TUESDAY, FEBRUARY 16, 1993
2:15 - 3:45 p.m.

CONCURRENT SESSION ONE

The Liability of Students and Student Organizations:
Managing High Risk Student Activities, Including
Recreation and Sports -- The Proper Use of Releases
and Consent Forms

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MANAGING LIABILITY FOR STUDENT ACTIVITIES

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Presented at the Stetson University.
College of Law Conference:

14th ANNUAL NATIONAL CONFERENCE ON
LAW AND HIGHER EDUCATION: ISSUES IN 1993
Sheraton Sand Key Resort Hotel
Clearwater Beach, Florida
February 14-17, 1993
Student Activities

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RECOGNITION AND SPONSORSHIP OF STUDENT ACTIVITIES

Every college and university has its own way of categorizing and evaluating a myriad of student activities. While these judgments may have been based solely on educational philosophies in the past, today they are used:

- to allocate limited resources;
- to effectuate a mission;
- to meet student interest; and
- to limit the liabilities to which the institution is exposed.

While it is common to talk about recognition and sponsorship of student activities, these terms have no uniform meaning. Nor is there a universal process to identify which groups have which rights or privileges. Some institutions require that groups undergo a formal application review process, others permit the student government to bestow such rights, and still others establish an automatic process that is self-generating.

It is possible, however, to identify two opposite approaches to managing student organizations and activities:

- The distant or “arms length” activities that are independent from the institution’s physical, financial or administrative involvement. Typically, the arms length approach involves the institution only in the ministerial aspects of student activities.

- The sponsored or “university-owned” activities, which have active management, financial, physical and administrative involvement from the institution. This approach usually involves significant staff and faculty time.

Most institutions use either a hybrid approach to student activities or try to match the approach to the particular activity. We have found no single approach that satisfies all of the educational or management goals for student organizations, nor is there an approach that will suit an institution permanently and in all instances. It is also important to note that neither one of the “extreme” approaches provides an institution with an absolute shield from liability.
Colleges and universities have long had to respond to student activities and organizations which push against the rules and stretch the limits. Administrators on campuses around the country routinely receive telephone calls requesting guidance on how to manage a wide-range of activities.

- The faculty advisor of the canoeing club calls to ask if she should issue a new waiver form when the club goes sky-diving.
- The transportation director calls to report that six undergraduates were injured when a university van, driven by a student, hit a car downtown while returning from a dormitory-sponsored tutoring project.
- A resident assistant calls to report that a female first year student returned to her dorm from a fraternity party with severe bruises and bleeding. Her friends told the RA that she had been served drinks at the fraternity house and was subsequently raped by three fraternity members.
- The president calls to insist that the anti-abortion advocacy group on campus not be permitted to run an advertisement in the university newspaper announcing a rally with the head of Operation Rescue as speaker. The president feels that the issue is confrontational, and he fears that the rally will block access to the university hospital, which performs abortions.

- Courts are finding greater responsibility is held by colleges when injuries happen on campus, or in the course of an activity that has some official connection to the institution.

STUDENT ACTIVITIES

The Ultimate Challenge

By Barbara Bennett, Jane Cambrinck-Graham and Sandra H. McMullan

- The head of the student government calls to inform the university that he just signed a contract with Guns 'N Roses to perform a live concert in the university's stadium next month.

Unfortunately, several things have happened that make responding to these questions and managing these incidents more difficult.

- National laws now require colleges to have in place, and in use, policies that seek to protect students from hazing, underage drinking, illegal drug use and sexual assault;
- Courts are increasingly less respectful of a college's attempts to limit liability in instances where the college was aware of dangerous activities (such as hazing, sexual assault or other negligent or criminal behavior), yet took insufficient steps to stop the behavior; and
- United Educators has prepared this paper to give you an overview of the issue of student activities on campus. We hope it will assist campus administrators to:
  - Identify campus practices that warrant attention and review;
  - