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

ELIZABETH DOE Plaintiff, v. BAYLOR UNIVERSITY; Defendant.	§ § § § § § § §	Civil Action No. 6:17-CV-00027

DEFENDANT BAYLOR UNIVERSITY'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TO THE JUDGE OF THE HONORABLE COURT:

Defendant Baylor University moves to dismiss Elizabeth Doe's First Amended Complaint (ECF 6) as follows:

OVERVIEW

Elizabeth Doe is a former Baylor University student. She alleges that she was raped in her private off-campus residence on April 18, 2013, by two Baylor football players. She asserts claims under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, as well as negligence claims under Texas law. Baylor moves to dismiss Plaintiff's assault, failure to investigate, and negligence claims because they are barred by the two-year statute of limitations. In particular, Plaintiff's complaint shows that she had notice of her claims prior to expiration of the statute of limitations.

Baylor also moves to dismiss Plaintiff's Title IX claim based on Baylor's Plaintiff's alleged encounters with the football players after the alleged sexual assault. This claim fails because the allegations, assumed to be true, do not rise to the level of "deliberate indifference," which is an essential element of this claim. Although Plaintiff's amended complaint alleges that she spoke with the *Waco* police about the alleged sexual assault, Plaintiff does not allege that she reported a sexual assault to *Baylor* until more than two years later, after she had already graduated from Baylor and was no longer a student. Additionally, while Plaintiff alleges that the Waco police notified the Baylor police about an occurrence at her residence, she does not allege that the Waco police provided any specific information about a rape. Indeed, the police report shows that the Plaintiff refused to provide information to the Waco police and that Baylor learned only of an unspecified incident involving unidentified males. Because Plaintiff never identified the alleged assailants and never requested an investigation by Baylor, case law demonstrates that Plaintiff has failed to state a claim for which relief can be granted.

Baylor moves to dismiss Plaintiff's negligence claims because, as a matter of law, Baylor did not breach any legal duty owed to the Plaintiff. As a general rule, universities do not have a legal duty to protect their students from harm caused by other students.

Finally, while Baylor recognizes that the Court must accept all well-pleaded allegations as true for purposes of this motion, Baylor does not agree with or concede the accuracy of Plaintiff's 146-paragraph complaint and its immaterial and inflammatory assertions. Notably, although Plaintiff alleges that her assault occurred on April 18, 2013, the amended complaint repeatedly refers to alleged occurrences in *subsequent* school years – events that plainly do not reflect Baylor's policies or knowledge prior to April 18, 2013, because they had not occurred. *See, e.g.*, ECF 6, ¶¶ 41, 47, 52, 54. For example, Plaintiff asserts that she "is aware" of "52 acts of rape" between 2011 and 2014, but her allegation expressly encompass a time period and incidents that post-date her own assault. ECF ¶ 41. Likewise, while broadly and needlessly impugning the integrity of the many female students who honorably participated in the Bruins organization, Plaintiff does not allege that she herself was ever asked by any Baylor official, directly or indirectly, to participate in the "good time" recruiting policy that she claims to have existed, nor does she claim that her alleged assault occurred in conjunction with any recruiting activity. Although Baylor appreciates the sensitivity and seriousness of the issue of sexual assault—a fact demonstrated by its voluntary release of the Pepper Hamilton investigation findings in May 2016—Plaintiff's inflammatory and immaterial allegations must be disregarded when evaluating whether Plaintiff has stated a claim.

STANDARD OF REVIEW

To avoid 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.* Plaintiffs must "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the Court must accept well-pled facts as true, neither conclusory allegations nor "legal conclusions masquerading as factual conclusions" are entitled to a presumption of truth. *Beavers v. Metro. Life Ins. Co.*, 556 F.3d 436, 439 (5th Cir. 2009). Dismissal also is proper "if the complaint lacks an allegation regarding a required element necessary to obtain relief." *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

FACTUAL ALLEGATIONS

Plaintiff enrolled at Baylor in 2010 and graduated in December 2014. ECF 6, ¶¶ 10, 107. She alleges that she joined the Baylor Bruins, a student group whose activities included hosting football recruits and their families. *Id.* ¶¶ 26, 27, 81. Plaintiff alleges that on April 18, 2013, she attended an off-campus party, "became very intoxicated," and ended up at her own residence with two football players who allegedly raped her. *Id.* ¶¶ 82, 88-89, 90. Plaintiff alleges that her roommate's boyfriend called 911 and that the Waco Police Department responded to the call. *Id.* ¶ 92-93, 96. Plaintiff alleges that she was "highly intoxicated" when the police arrived and that a fellow Bruin "interfer[ed]" with her "recitation of events." *Id.* ¶ 97.

