitories. The reason many studies of the prevalence of rape and other forms of sexual aggression have involved college students is simply because they are an available sample "in the same age range as the bulk of [all] rape victims and offenders. The victimization rate for women peaks in the 16-19 year-old age group, and the second highest rate occurs in the 20-24 year-old age group. The victimization rates for these [age] groups are approximately 4 times higher than the mean for all women. Also, 45% of all alleged rapists who are arrested are individuals under age of 25." (Koss et al., *The Scope of Rape*, *supra*, 55 J. of Consulting & Clinical [\*\*\*20] Psych. at p. 163, citations omitted.)

Appallingly, sexual aggression is endemic throughout our society. Finding that "the locus of violence against women rests squarely in the middle of what our culture defines as 'normal' interaction between men and women," one study asserts that "the average American woman is just as likely to suffer a sexual attack as she is to be diagnosed as having cancer, or to experience a divorce." (Johnson, *On the Prevalence of Rape in the United States*, 6 Signs: J. of Women in Culture & Society 136, 146 (1980), see also, Brownmiller, *Against Our Will: Men, Women and Rape* (1975); Katz & [\*\*\*444] Mazur, *Understanding the Rape Victim: A Synthesis of Research Findings* (1979).)

This information is of no assistance to plaintiff. While the studies she relies upon show that women her age are particularly vulnerable to sexual assault, they establish no connection between sexual violence and the conduct of university administrators (or other landlords); indeed, the empirical data strongly suggests there is no such connection.

Nor do the studies or any other evidence provide reason to think university students are unaware of the

risk of sexual violence on campus [\*\*\*21] and elsewhere or that they rely for protection on university administrators. To suppose that it is uniquely within the power of campus officials to diminish this risk would not only exaggerate their abilities but trivialize the problem.

Though it involved a cause of action for a dangerous condition of property under *Government Code section 835*, and a different [\*\*\*925] type of premises, *Hayes v. State of California* (1974) 11 Cal.3d 469 [113 Cal.Rptr. 599, 521 P.2d 855] is nonetheless relevant. In that case, two youths were attacked and beaten by unknown third persons while asleep at night on a beach on the campus of the University of California at Santa Barbara. A unanimous Supreme Court found the Regents of the University and other government defendants were under no duty to warn against criminal conduct. The court acknowledged "that the warning called for by plaintiffs might be beneficial in some instances . . ." ( *Id.*, at p. 472, fn. omitted.) But because of "public awareness of the prevalence of crime and policy factors," the court believed "it would serve little purpose for government to further [\*\*\*22] remind the public of this unfortunate circumstance in society." ( *Id.*, at p. 473.) The court also felt that warning of the danger of criminal conduct on university premises -- "unlike cautioning against a specific hazard in the use of property -- admonishes against any use of the property whatever, thus effectively closing the area." (*Ibid.*, italics in original.)

As explained in the majority opinion, plaintiff's premises liability theory is untenable. Therefore, like *Hayes*, the present case is distinguishable from cases, such as *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799 [205 Cal.Rptr. 842, 685 P.2d 1193], where the duty to warn was imposed in connection with "physical defects" of property that increased the risk of crime. ( *Id.*, at p. 813; see also *Kenny v. Southeastern Pennsylvania Transp.* (3d Cir. 1978) 581 F.2d 351, cert. den. 439 U.S. 1073 [59 L.Ed.2d 39, 99 S.Ct. 845].) It is also different from cases in which the landlord had notice of repeated [\*\*\*23] criminal assaults in the particular building [\*\*\*445] in which the plaintiff resided and of the likelihood of repeated attacks, and took no precautions to protect his tenants or concealed the problem. (See, e.g., *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802 [142 Cal.Rptr. 487]; *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (D.C. Cir. 1970) 439 F.2d 477, 479, 481.)

