IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JASMIN HERNANDEZ, Plaintiff,	§ § §	
v.	§	Civil Action No. 6:16-CV-00069
BAYLOR UNIVERSITY; ART BRILES, In His Official Capacity As Head Football Coach; and IAN McCAW, In His Official Capacity As Athletic Director, Defendants.	§ § § § §	

DEFENDANTS' MOTION TO DISMISS
IN RESPONSE TO PLAINTIFF'S AMENDED COMPLAINT

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TO THE JUDGE OF THE HONORABLE COURT:

Defendants Baylor University, Ian McCaw in his official capacity as former athletic director, and Art Briles in his official capacity as former head football coach move to dismiss Plaintiff's amended complaint (ECF No. 28) as follows:

OVERVIEW

Plaintiff Jasmin Hernandez is a former Baylor University student. Hernandez attended an off-campus party on April 15, 2012, and was raped by a fellow student, Tevin Elliott. Elliott was convicted in January 2014 of sexually assaulting Hernandez. *See Elliott v. State of Texas*, 2015 WL 1877052 (Tex. App. – Waco, April 23, 2015, pet. ref'd) (unreported). Plaintiff has sued Baylor and its former head football coach and former athletic director in their "official capacities," asserting tort claims under Texas law and claims under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Although the University condemns Elliot's reprehensible, criminal acts, dismissal is warranted because Plaintiff has failed to state a claim for which relief can be granted. In particular, Plaintiff's claims are time-barred on their face. Further, while Baylor is concerned for the welfare of all of its students, it is well settled that institutions of higher education may not be held liable in damages for criminal acts perpetrated by students against other students at a private, off-campus party unaffiliated with the institution. Because Hernandez has failed to state a plausible claim, Baylor and its officials move to dismiss all claims.

STANDARD OF REVIEW

To avert dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the plaintiff's complaint must provide sufficient factual allegations that, when assumed to be true, state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. When a complaint pleads acts that are "merely consistent with" a defendant's liability, "it 'stops short of the line between possibility and plausibility.'" *Id*. (citations omitted). Further, although the court must accept well-pleaded facts as true, conclusory allegations are not entitled to a presumption of truth. *Id.* at 678-79.

SUMMARY

Plaintiff was raped on April 15, 2012, by Tevin Elliott, a student athlete, at an off-campus party. ECF No. 28, ¶ 55. She alleges that she reported the incident to unidentified Baylor staff members and to a secretary in the athletics department but that no one assisted her. She claims that university administrators knew of six or seven other allegations of sexual assault by Elliott but that Baylor failed to "competently" investigate those allegations. ECF No. 28, ¶¶ 28, 80, 94. She alleges that sexual misconduct by football players was "prevalent," that athletes were not

held accountable, and that Baylor's policies and practices failed to comply with Title IX. *Id.*, ¶¶ 69, 89, 95.

To buttress her claim, Plaintiff's amended complaint also refers to alleged sexual assaults that occurred or were reported after Plaintiff's assault and thus were not known to Baylor prior to Elliott's rape of Plaintiff. *See* ECF No. 28, ¶¶ 33-43. The complaint also refers to an internal investigation conducted in 2015-2016 by Pepper Hamilton LLP, a law firm engaged by the Baylor University Board of Regents to advise the board and to review student sexual assault allegations for three academic years from 2012-2013 through 2014-2015. *See* ECF No. 28, ¶¶ 46, 83, 85. The period under review included multiple school years subsequent to Plaintiff's assault.

Although Baylor denies Plaintiff's version of events, including her allegation that Baylor was aware of six or seven other sexual assaults by Tevin Elliott prior to April 15, 2012, Baylor recognizes that the Court is obligated to assume the truth of Plaintiff's well-pleaded allegations. As shown below, assuming the truth of Plaintiff's well-pleaded allegations, she has failed to state a claim for which relief can be granted.

First, Plaintiff's claims are, on their face, barred by the statute of limitations. The statute of limitations is two years. Plaintiff filed her complaint in March 2016 – nearly four years after the assault. *Second*, Plaintiff's claim based on non-compliance with Title IX's administrative regulations and guidelines fails to state a claim as a matter of law. The Supreme Court has expressly held that non-compliance with these requirements is not actionable in damages. *Third*, Plaintiff's negligence claims fail as a matter of law due to the absence of a legal duty, which is an essential element of a negligence claim. It is the law in Texas and elsewhere that universities do not owe a legal duty to protect students from harm from fellow students that occurs at off-

campus events not affiliated with the university. Texas courts have not recognized a "special relationship" between universities and their students. *Fourth*, the intentional infliction of emotional distress theory fails as a matter of law because it is preempted by Plaintiff's Title IX claim and because the gravamen of Plaintiff's claim against Baylor is negligence, not intentional harm. *Finally*, the claims against the former head football coach and former athletic director in their official capacities must be dismissed because these former officials lack the capacity to be sued as representatives of Baylor University.[1]

ARGUMENT AND AUTHORITIES

I. Plaintiff has failed to state a viable claim under Title IX.

A. The Title IX claims are time-barred.

A complaint is subject to dismissal under Rule 12(b)(6) based on limitations when it is evident from the plaintiff's pleadings that the action is barred and there is no basis for tolling. *See King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 758 (5th Cir. 2015). In this case, Plaintiff's Title IX claims, on their face, are untimely, and there is no basis for tolling.