Plaintiff alleges that the Waco police notified the Baylor Police Department "what had been reported about their two football players," but the amended complaint does not allege what information actually was reported. *Id.* ¶ 100. The complaint references a Baylor "police report." *Id.* ¶ 102. The report in question shows that the Waco police told Baylor about an unspecified incident involving unidentified males and that the Plaintiff "would not provide any info." *See* Exhibit A. The Court properly may consider the police report because Plaintiff

expressly refers to the report in her lawsuit and the report is central to her claim that Baylor had notice of the incident.[1]

Plaintiff alleges that she suffered from a hostile environment following the alleged rape until her graduation in December 2014. ECF 6 ¶ 107. She alleges that she saw one of the offenders on "repeat occasions" and that these encounters impacted her learning environment. *Id.* ¶ 111-15. Plaintiff does not allege that she told anyone at Baylor about these occurrences. Finally, Plaintiff acknowledges that, when she reported the sexual assault to Baylor in 2015 (after she had graduated from Baylor), Baylor promptly investigated and expelled the offender who was still enrolled. *Id*. ¶ 118-119.

ARGUMENT & AUTHORITIES

I. Plaintiff does not state a viable Title IX claim.

A. Overview of Title IX

Title IX prohibits gender discrimination in the education programs and activities of educational institutions that receive federal funds. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998). In "certain limited circumstances," institutions may be held liable for claims based on student-to-student sexual harassment that occurs in a context under the "substantial control" of the institution. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 645 (1999). The context is critical because, under the statute, the harassment must occur "under" the operations of the school to be covered. *Id.* at 653. This requirement emanates from the statute itself. *Id.* Title IX prohibits sex discrimination only in a university's "education programs and activities." 20 U.S.C. § 1681(a). The "program" or "activity" must

[1] *See generally Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) (quotation omitted) (when considering a motion to dismiss, courts may consider documents attached to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim"); *see, e.g., Jane Doe 6 v. Rust Coll.*, 2015 WL 5674878, at *3 (N.D. Miss. Sept. 25, 2015).

relate to the educational operations of the institution. *See generally Doe v. Mercy Catholic Med. Ctr.*, 2017 WL 894455, at *6 (3d Cir. Mar. 7, 2017) (stating that "Title IX does not 'encompass every experience of life' that a student may encounter" and explaining that, by including the word "education" in Title IX, "Congress signified that Title IX has some boundary").

Plaintiff's amended complaint presents two theories of liability under Title IX. First, she alleges that Baylor's alleged actions before her assault led to a "sexually hostile culture" and that Baylor is therefore liable in damages for the assault itself. ECF 6, ¶¶ 123-126. This Court recently characterized this theory as a "heightened-risk claim." *Doe 1-10 v. Baylor Univ.*, No. 6:16-cv-00173-RP, Dkt. No. 78 at 10. Second, she claims that Baylor's actions after her assault led to a loss of her educational opportunities or what this Court has characterized as a "post-reporting claim." ECF 6, ¶¶ 127-131; *Doe 1-10*, No. 6:16-cv-00173-RP, Dkt. No. 78 at 10.

B. Plaintiff's claims regarding the assault expired on April 18, 2015, before she filed this suit.

Title IX claims are subject to the two-year statute of limitations under Section 16.003(a) of the Texas Civil Practices and Remedies Code. *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 758-59 & 760-61 (5th Cir. 2015). Plaintiff's specific allegations, assumed to be true, demonstrate that her claims based on the assault and alleged failure to investigate are untimely and are not saved by any tolling doctrine.