Absent a special relationship, a person who has not created a peril may not be held liable for failure to protect against it. ( *Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137].) Nor can the University be said to be under a legal duty to protect plaintiff from harm simply because it adopted a policy forbidding the consumption of alcohol in its dor-

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mitories and took some uneven action to enforce that policy. (See Seavey, *Reliance Upon Gratuitous Promises or Other Conduct* (1951) 64 Harv. L. Rev. 913, 918, 919, fn. 24 ["a gratuitous promise should not acquire validity merely by partial performance."])

Plaintiff has not only failed [\*\*\*24] to establish a close connection between the university's conduct and the injury suffered by plaintiff, which is a factor bearing upon the existence of the asserted "duty" ( *Rowland v. Christian* (1968) 69 Cal.2d 108, 113 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]), but she ignores the legal significance of the fact that the conduct she complains of constitutes a nonfeasance rather than a misfeasance. Where, as here, the defendant's conduct made the plaintiff's situation no worse, and merely failed to benefit her by interfering in her affairs, liability is imposed only where the defendant possesses considerably more power over the plaintiff's welfare than is evident here. (Prosser & Keeton, *Torts* (5th ed. 1984) pp. 373-374; Harper & Kime, *The Duty to Control the Conduct of Another* (1934) 43 Yale L.J. 886; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U. Pa. L. Rev. 217, 219.)

Plaintiff has also oversimplified the issue of foreseeability. The question in this case is not simply whether sexual violence on campus was foreseeable --

which I think must [\*\*\*25] be conceded -- but whether plaintiff's reliance on the ability of the University to protect her against sexual assault was both reasonable and foreseeable and whether the University should also have foreseen an unreasonable likelihood of harm as a result of such reliance, if the University's promise to supervise student conduct in the dormitory [\*\*926] was not carried out. Plaintiff does not satisfactorily address these requirements. For example, in connection with the element of reliance, she does not allege what precaution she would otherwise have taken to prevent the sexual assaults she experienced, which, as indicated, are not confined to University premises.

[\*446] The imposition of a duty to exercise care with resulting liability for breach would hold the University liable for a risk it neither created nor exacerbated nor can readily abate. As my colleagues point out, such a duty cannot be imposed without resurrecting the university's role of in loco parentis, which is no longer feasible, even accepting the doubtful assumption it would be wise. ( *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 287-288 [176 Cal.Rptr. 809]; *Bradshaw v. Rawlings* (3d Cir. 1979) 612 F.2d 135, 138-140.) [\*\*\*26]

For the foregoing reasons, in addition to those set forth in the majority opinion, I agree that the judgment below should be affirmed.





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\*\*\* issue of the Federal Register \*\*\*

TITLE 34 -- EDUCATION  
SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION  
CHAPTER VI -- OFFICE OF POSTSECONDARY EDUCATION, DEPARTMENT OF EDUCATION  
PART 668 -- STUDENT ASSISTANCE GENERAL PROVISIONS  
SUBPART D -- INSTITUTIONAL AND FINANCIAL ASSISTANCE INFORMATION FOR STUDENTS

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*34 CFR 668.46*

THERE ARE MULTIPLE VERSIONS OF THIS DOCUMENT.

§ 668.46 Institutional security policies and crime statistics. [Effective until July 1, 2015.]

[PUBLISHER'S NOTE: This section was revised at 79 FR 62752, 62783, Oct. 20, 2014, effective July 1, 2015. For the convenience of the user, the section has been set out twice. The version effective until July 1, 2015, immediately follows this note. For the version effective July 1, 2015, see the version following this section, also numbered § 668.46.]

(a) Additional definitions that apply to this section.

Business day: Monday through Friday, excluding any day when the institution is closed.

Campus: (1) Any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution's educational purposes, including residence halls; and

(2) Any building or property that is within or reasonably contiguous to the area identified in paragraph (1) of this definition, that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).

Campus security authority: (1) A campus police department or a campus security department of an institution.

(2) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department under paragraph (1) of this definition, such as an individual who is responsible for monitoring entrance into institutional property.

(3) Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses.