Overview of the Title IX claim. Title IX is a federal statute that prohibits gender discrimination by educational institutions that receive federal funds. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). The Supreme Court has recognized in "certain limited circumstances" a cause of action for damages based on student-to-student sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999). The Court held that damages may be available if a school official with authority to take corrective action receives "actual knowledge" of sexual harassment and responds with "deliberate indifference" that subjects the

[1] Plaintiff has sued Briles and McCaw only in their "official capacities" and, thus, effectively has sued the "office" rather than the individual officeholder. The purpose of this motion is to obtain dismissal of the claims against Briles and McCaw as purported representatives of Baylor University. This motion is not brought on behalf of Briles or McCaw in their individual or personal capacities.

student to "further" harassment. *Id*. at 644-645, 648. Liability is permitted only if the institution exercised "substantial control over both the harasser and the context in which the known harassment occurs." *Id.* at 645. The Supreme Court specifically rejected a liability standard premised on negligence or constructive notice. *Gebser*, 524 U.S. at 281-282. It also cautioned the lower courts to "refrain from second-guessing the disciplinary decisions made by school administrators." *Davis*, 526 U.S. at 648. Applying these standards, courts have rejected claims based on off-campus assaults occurring at events that were not affiliated with the institution. *See, e.g.*, *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (rejecting claim of a female student athlete who alleged that she was raped at an off-campus fraternity party).

Statute of limitations. The statute of limitations for claims under Title IX is two years. *See King-White*, 803 F.3d at 759. Because Title IX does not have its own statute of limitations, courts borrow the forum state's personal injury statute of limitations. *Id*. at 760-761, citing *Wilson v. Garcia*, 471 U.S. 261, 266, 278-79 (1985). In Texas, the general personal injury statute of limitations is two years. *See* TEX. CIV. PRAC. & REM CODE 16.003(a). Hernandez filed this lawsuit three years and 11 months after the assault.

The time of accrual is a question of federal law. *King-White*, 803 F.3d at 762. The statute of limitations begins to run when the plaintiff becomes aware that she has suffered an injury or has sufficient information to know that she has been injured. *Id*. (citation and quotation omitted). The plaintiff's awareness encompasses both knowledge of the injury and knowledge of the causal link between the injury and the defendant. *Id.* The plaintiff "need not know the full extent of his injury because it is the discovery of the injury, not all of the elements of the cause of action, that starts the limitations clock." *Doe v. Henderson Indep. Sch. Dist.*, 237 F.3d 631 at *6 (5th Cir. 2000) (unreported) (citation omitted). Additionally, awareness for accrual purposes

does not mean "actual knowledge," but, rather, means there are circumstances that would lead a reasonable person to investigate further. *King-White*, 803 F.3d at 762.

The Fifth Circuit's recent decision in *King-White* is dispositive of Hernandez's claim. In *King-White*, the court affirmed the 12(b)(6) dismissal of an untimely claim brought by a student who was sexually abused by her high school teacher. *King-White*, 803 F.3d at 762-763. The student was "sadly quite aware of the abuse that she suffered," she knew that the abuser was her teacher, and she knew that her mother's complaints to the school had gone unheeded. *Id.* at 763. With this information, a reasonable person would have investigated further. *Id.* Like the plaintiff in *King-White*, Hernandez alleges that her complaint was not acted upon. ECF No. 28, ¶¶ 64, 70. She alleges that a secretary told her parents that "they were looking into" the matter but that no one from the school called them back. *Id.*, ¶¶ 62-63.

Similarly, in *Henderson,* the Fifth Circuit rejected the claims of plaintiffs who admitted that they knew the offender's conduct was wrongful when the abuse occurred:

> Although each of the plaintiffs attempted to block out memories of the abuse, none of them forgot what had happened, and each knew that Ward's conduct was wrongful. The plaintiff's also knew that Ward was employed by HISD and the church as that was the context in which they came in contact with Ward. This should have been sufficient knowledge by the plaintiffs that there was nothing left for them to 'discover' for tolling purposes…

Henderson, 2000 WL 1701752 at *5.

The relevant knowledge for purposes of accrual is the plaintiff's knowledge of her own assault. *See, e.g., Doe v. Roman Catholic Archdiocese of Galveston-Houston*, 362 S.W.3d 803, 814 (Tex. App. – Houston [14th Dist.], 2012, no pet.) (plaintiff's knowledge of the abuse was the relevant knowledge for his claim against the molester and the church that employed him); *Marshall v. First Baptist Church*, 949 S.W.2d 504 (Tex. App. – Houston [14th Dist.] 1997, no

pet.) (same); *Mayzone v. Missionary Oblates of Mary Immaculate of Texas*, 2014 WL 374249 at 4 (Tex. App. – San Antonio, July 30, 2014, no pet.) (unreported) (same).

An illustrative case is *Samuelson v. Oregon State University*, 2016 WL 727162 (D. Or., Feb. 22, 2016), in which a freshman was raped in an off-campus apartment. When she reported the rape, school officials allegedly told her that she "should not have been drinking," and they "took no further action." *Id.* at *1. Years later, while reading the newspaper, the victim learned of an ostensibly related rape that had occurred prior to her own rape. *Id.* at *2. The court held that her Title IX claim was untimely, explaining that "she learned of OSU's deliberate indifference to her report of rape" at the time she reported her own rape. *Id*. Learning about additional victims did not restart the clock. *Id.*

Hernandez alleges that the rape occurred on April 15, 2012, toward the end of the spring semester. ECF No. 28, ¶ 55. She alleges that she reported the incident to unidentified school personnel in counseling and academic services departments. She alleges that Baylor did nothing and that she felt "vulnerable" until Elliott left Baylor in the summer of 2012. *Id.*, ¶¶ 65. These allegations, assumed to be true, demonstrate that Hernandez, four years ago, was fully aware of her injury and Baylor's alleged inaction.