The time of accrual is a question of federal law. *Id.* 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*. The plaintiff's awareness encompasses both awareness of the injury and awareness of the causal link between the injury and the defendant. *Id.* ***Awareness for accrual purposes does not mean "actual knowledge,"*** but, rather, means there are circumstances that would lead a reasonable person to investigate further. *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, 2000 WL 1701752, at *6 (5th Cir. 2000) (citation omitted); *see also Rotella v. Wood*, 528 U.S. 549, 555-56 (2000) (rejecting the argument that accrual in a RICO action should be tied to plaintiff's discovery of a "pattern of racketeering" rather than the plaintiff's injury; accrual was not deferred even though the "pattern of predicate acts" may be "complex, concealed, or fraudulent").

In *King-White*, the Fifth Circuit affirmed the 12(b)(6) dismissal of an untimely claim brought by a student who was sexually abused by her high school teacher. *See* 803 F.3d at 762-63. In *King-White*, the plaintiffs "urge[d]" the court "to adopt a 'delayed accrual' rule with respect to HISD, because the claims against HISD [we]re necessarily based on official 'policies or customs' that could not have been known at the time of [the teacher]'s abuse." *Id*. at 763. The Fifth Circuit declined to do so, instead applying the "ordinary" accrual rule because of the plaintiffs' awareness of (i) the abuse, (ii) the abuser's connection to her school, and (iii) the fact that her own complaints to the district "had gone unheeded." *Id.* at 763. This information would have caused a reasonable person to investigate further. *Id.*

Similarly, in *Henderson,* the Fifth Circuit rejected the untimely claims of several child abuse victims because they knew that they had been abused and they knew that the offender worked at their school. 2000 WL 1701752 at *5. Likewise, in *Twersky v. Yeshiva University*, a multi-plaintiff case, the court held that plaintiffs' knowledge of their injuries, their abusers' identities, and their abusers' connection to the school put the plaintiffs on "at least inquiry notice." 579 F. App'x 7, at *10 (2d Cir. 2014). The court rejected the plaintiffs' argument that

their claim did not accrue until a university official admitted in a media interview years later that school officials previously knew of the risk of sexual abuse. *Id.*

In this case, Plaintiff's allegations show that she, too, was on "at least inquiry notice." Plaintiff's amended complaint shows that she was aware of the assault, was aware of the assailants' connection to Baylor, was aware of Baylor's management of the Bruins, and was aware of the activity that she claims resulted in her interactions with football players. These facts are more than sufficient to establish notice under *King-White* and *Henderson*. *See generally King-White*, 803 F.3d at 762 (the relevant inquiry is whether there were circumstances that would lead a reasonable person to investigate further); *see, e.g.*, *Jane Doe 6*, 2015 WL 5674878, at *3 (citing *Doe v. St. Stephen's Episcopal School*, 382 F. App'x 386 (5th Cir. 2010), and rejecting plaintiff's argument that her claim "was tolled because it involved a latent injury in addition to the sexual assault—that is, the defendant's inaction when it knew of [employee's] proclivity for assaulting young females but failed to intervene and prevent such conduct").

Plaintiff's allegations also demonstrate that she had "at least inquiry notice" of an allegedly hostile culture for women, particularly within the Baylor Bruins program of which she was a member. ECF 6, ¶¶ 25-33. Plaintiff alleges that the Bruins had an unofficial policy in which female students "were at times used to engage in sexual acts" with high school recruits and football players. ECF 6, ¶¶ 28-29, 31-32. Plaintiff alleges that she became aware of these alleged practices and the "implied promise of sex" during her tenure as a Bruin. ECF 6, ¶ 31; *see also id.* ¶ 24. She further alleges that the subsequent findings from Baylor's Pepper Hamilton investigation regarding sexual assault and failure to discipline athletes were "consistent with" Plaintiff's "own interactions with the football program ***while a Bruin***." ECF 6, ¶ 55

(emphasis added). Plaintiff possessed information that would have prompted a reasonable person to investigate further. Her claim is untimely as a matter of law.

Plaintiff's post-assault claim based on the alleged failure to investigate also is time-barred. According to Plaintiff, she was raped on April 18, 2013, and graduated in December 2014. She claims that Baylor did nothing to investigate. Any claim based on this alleged indifference expired on April 18, 2015. *See, e.g.*, *Samuelson v. Or. State Univ.*, 2016 WL 727162, at *2 (D. Or. Feb. 22, 2016) (plaintiff's claim based on university's deliberate indifference accrued when university was indifferent to her specific report and not when plaintiff later learned of other victims).