(4) An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings. If such an official is a pastoral or professional counselor as defined below, the official is not considered a campus security authority when acting as a pastoral or professional counselor.

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Noncampus building or property: (1) Any building or property owned or controlled by a student organization that is officially recognized by the institution; or

(2) Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution's educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.

Pastoral counselor: A person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor.

Professional counselor: A person whose official responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope of his or her license or certification.

Public property: All public property, including thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.

Referred for campus disciplinary action: The referral of any person to any campus official who initiates a disciplinary action of which a record is kept and which may result in the imposition of a sanction.

Test: Regularly scheduled drills, exercises, and appropriate follow-through activities, designed for assessment and evaluation of emergency plans and capabilities.

(b) Annual security report. An institution must prepare an annual security report that contains, at a minimum, the following information:

(1) The crime statistics described in paragraph (c) of this section.

(2) A statement of current campus policies regarding procedures for students and others to report criminal actions or other emergencies occurring on campus. This statement must include the institution's policies concerning its response to these reports, including --

(i) Policies for making timely warning reports to members of the campus community regarding the occurrence of crimes described in paragraph (c)(1) of this section;

(ii) Policies for preparing the annual disclosure of crime statistics; and

(iii) A list of the titles of each person or organization to whom students and employees should report the criminal offenses described in paragraph (c)(1) of this section for the purpose of making timely warning reports and the annual statistical disclosure. This statement must also disclose whether the institution has any policies or procedures that allow victims or witnesses to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics, and, if so, a description of those policies and procedures.

(3) A statement of current policies concerning security of and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.

(4) A statement of current policies concerning campus law enforcement that --

(i) Addresses the enforcement authority of security personnel, including their relationship with State and local police agencies and whether those security personnel have the authority to arrest individuals;

(ii) Encourages accurate and prompt reporting of all crimes to the campus police and the appropriate police agencies; and

(iii) Describes procedures, if any, that encourage pastoral counselors and professional counselors, if and when they deem it appropriate, to inform the persons they are counseling of any procedures to report crimes on a voluntary, confidential basis for inclusion in the annual disclosure of crime statistics.

(5) A description of the type and frequency of programs designed to inform students and employees about campus security procedures and practices and to encourage students and employees to be responsible for their own security and the security of others.

(6) A description of programs designed to inform students and employees about the prevention of crimes.

(7) A statement of policy concerning the monitoring and recording through local police agencies of criminal activity in which students engaged at off-campus locations of student organizations officially recognized by the institution, including student organizations with off-campus housing facilities.

(8) A statement of policy regarding the possession, use, and sale of alcoholic beverages and enforcement of State underage drinking laws.

(9) A statement of policy regarding the possession, use, and sale of illegal drugs and enforcement of Federal and State drug laws.

(10) A description of any drug or alcohol-abuse education programs, as required under section 120(a) through (d) of the HEA. For the purpose of meeting this requirement, an institution may cross-reference the materials the institution uses to comply with section 120(a) through (d) of the HEA.

(11) A statement of policy regarding the institution's campus sexual assault programs to prevent sex offenses, and procedures to follow when a sex offense occurs. The statement must include --

(i) A description of educational programs to promote the awareness of rape, acquaintance rape, and other forcible and nonforcible sex offenses;

(ii) Procedures students should follow if a sex offense occurs, including procedures concerning who should be contacted, the importance of preserving evidence for the proof of a criminal offense, and to whom the alleged offense should be reported;

(iii) Information on a student's option to notify appropriate law enforcement authorities, including on-campus and local police, and a statement that institutional personnel will assist the student in notifying these authorities, if the student requests the assistance of these personnel;

(iv) Notification to students of existing on- and off-campus counseling, mental health, or other student services for victims of sex offenses;

(v) Notification to students that the institution will change a victim's academic and living situations after an alleged sex offense and of the options for those changes, if those changes are requested by the victim and are reasonably available;

(vi) Procedures for campus disciplinary action in cases of an alleged sex offense, including a clear statement that --

(A) The accuser and the accused are entitled to the same opportunities to have others present during a disciplinary proceeding; and

(B) Both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense. Compliance with this paragraph does not constitute a violation of the Family Educational Rights and Privacy Act (20 U.S.C. 1232g). For the purpose of this paragraph, the outcome of a disciplinary proceeding means only the institution's final determination with respect to the alleged sex offense and any sanction that is imposed against the accused; and

(vii) Sanctions the institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, or other forcible or nonforcible sex offenses.