Nor has Hernandez alleged any basis for tolling the statute of limitations. The discovery rule is a limited exception that tolls the statute of limitations when the plaintiff has experienced an injury that is "inherently undiscoverable" within the limitations period. *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1996). An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence. *Id.* at 7. When the discovery rule applies, accrual of the cause of action is deferred until the plaintiff knows, or in the exercise of reasonable diligence, should know of the wrongful act and injury. *See Marshall,*

949 S.W.2d at 507. Here, Hernandez reported the incident to the city police the same day that it happened. ECF No. 28, ¶¶ 56-57. Knowledge and reporting of a sexual assault "foreclose" the contention that the injury was inherently undiscoverable. *See Doe v. St. Stephen's Episcopal Sch.,* 382 Fed. App'x 386, 389 (5th Cir. 2010) (unreported).

The doctrines of fraudulent concealment and equitable estoppel also are inapplicable to toll the statute of limitations in this case. The doctrine of fraudulent concealment applies when a defendant is under a duty to disclose information but fraudulently conceals the existence of a cause of action from the injured party. *See Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983). The plaintiff must show a duty to disclose and a fixed purpose to conceal. *St. Stephen's Episcopal*, 382 Fed. App'x at 390. Similarly, the doctrine of equitable estoppel requires "a false representation or concealment of material facts [and] the party to whom the statement was made must have been without knowledge or means of knowledge of the real facts." *Id*. With both doctrines, the estoppel effect ends when the party learns of facts that would cause a reasonably prudent person to make inquiry that, if pursued, would lead to discovery of the concealed claim. *See Borderlon*, 661 S.W.2d at 908.

Hernandez claims that she did not understand her Title IX rights. ECF No. 28, ¶ 74. However, the "plaintiff need not know that a legal cause of action exists; he need only know facts that would support a claim." *Henderson*, 237 F.3d at *7. Similarly, Hernandez claims that Baylor was "misleading," but these allegations are wholly conclusory. ECF No. 28, ¶ 71. Conclusory assertions are insufficient to toll the statute of limitations. *See, e.g., Bell v. Children's Protective Services*, 2013 WL 5977953 at *3 (5th Cir., Nov. 12, 2013) (unreported) (affirming 12(b)(6) dismissal and holding that conclusory allegations about defendant's withholding information were insufficient to toll the statute of limitations). Hernandez's

argument regarding failure to disclose also fails to take into account the federal student privacy statute that restricts the disclosure of students' pending disciplinary charges to third parties. *See* 20 U.S.C. § 1232g(b).

Hernandez has not alleged any facts indicating that Baylor engaged in affirmative fraudulent acts or false statements that induced her not to file suit before the statute of limitations expired. Like the plaintiff in *King-White*, the focus of Hernandez's amended complaint is *failure to act*, not fraud. *See*, *e.g.*, ECF No. 28, ¶ 64 ("Baylor did not take any action whatsoever to investigate Hernandez's claim"), ¶ 63 ("Hernandez's father never received a return phone call"); *compare with King-White*, 803 F.3d at 764 (rejecting fraudulent concealment and equitable estoppel argument where plaintiff's allegations focused on the school officials' alleged failure to act after receiving complaints).

Hernandez claims that her cause of action did not accrue until May 2016 when Baylor released investigatory findings by the Pepper Hamilton law firm. ECF No. 28, ¶¶ 46, 83, 85. This allegation provides no basis for tolling. The amended complaint shows that, in April 2012, Hernandez was aware of her own injury, was aware of Baylor's alleged inaction, and was never deceived into thinking she had not been assaulted. These admissions foreclose both fraudulent concealment and equitable estoppel as a matter of law. *See, e.g., St. Stephen's Episcopal Sch.*, 382 Fed. App'x at 390 (fraudulent concealment and equitable estoppel were inapplicable to claims against the school because the victims knew about the abuse when it happened and "had not been deceived into thinking they had not been abused"); *Henderson*, 237 F.3d 631 at *7 ("Although the plaintiffs argue that they were ignorant of the defendants' concealment, they were painfully aware of the abuse by Ward"); *Roman Catholic Archdiocese*, 362 S.W.3d at 814 (church's failure to disclose did not toll statute of limitations; a plaintiff cannot argue fraudulent

concealment when she "was not deceived into thinking that she was not being abused when she was"); *Doe v. Linam*, 225 F.Supp.2d 731, 735-737 (S.D. Tex. 2002) (rejecting tolling despite allegation that defendant engaged in "cover-up" of abuse); *see also Samuelson v. Oregon State Univ.*, 2016 WL 727162 at 8-9 (D. Or., Feb. 22, 2016) ("That Ms. Samuelson later learned OSU was also deliberately indifferent to earlier rapes does not somehow restart the statute of limitations for Ms. Samuelson's own claim."); *Getchey v. County of Northumberland*, 120 Fed. App'x 895 at 3 (3d Cir., Jan. 6, 2004) (unreported) (although supervisor discouraged the plaintiff from complaining, he did not mislead plaintiff "with respect to the availability of a cause of action because [the supervisor] never denied that the injuries occurred"). Furthermore, tolling requires the exercise of reasonable diligence by the plaintiff. *See Longoria v. City of Bay City*, 779 F.2d 1136, 1139 (5th Cir. 1986). Here, while Hernandez alleges that she contacted Baylor staff in the spring of 2012, she does not allege that she took any other action to investigate during the three-and-one-half years subsequent to the assault.