Nor has Plaintiff alleged any basis for tolling. Texas's discovery rule tolls the statute of limitations "if 'the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.'" *King-White*, 803 F.3d at 764. As with the federal accrual rule, "'[d]iscovery' does not mean 'actual knowledge of the particulars of a cause of action,' but whether the plaintiff has 'knowledge of facts which would cause a reasonable person to diligently make inquiry to determine his or her legal rights.' Hence, the tolling period may expire and the statute of limitations may begin to run before a plaintiff subjectively learns the 'details of the evidence by which to establish [her] cause of action.'" *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 402–03 (5th Cir. 1998) (internal citations omitted).

Knowledge and reporting of a sexual assault "foreclose" the contention that the injury was inherently undiscoverable. *See St. Stephen's Episcopal Sch.,* 382 F. App'x at 389. Here, because Plaintiff alleges that she made a report to the Waco police, the discovery rule is inapplicable. *See, e.g., Henderson*, 2000 WL 1701752, at *6-7 (plaintiff "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"); *Mayzone v. Missionary Oblates of Mary Immaculate of Tex.*, 2014 WL 3747249, at *4 (Tex. App.—San Antonio July 30, 2014, pet. den.) (rejecting discovery rule despite allegation that the molesting priest "had a history of sexually abusing children and that [church officials] were aware of this history but nevertheless authorized him to work at the church"; plaintiff's knowledge of the sexual abuse was the relevant knowledge for accrual purposes); *Doe v. Linam*, 225 F. Supp. 2d 733, 735 (S.D. Tex. 2002) (refusing to apply discovery rule despite allegation of cover-up).

The doctrines of fraudulent concealment and equitable estoppel also do not apply. 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 that the defendant had actual knowledge that a wrong occurred, a duty to disclose the wrong, and a fixed purpose to conceal. *Id*. Similarly, 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 an inquiry that, if pursued, would lead to discovery of the concealed claim. *King-White,* 803 F.3d at 764.

The Fifth Circuit rejected tolling on similar facts in *King-White* and *Henderson*. Similarly, in *Longoria v. City of Bay City*, 779 F.2d 1136, 1139 (5th Cir. 1986), the Fifth Circuit held that the plaintiffs, whose home had flooded, were on notice to investigate the possibility of fraud when their house first flooded and not when they learned from the media that the city had concealed that the land was flood-prone. "The argument that the statutory period is tolled until

the plaintiff learns that the defendant's conduct may have been wrongful finds no support in the relevant case law." *Id.*

As in *Henderson*, Plaintiff knew the offenders' connection to her school "as that was the context in which [she] came into contact" with them. 2000 WL 1701752, at *6-7. This was sufficient knowledge for tolling purposes. *Id.* Plaintiff does not allege that she was deceived by Baylor into believing that she had not been assaulted. ECF 6 at ¶¶ 127, 128; *see, e.g., St. Stephen's Episcopal Sch.*, 382 F. App'x at 390 (fraudulent concealment and equitable estoppel did not apply where the plaintiffs "had not been deceived into thinking they had not been abused"); *Henderson*, 2000 WL 1701752, at *5 (although the plaintiffs "were ignorant of the defendants' concealment, they were painfully aware of the abuse by [the offender]"); *Doe v. Roman Catholic Archdiocese of Galveston-Hous. ex rel. Dinardo*, 362 S.W.3d 803, 814 (Tex. App.—Houston [14th] 2012, no pet.) (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"); *Getchey v. Cnty. of Northumberland*, 120 F. App'x 895, 899 (3d Cir. 2005) (although supervisor discouraged 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"); *see also King-White*, 803 F.3d at 764 (rejecting fraudulent concealment because plaintiff's allegations "focus on the School Officials' failure to act in the face of knowledge of abuse"). Nor can Plaintiff rely on equitable estoppel, as she has not alleged any representations by Baylor that induced her not to file suit. *Henderson Indep. Sch. Dist.*, 2000 WL 1701752, at *7. Indeed, she does not allege that she spoke to anyone at Baylor until 2015, after the statute of limitations already had expired.