(12) Beginning with the annual security report distributed by October 1, 2003, a statement advising the campus community where law enforcement agency information provided by a State under section 170101(j) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(j)), concerning registered sex offenders may be obtained, such as the law enforcement office of the institution, a local law enforcement agency with jurisdiction for the campus, or a computer network address.

(13) Beginning with the annual security report distributed by October 1, 2010, a statement of policy regarding emergency response and evacuation procedures, as described in paragraph (g) of this section.

(14) Beginning with the annual security report distributed by October 1, 2010, a statement of policy regarding missing student notification procedures, as described in paragraph (h) of this section.

(c) Crime statistics. (1) Crimes that must be reported. An institution must report statistics for the three most recent calendar years concerning the occurrence on campus, in or on noncampus buildings or property, and on public property of the following that are reported to local police agencies or to a campus security authority:

(i) Criminal homicide:

(A) Murder and nonnegligent manslaughter.

(B) Negligent manslaughter.

(ii) Sex offenses:

(A) Forcible sex offenses.

(B) Nonforcible sex offenses.

(iii) Robbery.

(iv) Aggravated assault.

(v) Burglary.

(vi) Motor vehicle theft.

(vii) Arson.

(viii) (A) Arrests for liquor law violations, drug law violations, and illegal weapons possession.

(B) Persons not included in paragraph (c)(1)(viii)(A) of this section, who were referred for campus disciplinary action for liquor law violations, drug law violations, and illegal weapons possession.

(2) Recording crimes. An institution must record a crime statistic in its annual security report for the calendar year in which the crime was reported to a campus security authority.

(3) Reported crimes if a hate crime. An institution must report, by category of prejudice, the following crimes reported to local police agencies or to a campus security authority that manifest evidence that the victim was intentionally selected because of the victim's actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability:

(i) Any crime it reports pursuant to paragraph (c)(1)(i) through (vii) of this section.

(ii) The crimes of larceny-theft, simple assault, intimidation, and destruction/damage/vandalism of property.

(iii) Any other crime involving bodily injury.

(4) Crimes by location. The institution must provide a geographic breakdown of the statistics reported under paragraphs (c)(1) and (3) of this section according to the following categories:

(i) On campus.

(ii) Of the crimes in paragraph (c)(4)(i) of this section, the number of crimes that took place in dormitories or other residential facilities for students on campus.

(iii) In or on a noncampus building or property.

(iv) On public property.

(5) Identification of the victim or the accused. The statistics required under paragraphs (c)(1) and (3) of this section may not include the identification of the victim or the person accused of committing the crime.

(6) Pastoral and professional counselor. An institution is not required to report statistics under paragraphs (c)(1) and (3) of this section for crimes reported to a pastoral or professional counselor.

(7) UCR definitions. An institution must compile the crime statistics required under paragraphs (c)(1) and (3) of this section using the definitions of crimes provided in appendix A to this subpart and the Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Hate Crime Data Collection Guidelines and Training Guide for Hate Crime Data Collection. For further guidance concerning the application of definitions and classification of crimes, an institution must use either the UCR Reporting Handbook or the UCR Reporting Handbook: NIBRS EDITION, except that in determining how to report crimes committed in a multiple-offense situation an institution must use the UCR Reporting



Handbook. Copies of the UCR publications referenced in this paragraph are available from: FBI, Communications Unit, 1000 Custer Hollow Road, Clarksburg, WV 26306 (telephone: 304-625-2823).