Finally, even if tolling were permitted, any tolling effect would have ended in January 2014, more than two years before Hernandez filed this lawsuit. The estoppel effect ends when the party learns of facts that would cause a reasonably prudent person to make inquiry. *Borderlon*, 661 S.W.2d at 908. Elliott was convicted of rape in January 2014 and, at his trial, three women in addition to Hernandez testified that Elliott had sexually assaulted them. *See* Exhibit A (certified copy of judgment); *Elliott v. State of Texas*, 2015 WL 1877052 at 4, 6 (Tex. App. – Waco, April 23, 2015, pet. ref'd) (unreported) (discussing extraneous offense testimony of "three other females alleging sexually assaultive" conduct by Elliott) (attached as

Exhibit B).[2] By January 2014, Hernandez had sufficient information that would have prompted a reasonable person to make inquiry. *See, e.g.*, *King-White*, 803 F.3d at 764-765 (student's knowledge that school officials did not respond to her complaints ended any "estoppel effect" that might have applied). In this case, Hernandez knew about Baylor's alleged inaction and she knew there were other potential victims. Hernandez's Title IX claim is time-barred and should be dismissed.

B. As a matter of law, the Plaintiff may not sue for damages for a violation of federal regulations or administrative guidance.

Hernandez attempts to assert a claim for damages based on Baylor's alleged failure to comply with regulatory and administrative guidance published by the U.S. Department of Education. ECF No. 28, ¶¶ 8-25, 68, 69, 72, 73, 74. In particular, she cites a "Dear Colleague Letter" published by the U.S. Department of Education in 2011 that provides guidance regarding sexual assault policies, prevention, and investigation.[3] Plaintiff's allegations regarding alleged non-compliance with federal regulations and administrative guidance fail to state a plausible claim for relief. The Supreme Court has held that regulatory non-compliance is not actionable in damages.

Title IX was enacted by Congress pursuant to its authority under the Spending Clause of the U.S. Constitution. *See Gebser*, 524 U.S. at 286. When Congress acts pursuant to its spending power, the offer of federal funds is in the nature of a contract: in return for federal funds, the funding recipient agrees not to discriminate. *Id.* The legitimacy of the spending power is the recipient's voluntary and knowing acceptance of the conditions attached to the money.

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[2] The Court may take judicial notice of matters of public record, including judicial records, without converting a 12(b)(6) motion into a motion for summary judgment. *See Cinel v. Connick*, 15 F.3d 1338, 1343 n. 6 (5th Cir. 1995); *see, e.g., Doe v. Round Valley Unified Sch. Dist.*, 873 F.Supp.2d 1124, 1128 (D. Ariz. 2012) (taking judicial notice of a criminal indictment at the 12(b)(6) stage in a Title IX action).

[3] *See* U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (April 4, 2011) (available at www.ed.gov/ocr/letters/colleagues-201104.pdf) [hereinafter "2011 Dear Colleague Letter"].

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Congress must communicate these conditions clearly and unambiguously. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996). The "customary tort paradigm" is simply contrary to the spending power. *Rosa H. v. San Elizario Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997).

The only express statutory remedy for a violation of Title IX is termination of funding. *Gebser*, 524 U.S. at 289-290. The Department of Education is authorized to investigate and commence administrative proceedings if the institution is found in violation and refuses to take corrective action. 20 U.S.C. § 1682. However, if the institution voluntarily agrees to take corrective action, the Department will not seek to terminate funding even if discrimination is found to have occurred in the school's programs.[4]

Although Title IX sets forth only an administrative remedy, the Supreme Court has judicially implied a private right of action in cases involving "intentional" discrimination. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992). Spending Clause and statutory considerations compelled the Court to impose a high standard of liability premised on "actual knowledge" of sexual harassment and "deliberate indifference" by a school administrator with authority to take corrective action. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 644-645, 648. The Supreme Court declined to impose a negligence or constructive notice standard of liability. *Gebser*, 524 U.S. at 290. "It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice." *Id.* at 289 (emphasis in original). A "central purpose" of this standard is "to avoid diverting education

[4] U.S. Department of Educ., Office for Civil Rights, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) at 15, *available at* www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

funding from beneficial uses where a recipient was unaware of discrimination in its program and is willing to institute prompt corrective measures." *Gebser*, 524 U.S. at 289.

Because liability requires proof of actual knowledge of, and deliberate indifference to, specific instances of sexual harassment, *Gebser* held that a school's failure to comply with Department of Education administrative regulations will not establish intentional discrimination under Title IX and is not actionable in damages. *Gebser*, 524 U.S. at 291-292; *see also Gebser*, 524 U.S. at 292 (internal citation omitted) (noting that federal agencies have the authority to promulgate requirements "that effectuate the statute's nondiscrimination mandate, even if those requirements do not purport to represent a definition of discrimination under the statute").[5]

As a matter of law, non-compliance with administrative requirements "does not itself constitute 'discrimination' under Title IX." *Gebser*, 524 U.S. at 291-292; *see, e.g.*, *Moore v. Regents of Univ. of Calif.*, 2016 WL 2961984 (N.D. Calif., May 23, 2016) ("There is no private right of action to recover damages under Title IX for violations of DOE's administrative requirements, much less the provisions of the DCL and Q&As…."); *Karasek v. Regents of the Univ. of Calif.*, 2015 WL 8527338 at 13-14 (N.D. Cal., Dec. 11, 2015) (holding that university's failure to comply with Dear Colleague Letter was not "deliberate indifference" under *Gebser*); *see also Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (rejecting claim that a state's "English only" policy violated federal Title VI regulations by causing a disparate impact on non-English speakers; private litigants could not sue to enforce an agency's disparate-impact regulations).

[5] In contrast to the "deliberate indifference" standard that applies in a damages action, the Department of Education employs a negligence standard when evaluating a school's compliance with its administrative requirements. *See* 2011 Dear Colleague Letter, p. 4. The 2011 Dear Colleague Letter itself expressly rules out any suggestion that its requirements may be used to support a damages claim. *See* 2011 Dear Colleague Letter, p. 4 & n. 12 (stating that the DCL standards do not apply to "private lawsuits for monetary damages").

As a matter of law, Hernandez's allegations regarding non-compliance with Department of Education administrative requirements fail to state a plausible claim for damages under *Davis* and *Gebser*. Accordingly, Baylor moves to dismiss any and all such claims.

C. Punitive damages are not allowed under Title IX

Hernandez seeks punitive damages under Title IX, but these are not recoverable as a matter of law. *See Mercer v. Duke Univ.*, 50 Fed. App'x 643 (4th Cir., Nov. 15, 2002) (unreported), citing *Barnes v. Gorman*, 536 U.S. 181 (2002). Accordingly, Baylor moves to dismiss any claims for punitive damages under Title IX.

II. Plaintiff has failed to state a viable claim under Texas law.

A. Plaintiff's negligence and infliction of emotional distress claims are time-barred.

Hernandez has asserted common law claims for negligence, negligence *per se*, and intentional infliction of emotional distress. These claims are untimely.

As previously noted, the statute of limitations for personal injury claims is two years. TEX. CIV. PRAC. & REM CODE 16.003(a). Therefore, Hernandez's tort claims based on events in 2012 are time-barred. *See, e.g., Doe v. Linam*, 225 F.Supp.2d 731 (S.D. Tex. 2002) (applying two-year rule to assault victim's claims of negligence and intentional infliction of emotional distress); *Twist v. Lara*, 2007 WL 2088363 (S.D. Tex. 2007) (applying two-year rule to assault victim's intentional infliction of emotional distress claim) (unreported).

Although Texas has adopted a five-year statute of limitations for personal injury claims that arise "as a result of conduct" that violates the sexual assault provisions of the Texas Penal Code, *see* TEX. CIV. PRAC. & REM CODE 16.045(b), its reach against non-perpetrators is circumscribed. *See Linam*, 225 F.Supp.2d at 734; *Twist*, 2007 WL 2088363 at *4; *see generally Doe v. St. Stephen's Episcopal Sch.*, 382 Fed. App'x 386, 390 n. 3 (5th Cir. 2010) and *Doe v. St.*

Stephen's Episcopal Sch., 2008 WL 4861566 (S.D. Tex., Nov. 4, 2008) (in suit involving molestation of children by a priest, applying two-year statute of limitations to negligence and negligent misrepresentation claims and five-year statute of limitations to vicarious liability claim). Although the five-year rule has been applied to claims against non-perpetrators, such cases have involved perpetrators that actually were employed by the institution. *See, e.g., St. Stephen's Episcopal Sch.*, 382 Fed. App'x. at 388 (applying five-year limitations rule to claim based on assault of a child by a priest) (unreported); *C.R. v. American Institute for Foreign Study, Inc.*, 2013 WL 5157699 at *6 (W.D. Tex. 2013) (applying the five-year limitations rule to a negligence claim against a summer camp that hired a counselor who molested a child) (unreported).

In this case, the perpetrator, Tevin Elliott, was not an employee, and the assault did not occur on the university's premises or in a situation under the control over the university. Moreover, Hernandez's *post*-assault claims, such as Baylor's alleged failure to provide assistance or counseling, do not involve assaultive conduct. As a matter of law, Plaintiff's claims are subject to the two-year statute of limitations.

B. The negligence claims fail because it is well settled that universities do not have a legal duty to protect their students.

Hernandez presents a variety of overlapping negligence theories that are variations on the same theme: failure to supervise or control Elliott; failure to educate students and employees; failure to properly investigate claims; failure to properly manage the football program and to supervise employees; failure to enforce school policy; and failure to warn and protect Hernandez from sexual assault in general and from Elliott in particular. ECF No. 28, ¶¶ 87-96. She claims that she had a "special relationship" with Baylor that gave rise to these duties. *Id.*, ¶ 88.

Even if these claims were not time-barred, Hernandez has failed to state a plausible claim for which relief can be granted. The common law does not impose the alleged duties listed in the amended complaint. Moreover, it is well settled in Texas – and across the country – that there is no "special relationship" between a university and its students that would give rise to any of the duties asserted by Hernandez. As a matter of law, a university does not owe a legal duty to protect or control students, particularly at private, off-campus parties.

To establish a cause of action for negligence, the plaintiff must show the existence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, and damages that were proximately caused by the breach of that duty. *See Nabors Drilling, USA Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *See Centeq Realty, Inc., v. Siegler,* 899 S.W.2d 195, 197 (Tex.1995). If there is no duty, then there is no liability, and the claim fails. *See Boyd v. Texas Christian Univ.*, 8 S.W.3d 758 (Tex. App. – Fort Worth 1999, no pet.).