In sum, Plaintiff was aware of activities within the Bruins, the assailants' connection to the university, and the university's alleged management of the Bruins program. Plaintiff's claims are untimely under the reasoning in *King-White*, *Henderson,* and *Twersky*, and should be dismissed.

C. Because Plaintiff did not report a sexual assault to Baylor, never identified the assailants, and never requested an investigation while she was still a student, Plaintiff's post-assault claims fail under *Davis* as a matter of law.

Alleged failure to investigate. This claim also fails on the merits. Under *Davis*, damages are available when an "appropriate person" with authority to take corrective action receives "actual knowledge" of peer sexual harassment and responds with "deliberate indifference" that "subjects" its students to harassment that is "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[ ] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 644-45, 648, 650-51. A response is deliberately indifferent if it is "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. The "clearly unreasonable" standard is more rigorous than a "mere reasonableness" standard. *Id.* at 649. Consequently, allegations of negligence will not support a claim of deliberate indifference. *See Sanches v. Carrolton-Farmers Branch Indep. Sch. Dist.,* 647 F.3d 156, 170 (5th Cir. 2011); *see, e.g.*, *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006) (a school's response can be "negligent, lazy, or careless" without being deliberately indifferent). Even "heightened negligence" will not suffice. *Rost ex. Rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1122 (10th Cir. 2008) (citing *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407 (1997)).

Plaintiff's allegations regarding the Baylor Police Department, assumed to be true, fail as a matter of law to support a claim of actual knowledge and deliberate indifference. First, Plaintiff's amended complaint does not contain facts indicating that a sexual assault was reported

to Baylor; moreover, her assertion that Baylor knew the identity of the two assailants is wholly conclusory. *See*, *e.g.*, ECF 6 ¶¶ 100, 101, 109. Conclusory assertions about notice "without any indication as to why, when, or how Defendant was on notice" are insufficient. *Bello v. Howard Univ.*, 898 F.Supp.2d 213, 221-222 (D.D.C. 2012). In a similar case, *Ross v. University of Tulsa*, 180 F.Supp.3d 951, 968 (N.D. Okla. 2016), a female student told campus police officers that a specific male athlete, Swilling, "took advantage of her," but she "did not use the word rape" and provided no "facts or details and was unwilling to accuse Swilling of any specific misconduct." Although the female student allegedly was scared when she spoke with the police, the court found that the report to the police was too vague to put the university on notice that "Swilling posed a "substantial risk" of sexual violence. *Id*.

Here, Plaintiff's amended complaint alleges that the Waco police notified the Baylor police "what had been reported" without describing what had been reported. ECF 6, ¶¶¶ 100-102. The plausibility standard, however, "asks for more than a sheer possibility that a defendant has acted wrongfully." *Ashcroft*, 556 U.S. at 678. Moreover, the actual police report shows that Baylor was informed that Plaintiff did not cooperate and "would not provide any info" to the Waco police. Exhibit A.

Second, even if the police report were sufficient to establish notice, Plaintiff's claim fails because she does not allege that she requested an investigation by Baylor at any point prior to her graduation.[2] "Campus security officers and school administrators walk a fine line when they investigate a report of sexual assault by a victim who is unwilling to proceed or make any specific accusations." *Ross*, 180 F.3d at 969. As in *Moore v. Regents of the University of California*, Plaintiff's claim fails because she does not allege any facts indicating that she had

[2] After graduating in December 2014, Plaintiff was no longer a Title IX beneficiary. *See generally Morales v. Corinthian Colls. Inc.*, 2013 WL 3994643, at *9 (W.D. Tex. Aug. 2, 2013) ("courts have indicated that a non-student may not maintain a Title IX claim").

requested an investigation. 2016 WL 4917103 (N.D. Cal. Sept. 15, 2016). In *Moore*, the student did not allege "whether she ever took any affirmative steps to file a formal request [for investigation] and, if so, when or how." *Id.* at *4-5. Because of "the ambiguity that surrounds Moore's request for an investigation, she has not pleaded delay or inaction that is 'clearly unreasonable in light of the known circumstances.'" *Id.* at *4. *See also Butters v. James Madison Univ.*, __ F. Supp. 3d __, 2016 WL 5317695, at *5, 10 (W.D. Va. 2016) (rejecting claim of a student who delayed in responding to the school's attempts to reach her "because she 'felt like no one cared so I didn't really care'"; under such circumstances, the court "simply [could not] agree that [the school's] decision not to pursue disciplinary action against the Assailants without her involvement constitutes deliberate indifference").