(8) Use of a map. In complying with the statistical reporting requirements under paragraphs (c)(1) and (3) of this section, an institution may provide a map to current and prospective students and employees that depicts its campus, noncampus buildings or property, and public property areas if the map accurately depicts its campus, noncampus buildings or property, and public property areas.

(9) Statistics from police agencies. In complying with the statistical reporting requirements under paragraphs (c)(1) through (4) of this section, an institution must make a reasonable, good faith effort to obtain the required statistics and may rely on the information supplied by a local or State police agency. If the institution makes such a reasonable, good faith effort, it is not responsible for the failure of the local or State police agency to supply the required statistics.

(d) Separate campus. An institution must comply with the requirements of this section for each separate campus.

(e) Timely warning and emergency notification. (1) An institution must, in a manner that is timely and will aid in the prevention of similar crimes, report to the campus community on crimes that are --

(i) Described in paragraph (c)(1) and (3) of this section;

(ii) Reported to campus security authorities as identified under the institution's statement of current campus policies pursuant to paragraph (b)(2) of this section or local police agencies; and

(iii) Considered by the institution to represent a threat to students and employees.

(2) An institution is not required to provide a timely warning with respect to crimes reported to a pastoral or professional counselor.

(3) If there is an immediate threat to the health or safety of students or employees occurring on campus, as described in paragraph (g)(1) of this section, an institution must follow its emergency notification procedures. An institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed.

(f) Crime log. (1) An institution that maintains a campus police or a campus security department must maintain a written, easily understood daily crime log that records, by the date the crime was reported, any crime that occurred on campus, on a noncampus building or property, on public property, or within the patrol jurisdiction of the campus police or the campus security department and is reported to the campus police or the campus security department. This log must include --

(i) The nature, date, time, and general location of each crime; and

(ii) The disposition of the complaint, if known.

(2) The institution must make an entry or an addition to an entry to the log within two business days, as defined under paragraph (a) of this section, of the report of the information to the campus police or the campus security department, unless that disclosure is prohibited by law or would jeopardize the confidentiality of the victim.

(3)(i) An institution may withhold information required under paragraphs (f)(1) and (2) of this section if there is clear and convincing evidence that the release of the information would --

(A) Jeopardize an ongoing criminal investigation or the safety of an individual;

(B) Cause a suspect to flee or evade detection; or

(C) Result in the destruction of evidence.

(ii) The institution must disclose any information withheld under paragraph (f)(3)(i) of this section once the adverse effect described in that paragraph is no longer likely to occur.

(4) An institution may withhold under paragraphs (f)(2) and (3) of this section only that information that would cause the adverse effects described in those paragraphs.

(5) The institution must make the crime log for the most recent 60-day period open to public inspection during normal business hours. The institution must make any portion of the log older than 60 days available within two business days of a request for public inspection.

(g) Emergency response and evacuation procedures. An institution must include a statement of policy regarding its emergency response and evacuation procedures in the annual security report. This statement must include--

(1) The procedures the institution will use to immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on the campus;

(2) A description of the process the institution will use to--

(i) Confirm that there is a significant emergency or dangerous situation as described in paragraph (g)(1) of this section;

(ii) Determine the appropriate segment or segments of the campus community to receive a notification;

(iii) Determine the content of the notification; and

(iv) Initiate the notification system.

(3) A statement that the institution will, without delay, and taking into account the safety of the community, determine the content of the notification and initiate the notification system, unless issuing a notification will, in the professional judgment of responsible authorities, compromise efforts to assist a victim or to contain, respond to, or otherwise mitigate the emergency;

(4) A list of the titles of the person or persons or organization or organizations responsible for carrying out the actions described in paragraph (g)(2) of this section;

(5) The institution's procedures for disseminating emergency information to the larger community; and

(6) The institution's procedures to test the emergency response and evacuation procedures on at least an annual basis, including--

(i) Tests that may be announced or unannounced;

(ii) Publicizing its emergency response and evacuation procedures in conjunction with at least one test per calendar year; and

(iii) Documenting, for each test, a description of the exercise, the date, time, and whether it was announced or unannounced.