The general rule is that a person has no legal duty to protect another from the criminal acts of a third person or to control their conduct. *See Boyd,* 8 S.W.3d at 760. The existence of a "special relationship" is an exception to this general rule, such as the relationship between employee/employer, parent/child, and independent contractor/contractee. *Id*. Absent a special relationship, there is no general duty to warn. *See Gatten v. McCarley*, 391 S.W.3d 689, 674 (Tex. App. – Dallas 2013, no pet.); *see, e.g., Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999) (psychiatrist whose patient said he wanted to kill third party and then acted on that threat did not have a duty to warn the victim). Foreseeability alone is not sufficient to create a duty. *Gatten*, 391 S.W.3d at 677 ("Because liability for a criminal act committed by a third party cannot be

based on foreseeability alone, in the absence of control or a right of control, we hold that the appellees owed no duty" to prevent the assault on the plaintiff).

Hernandez's negligence claims fail because, as a matter of law, there is no special relationship between a university and its students and thus no duty to protect or control. *See generally Boyd*, 8 S.W.3d at 760; *see also Hux v. Southern Methodist Univ.*, 819 F.3d 776, 781 (5th Cir. 2016) (because there is no "special relationship" between a university and its students, the university did not owe a duty of good faith and fair dealing). "[C]ourts with good reason have been unwilling to shift moral and legal responsibility away from student perpetrators" to colleges and universities. *Tanja H. v. Regents of the Univ. of Calif.*, 228 Cal.App.3d 434 (1991) (collecting cases); *see generally Guest v. Hansen*, 603 F.3d 15, 17 (2d Cir. 2010) ("colleges have no legal duty to shield students or their guests from the harmful off-campus activity of other students" even if school officials as a practical matter could have exercised control); *Freeman v. Busch*, 349 F.3d 582, 587-588 (8th Cir. 2003) ("since the late 1970s," the general rule is that no special relationship exists between a college and its students); *Rabel v. Illinois Wesleyan Univ.*, 514 N.E.2d 552, 560-561 (Ill. App. Ct. 4th Dist. 1987) ("Imposing such a duty of protection would place the university in the position of an insurer of the safety of its students"); *Bradshaw v. Rawlings*, 612 F.2d 135, 138-140 (3d Cir. 1979) (*in loco parentis* no longer applies to university students).

Rejection of *in loco parentis* as applied to university students is a result "of changes in society's perception of the most beneficial allocation of rights and responsibilities in the university-student relationship." *University of Delaware v. Whitlock*, 744 P.2d 54, 60-61 (Colo. 1987). Courts "have not been willing to require college administrators to reinstitute curfews, bed checks, dormitory searches, hall monitors, chaperones, and the other concomitant measures

which would be necessary" to protect students from each other. *Tanja H.,* 228 Cal.App.3d at 438. Thus, even if it were foreseeable that football players "could rape a fellow student after a party where alcohol was served," courts have been unwilling to make colleges liable for damages caused by third parties because the trade-off would be onerous restrictions on the freedom and privacy of students. *Id.*

Thus, in *Boyd*, the court rejected the personal injury claims of a Texas Christian University student who was "seriously injured" during an off-campus altercation with four TCU football players. *Boyd*, 8 S.W.3d at 759. The university did not sponsor the event or control the premises. The student alleged that the university was negligent in failing to properly supervise, control, or discipline the athletes and in failing to provide a safe environment for the plaintiff. The court rejected the claim, finding that the university owed no duty to provide a safe environment at an off-campus event not organized by the university. *Id.* at 760. Courts have reached the same conclusion in cases involving off-campus and even on-campus injuries.[6]

Nor is this a situation in which it can be said that Baylor affirmatively rendered Hernandez more vulnerable to sexual assault by, for example, physically isolating her with Elliott. Although Hernandez claims that she was "entrusted" to Baylor's care, this allegation is conclusory and is not supported by any facts. ECF No. 28, ¶ 88. Conclusory assertions that lack a factual foundation are not entitled to a presumption of truth. *Ashcroft*, 556 U.S. at 678-679. The requirement of affirmative action means that the defendant actually exercised control of the plaintiff and placed her in a more vulnerable position. *See generally* Restatement (Second) of

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[6] *See, e.g.*, *Pawlowski v. Delta Sigma Phi*, 2009 WL 415667, 47 Conn. L. Rptr. 132 (Sup. Ct. Conn., Jan. 23, 2009) (unreported) (holding that university did not have a duty to protect an intoxicated student at an off-campus fraternity party despite allegation that university had previously warned fraternity about underage drinking); *Tanja H. v. Regents of the Univ. of Calif.,* 228 Cal.App.3d 434, 437-438 (1991) (rejecting claim of student who was raped in her dorm following a party where alcohol was served to underage students); *Rabel,* 514 N.E.2d at 560-561 (rejecting claim of student who was removed from her dorm and injured by a drunken fraternity member).

Torts § 323 and § 314. Mere knowledge that the plaintiff needs help or is in danger is insufficient to impose a legal duty. *See Carter v. Abbyad*, 299 S.W.3d 892, 895-896 (Tex. App. – Austin 2009, no pet.). Thus, in *Freeman v. Busch*, 349 F.3d 582, 587-588 (8th Cir. 2003), the court rejected the claim of a young woman who was raped in a dorm after becoming intoxicated. The court rejected the claims despite evidence that a resident assistant knew that the woman had passed out. Although the resident assistant asked a student to monitor her condition, he "took no specific action to exercise control or custody" over her and, thus, "had no legal duty to come to her aid." *Id*. at 587-588.