Finally, assuming for argument's sake that Baylor *could have* or *should have* done more in response to the Waco report, such allegations sound in negligence and fail to state a claim under *Davis* as a matter of law. *See, e.g.*, *Rost*, 511 F.3d at 1122 ("Perhaps the district should have independently interviewed the boys involved instead of relying" on the police, "but such an allegation would sound in negligence"); *Butters*, 2016 WL 5317695, at *8-9 (by arguing what university could have done, plaintiff "seems to be asking the court to employ a standard of either 'best practices' or a 'reasonableness' standard, but the standard for Title IX liability in this case is deliberate indifference.").[3] Finally, Plaintiff's allegations show that, once she actually reported the alleged assault in 2015 (and actually provided the names of the offenders), the investigation was swift, and the remaining offender was expelled. ECF 6 ¶ 118-119.

[3] As for Plaintiff's allegations regarding the Waco police, the Waco officers were not Baylor employees and their actions, or inactions, "cannot be attributed to the university. A school is liable 'only for its own misconduct.'" *Moore*, 2016 WL 4917103, at *4-5 (quoting *Davis*, 526 U.S. at 643).

Alleged hostile environment. Plaintiff alleges that, after the sexual assault in April 2013, she continued to encounter one of the assailants (Armstead) and that his presence of campus created a hostile environment for her until she graduated in December 2014. ECF 6 ¶ 107, 111-15. Setting aside the vagueness of Plaintiff's allegation (she does not allege when or where she ever saw Armstead again), Plaintiff's factual allegations do not show that Baylor knew that Armstead had raped her or that it knew that she was being harmed by his continued presence on campus. A university cannot be deliberately indifferent to information that it does not know. *See, e.g., Karasek v. Regents of the Univ. of Cal.*, 2016 WL 7406431, at *13 (N.D. Cal. Dec. 22, 2016) ("Karasek alleges that she still saw TH one day from a distance as she walked to class, but she does not allege that she informed the University of this incident. Nor does she allege facts plausibly indicating that the University was aware of the need to take particular additional steps"). Likewise, an institution cannot be held liable in damages for not providing measures that were not requested. *See Butters*, 2016 WL 5317695, at *9 ("Moreover, there is no evidence Butters asked for those accommodations."); *Moore*, 2016 WL 4917103, at *4-5 (finding no deliberate indifference where plaintiff did not allege that "the school ignored or rebuffed any request for remedial action"); *Karasek,* 2016 WL 7406431, at *12 ("Nor does she allege that she requested any accommodations from the University that were not granted").

Here, Plaintiff Elizabeth Doe does not allege that she requested remedial action from Baylor while she was enrolled nor that her requests were not granted. She has failed to state a Title IX claim for which relief can be granted.

II. Plaintiff does not state a viable negligence claim.

A. Universities do not owe a legal duty to protect students from harm from fellow students.

Plaintiff's negligence claims fail as a matter of law. To state a claim 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 a duty is a question of law for the court to decide from the facts surrounding the occurrence at issue. *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 Doe 1-10*, No. 6:16-cv-00173-RP, Dkt. No. 78 at 23; *Boyd v. Tex. Christian Univ*., 8 S.W.3d 758 (Tex. App.—Fort Worth 1999, no pet.).

Plaintiff alleges that Baylor "owed a duty of reasonable care to protect [Plaintiff] from a sexually hostile environment." ECF 6, ¶ 132. However, 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," such as the relationship between employer/employee, is an exception to this general rule. *Id*. Absent such a special relationship, there is no general duty to warn or protect. *See Gatten v. McCarley*, 391 S.W.3d 669, 674 (Tex. App.—Dallas 2013, no pet.).