(h) Missing student notification policies and procedures. (1) An institution that provides any on-campus student housing facility must include a statement of policy regarding missing student notification procedures for students who reside in on-campus student housing facilities in its annual security report. This statement must--

(i) Indicate a list of titles of the persons or organizations to which students, employees, or other individuals should report that a student has been missing for 24 hours;

(ii) Require that any missing student report must be referred immediately to the institution's police or campus security department, or, in the absence of an institutional police or campus security department, to the local law enforcement agency that has jurisdiction in the area;

(iii) Contain an option for each student to identify a contact person or persons whom the institution shall notify within 24 hours of the determination that the student is missing, if the student has been determined missing by the institutional police or campus security department, or the local law enforcement agency;

(iv) Advise students that their contact information will be registered confidentially, that this information will be accessible only to authorized campus officials, and that it may not be disclosed, except to law enforcement personnel in furtherance of a missing person investigation;

(v) Advise students that if they are under 18 years of age and not emancipated, the institution must notify a custodial parent or guardian within 24 hours of the determination that the student is missing, in addition to notifying any additional contact person designated by the student; and

(vi) Advise students that, the institution will notify the local law enforcement agency within 24 hours of the determination that the student is missing, unless the local law enforcement agency was the entity that made the determination that the student is missing.

(2) The procedures that the institution must follow when a student who resides in an on-campus student housing facility is determined to have been missing for 24 hours include--

(i) If the student has designated a contact person, notifying that contact person within 24 hours that the student is missing;

(ii) If the student is under 18 years of age and is not emancipated, notifying the student's custodial parent or guardian and any other designated contact person within 24 hours that the student is missing; and

(iii) Regardless of whether the student has identified a contact person, is above the age of 18, or is an emancipated minor, informing the local law enforcement agency that has jurisdiction in the area within 24 hours that the student is missing.

(Approved by the Office of Management and Budget under control number 1840-0022)

**HISTORY:** [59 *FR* 22318, Apr. 29, 1994; 60 *FR* 34431, June 30, 1995; redesignated and revised at 64 *FR* 59060, 59067, 59069, Nov. 1, 1999; 65 *FR* 65632, 65637, Nov. 1, 2000; 67 *FR* 66520, Oct. 31, 2002; 74 *FR* 55902, 55945, Oct. 29, 2009]

**AUTHORITY:** (20 *U.S.C.* 1092)

**NOTES:** NOTES APPLICABLE TO ENTIRE CHAPTER:

CROSS-REFERENCE: Regulations for State Grants for Strengthening the Skills of Teachers and Instruction in Mathematics, Science, Foreign Languages, and Computer Learning and for increasing the Access of all Students to That Instruction, 34 CFR Part 208.

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter VI Final priorities, see: 78 *FR* 5036, Jan. 23, 2013; 79 *FR* 17035, Mar. 27, 2014; 79 *FR* 31028, May 30, 2014; 79 *FR* 31031, May 30, 2014; 79 *FR* 31870, June 3, 2014; 79 *FR* 32651, June 6, 2014; 79 *FR* 33432, June 11, 2014.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: Federal Register Citations concerning Regulatory Relief from the requirements of certain sections of Part 668: 58 *FR* 52195, Oct. 6, 1993; 59 *FR* 17648, Apr. 13, 1994; 59 *FR* 32657, June 24, 1994; 59 *FR* 33681, June 30, 1994; 61 *FR* 58928, Nov. 19, 1996; 68 *FR* 69312, Dec. 12, 2003; 70 *FR* 61037, Oct. 20, 2005; 72 *FR* 72947, Dec. 26, 2007.]

[PUBLISHER'S NOTE: For Federal Register Citations concerning Part 668 Waivers and Modifications, see: 77 *FR* 59311, Sept. 27, 2012.]

CASE NOTES Applicable to entire Part:Part Note