In Hernandez's case, there are no allegations that Baylor constrained Hernandez's choices, placed her at the party, or promised to protect her at the party and failed to do so. Moreover, even if there had been grounds to suspend Tevin Elliott prior to April 15, 2012, as suggested by Hernandez, suspension from school would not have prevented him from attending an off-campus party in Waco, South Padre Island, New Orleans, or anywhere else.

Hernandez also claims that, because Baylor sought to investigate reports against Elliott, it was required to do so "competently." ECF No. 28, ¶¶ 90-91. However, there is no common law duty to conduct a competent student discipline investigation. *See Vu v. Vassar College*, 2015 WL 1499408 at 30 (S.D.N.Y., March 31, 2015) (unreported); *see also Texas Farm Bureau Mutual Ins. v. Sears*, 84 S.W.3d 604, 608-609 (Tex. 2002) (holding that an employer does not have a common law duty to use ordinary care when investigating employee misconduct). Similarly, negligent administration of a university's rules or policies does not give rise to an enforceable duty. *See Pawlowski*, 2009 WL 415667 at *3 (citing cases); *Whitlock*, 744 P.2d at 60-61 (handbook regulations on student conduct did not give rise to special duty to protect students).

Finally, many of Hernandez's negligence theories are fatally vague and lack any support in the case law, such as the failure "to meet the behavior and social needs" of students and the failure to "implement safeguards for female students adequate to protect them from foreseeable criminal and anti-social activities." ECF No. 28, ¶ 95. The amended complaint also references theories that have no factual application to Hernandez's case, such as the failure to screen athletes who are being recruited. There are no factual allegations in the complaint regarding the recruitment of Elliott.

In sum, substantial case law demonstrates that there is no special relationship between universities and their students and that universities do not have a common law duty to protect. The case law does not support the imposition of duties suggested by Hernandez. Because Hernandez has not established a plausible claim for a breach of any common law duty, the negligence claim fails as a matter of law and should be dismissed.

C. The negligence *per se* claim cannot be based on a violation of Title IX.

Hernandez alleges that Baylor engaged in negligence *per se* and violated the "standards of care and statute set forth herein," presumably Title IX since no other statute is identified in the pleading. ECF No. 28, ¶¶ 96. The negligence *per se* claim fails on its face. Negligence *per se* is a concept whereby a legislatively imposed *standard of conduct* is adopted by the civil courts as defining the conduct of a reasonably prudent person. *See Supreme Beef Packers, Inc. v. Maddox*, 67 S.W.3d 453, 456 (Tex. App. – Texarkana 2002, pet. den.), citing *Carter v. William Sommerville & Son, Inc.,* 584 S.W.2d 274, 278 (Tex. 1979). In such a case, the inquiry is not whether the defendant acted as a reasonably prudent person; the statute itself states what a reasonably prudent person would have done. For example, it is negligence *per se* to drive on the wrong side of the road. *Supreme Beef*, 67 S.W.3d at 456 (citation omitted).

In contrast, "some statutes do not define a mandatory standard of *conduct,* but merely create a standard of *care,* under which the duty of compliance may be conditional or less than absolute," such as a statute that requires the exercise of judgment. *Supreme Beef*, 67 S.W.3d at 456 (emphasis in original). In that situation, negligence *per se* does not apply because the statute does not establish a specific standard of conduct different from the common law standard of ordinary care. *Id.*; *see also U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118 (Tex. 2012) (rejecting negligence *per se* claim based on OSHA regulations that established a standard of care but not a mandatory standard of conduct).

Title IX, "which is a general nondiscrimination statute," does not establish a statutory standard that may substitute for the general common law standard. *Ross v. Univ. of Tulsa*, 2015 WL 4064754 (N.D. Okla., July 2, 2015) (unreported). "[T]he 'standard' set by Title IX is simply to avoid sex discrimination in educational programs or activities." *Id*. Further, allowing a Title IX regulatory violation to establish a negligence *per se* claim is contrary to *Gebser*, which requires "deliberate indifference." *Id*. Similarly, even the non-actionable Dear Colleague Letter employs a general reasonableness standard. *See* 2011 DCL, p. 4.

Here, Hernandez's pleading refers only to a "standard of care" and not to any mandatory standard of conduct. ECF No. 28, ¶ 96. Further, the claim is time-barred. Because Plaintiff has not articulated a plausible negligence *per se* claim, Baylor moves to dismiss this claim.

D. Title IX preempts the intentional infliction of emotional distress claim.

Even if Hernandez's IIED claim were not barred by the statute of limitations, she has failed to state a claim for which relief can be granted. Intentional infliction of emotional distress is a "gap filler" tort and is available only if there are no other statutory or common law remedies to cover the conduct in question. *See Creditwatch Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex.

2005). The common law intentional infliction of emotional distress claim was judicially created for "the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2014) (citation omitted) (holding that a plaintiff could not recover on an IIED theory based on sexual harassment because a statute provided a remedy "for the same emotional distress damages caused by essentially the same actions"). When the gravamen of a plaintiff's complaint is really another tort or statutory claim, the plaintiff may not assert an IIED claim, even if the other claim is no longer available. *See Creditwatch,* 157 S.W.3d at 816 (rejecting IIED claim based on sexually harassing incidents even though plaintiff's statutory sexual harassment claim was found to be time-barred).