This Court recently acknowledged that, under Texas law, there is no special relationship between a university and its students, and universities do not stand *in loco parentis*. *See Doe 1-10*, No. 6:16-cv-00173-RP, Dkt. No. 78 at 23-24; *Boyd*, 8 S.W.3d at 760 (court's "review of the relevant case law reveals no authority favorable to Appellants' position" that university had special relationship with student under the doctrine of *in loco parentis*"); *see also 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); *Bradshaw v. Rawlings*, 612 F.2d 135, 138-140 (3d Cir. 1979) (*in loco parentis* no longer applies to university students); *Tanja H. v. Regents of the Univ. of Calif.*, 228 Cal.App.3d 434 (1991) (collecting cases); *Rabel v. Ill. 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"). Therefore, even if a "serious risk of sexual harassment and assault" was foreseeable (ECF 6, ¶ 133), courts have been unwilling to hold colleges liable for damages under this theory. *See Doe 1-10*, No. 6:16-cv-00173-RP, Dkt. No. 78 at 24; *Tanja H.,* 228 Cal.App.3d at 438.

Nor is this a situation in which Baylor affirmatively rendered Plaintiff more vulnerable to sexual assault by, for example, physically isolating her with the offender. The requirement of affirmative action means that the defendant actually exercised control of the plaintiff on the occasion in question and placed her in a more vulnerable position. *See generally* Restatement (Second) of Torts §§ 323, 314. Mere knowledge that the plaintiff is in danger is insufficient to impose a legal duty. *See Carter v. Abbyad*, 299 S.W.3d 892, 895-96 (Tex. App.—Austin 2009, no pet.). Thus, in *Freeman* the court rejected the claim of a young woman who was raped in a dorm after becoming intoxicated and passing out. 349 F.3d at 587-88. Although a resident assistant asked a student to monitor her, he "took no specific action to exercise control or custody" over her and, thus, "had no legal duty to come to her aid." *Id*.

Plaintiff alleges that Baylor had some control over the context of her assault because Baylor allegedly arranged off-campus housing for football players. ECF 6, ¶¶ 37-39, 86. These allegations are insufficient to impose a duty to protect Plaintiff from the criminal acts of other students. First, Plaintiff alleges that she was assaulted in her own private home, not in an athlete's off-campus housing. Second, even in situations involving actual dormitories, courts

have rejected liability. A university's role as a dormitory operator is similar to that of an innkeeper, which "does not have a duty to search guests for contraband, separate them from each other, or monitor their private social activities." *Tanja H.,* 228 Cal.App.3d at 438. Absent a valid premises liability claim, which would require evidence that the university created or allowed an unsafe condition to continue that was a legal cause of the assault, the university may not be held liable for an on-campus assault. *Id.* at 439-40; *see, e.g., Doe 1-10*, No. 6:16-cv-00173-RP, Dkt. No. 78 at 24 ("While Does 1, 3, and 5 allege they were sexually assaulted on Baylor's campus, they have not alleged that Baylor failed to meet its duty to provide them with safe housing, thereby causing their assaults, nor have they provided any other exception to the general rule that a university has no duty to protect its students."); *Freeman*, 349 F.3d 587-88.

Plaintiff also claims that one of the alleged offenders previously had assaulted another student. ECF 6, ¶ 141. However, in Texas, there is no general duty to control the conduct of third persons, even if the actor has the practical ability to control the third person. Thus, for example, in *Newsom v. B.B.*, the court held that a parent could not be held liable for sexual assaults committed by his adult son even though the parent knew of prior instances of molestation. 306 S.W.3d 910 (Tex. App.—Beaumont 2010, pet. den); *see also Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999) (psychiatrist whose patient threatened to kill a third party had no duty to warn the victim). Texas law does not support Plaintiff's tort theories.

B. A claim for negligent hiring, training, or supervision requires proof of an underlying tort by an employee.

Plaintiff also alleges that Baylor owed a duty to supervise its employees, particularly football program staff who may have had authority to investigate misconduct and discipline athletes. ECF 6, ¶¶ 137-139. Because there is no legal duty requiring universities to investigate and discipline students in the first instance, there is no duty to supervise university officials in

performing these tasks. Courts have not recognized a common law duty to conduct a competent student discipline investigation. *See Vu v. Vassar Coll.*, 97 F.Supp.3d 448, 484 (S.D.N.Y. March 31, 2015). Further, negligent administration of a university's policies does not give rise to an enforceable duty to discipline students or to ensure that school rules are followed. *See, e.g., Pawlowski v. Delta Sigma Phi,* 2009 WL 415667, at *3 (Sup. Ct. Conn. Jan. 23, 2009) (citing cases).