Here, none of the alleged wrongful acts referenced in the Amended Complaint is independent of the conduct that forms the basis of Hernandez's other claims. Indeed, her pleading simply cross-references the allegations from other portions of the complaint. ECF No. 28, ¶¶ 98-99. There is no gap to fill. *See, e.g., D.D. v. Zirus*, 2011 WL 4526811 at *3 (W.D. Tex., Sept. 28, 2011) (unreported) (rejecting IIED claim brought by parents of children who were molested by a camp counselor because other theories were available); *Arrendo v. Estrada*, 120 F.Supp.2d 737, 649 (S.D. Tex. 2015) (unreported) (dismissing IIED claim based on assault because other remedies were available); *see also Watkins v. Texas Dep't of Crim. Justice*, 269 F.3d 457, 465 (5th Cir., March 12, 2008) (unreported) (holding that Title VII discrimination claim preempted common law IIED claim).

Thus, in *Thompson v. Aerotek Inc.*, 2015 WL 3794899, (W.D. Tex., June 17, 2015) (Pittman, J.) (unreported), this Court disallowed an IIED claim that was based on the same facts

as a statutory discrimination claim because there was no gap to fill. "Because he cites the same facts in support of his other claims, Texas law bars his claim for intentional infliction of emotional distress. …" *Id*. at 2 (citation omitted). Hernandez has not cited additional facts, unrelated to her hostile environment allegations, to support an independent IIED claim.

Finally, Hernandez has failed to plead essential elements of this claim. A plaintiff must show that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe. *Zeltwanger*, 144 S.W.3d at 445. This claim cannot be asserted "when the risk that emotional distress will result is merely incidental to the commission of some other tort." *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex.1998). An IIED claim "is available only in those situations in which severe emotional distress is the *intended consequence* or *primary risk* of the actor's conduct." *Hairston v. Southern Methodist Univ.*, 441 S.W.3d 327, 333 (Tex. App.—Dallas 2013, no pet.) (emphasis added). Hernandez does not identify any acts by the Defendants that were intended to cause Hernandez severe emotional distress. The amended complaint consists largely of broad assertions about the football program in general and the potential impact on the entire student body due to the alleged maladministration of student conduct policies. If Hernandez's theory were plausible, then every student at Baylor during the applicable time period would have a viable cause of action against Defendants for intentional infliction of emotional distress. Hernandez's specific allegations regarding her own situation focus on omissions, such as the failure to assist her after the assault. Hernandez's allegations are not actionable under the IIED theory. *See generally Tiller v. McLure,* 121 S.W.3d 709, 714 (Tex. 2003) (stating that "callous"

and "uncaring" conduct is not actionable). Finally, the "mere fact that conduct violates a legal duty does not, standing alone," also is insufficient to render it extreme and outrageous. *Id.*

For these reasons, the Defendants move to dismiss the IIED claim.

III. Dismissal of the claims against Art Briles and Ian McCaw is warranted

Baylor University is a non-profit corporation organized under the laws of the State of Texas. (Exhibit C – certificate of formation.) Plaintiff has attempted to sue two former employees as representatives of the University in their "official capacity" based on their previous positions at Baylor. ECF No. 81, p. 1. Plaintiff claims that they breached duties that could have existed only by virtue of their employment. *Id.*, p. 21. As shown below, Plaintiff may not sue Briles and McCaw as representatives or surrogates of Baylor.

It is well settled that a plaintiff may not sue a subdivision of a corporate entity unless the subdivision enjoys a separate and legal existence. *See Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313-14 (5th Cir. 1991); *Halton v. Duplantis*, 2013 WL 1148758 (S.D. Tex., March 1, 2013) (unreported); *see, e.g.*, *Heslep v. Americans for African Adoption Inc.*, 890 F.Supp.2d 671, 679 (N.D. W.Va. 2012) (dismissing board of directors of non-profit corporation due to lack of capacity to be sued). The capacity of an entity to sue or be sued "shall be determined by the law of the state in which the district court is held." FED. R. CIV. P. 17(b). Under Texas law, a "board of directors" manages the corporation but is not a separate legal entity. *See* TEX. BUSINESS ORG. CODE § 22.001(1). Just as Baylor cannot be sued through its board of regents, it cannot be sued through former employees who are subordinate to the board of regents.

Hernandez avers that Briles and McCaw were "agents" of Baylor. ECF No. 81, p. 1. She claims they were "acting within the course and scope of their employment at all times."

Id., ¶ 93. However, despite an opportunity to replead, Plaintiff has not alleged that Baylor has authorized its board of regents or any subordinate department or employee to be sued on its behalf. Furthermore, the inclusion of duplicative defendants adds nothing but cost and inconvenience. In the analogous context of suits against public officials, the Supreme Court has explained that "official capacity" is simply another way of pleading a claim against the entity that employs the official. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985). An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" and "*not* a suit against the official personally, for the real party in interest is the entity." *Id.* (emphasis in original). Damages may be awarded only against the entity. *Id.* at 166. Federal courts routinely dismiss "official capacity" suits on the ground that they are redundant of the claims against the entity. *See, e.g., Madrid v. Anthony*, 510 F.Supp.2d 425, 427 n. 2 (S.D. Tex. 2007); *Rascon v. Austin Indep Sch. Dist*, 2006 WL 2045733 at 3 (W.D. Tex., July 18, 2006) (unreported).

Because the "official capacity" claims are redundant of the claims against Baylor, the officials would be entitled to the same defenses as Baylor, including the statute of limitations. Accordingly, these Defendants incorporate by reference the argument in Sections I and II of this motion. All claims against the former officials should be dismissed.

V. CONCLUSION

For the foregoing reasons, the Defendants pray that the Court will grant this motion and dismiss Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served upon all counsel of record on August 3, 2016, via the Court's ECF/CMF electronic service system as follows:

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