Additionally, the common law duty to supervise employees is implicated only when the **employee** commits an actionable tort. *Host Marriott Corp. v. Meadows*, 2001 WL 727341, at *2 (Tex. App.—Dallas June 29, 2001, pet. denied) ("In the context of negligent supervision, the plaintiff has not been injured in the eyes of the law if the employee did not commit an actionable tort . . ."); *see also Nart v. Open Text Corp*., 2011 WL 3844216, at *5 (W.D. Tex. Aug. 29, 2011). "The duty of the employer or contractee extends only to prevent the **employee or independent contractor** from causing physical harm to a third party." *Doege v. Sid Peterson Mem'l Hosp*., 2005 WL 1521193, at *7 (Tex. App.—San Antonio June 29, 2005, pet. denied) (emphasis added); *see also Nadeau v. Echostar*, 2013 WL 1715429, at *3 (W.D. Tex. Apr. 19, 2013) ("Plaintiff has failed to identify an actionable, common-law tort that Defendants' employees might have committed."). Plaintiff has not alleged any separate actionable tort by any employee to support a negligent supervision claim. *See, e.g*., *Jackson v. NAACP Hous. Branch*, 2016 WL 4922453, at *11 (Tex. App.—Houston [14th Dist.] Sept. 15, 2016, pet. den.). Case law does not support Plaintiff's assertion that a university has a legal duty to supervise employees to ensure that the employees supervise students to prevent the students from harming others.

C. Plaintiff's gross negligence claim fails for the same reasons as her negligence claims.

It is axiomatic that "a finding of ordinary negligence is prerequisite to a finding of gross negligence." *Nowzaradan v. Ryans*, 347 S.W.3d 734, 739 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *see also J.P. Morgan Chase Bank, N.A. v. Tex. Contract Carpet, Inc.*, 302 S.W.3d 515, 535 (Tex. App.—Austin 2009, no pet.); *Driskill v. Ford Motor Co.*, 269 S.W.3d 199, 206 (Tex. App.—Texarkana 2008, no pet.). "The difference between these two forms of negligence is one of degree rather than kind." *Trevino v. Lightning Laydown, Inc.*, 782 S.W.2d 946, 949 (Tex. App.—Austin 1990, writ den'd). Plaintiff's gross negligence claim fails for the same reason as her ordinary negligence claim—she cannot show that Baylor had a duty of care to protect her from the alleged assault or to provide post-assault services, and therefore she cannot show a departure from that standard.

D. Plaintiff's negligence claims are time-barred.

Even if she had stated a viable claim, Plaintiff's negligence claims are barred by the two-year statute of limitations under Section 16.003 of the Texas Civil Practices and Remedies Code. 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 16.0045(b), its reach against non-perpetrators is circumscribed. *See Linam*, 225 F. Supp. 2d at 734; *see also St. Stephen's Episcopal Sch.*, 382 F. App'x at 390 n.3 (applying two-year statute to negligence claims and five-year statute to vicarious liability claim). Courts have applied the five-year rule to certain claims against institutions, but these cases generally involve claims against employers of employee-perpetrators. *See, e.g.*, *Stephanie M. v. Coptic Orthodox Patriarchate Diocese of S. U.S.*, 362 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2011, pet. den.) (applying five-year rule to claim based on priest's molestation of

child where child's allegations against the church were not independent of her claim of intentional conduct by the priest); *C.R. v. Am. Institute for Foreign Study, Inc*., 2013 WL 5157699, at *6 (W.D. Tex. Sept. 12, 2013) (applying five-year rule to claim against a summer camp that hired a counselor who molested a child). Plaintiff's negligence claims based on "pre-assault" allegations and the "post-assault" failure to investigate accrued in April 2013 and expired two years later in 2015. Additionally, tolling is unavailable for the reasons discussed in Section I.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendant Baylor University prays that the Court will grant this motion and dismiss all claims against it. Defendant also prays that the Court grant such other relief, at law or in equity, to which it may show itself entitled.

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 opposing counsel on March 28, 2017, via the Court's ECF/CMF electronic filing and service system as follows:

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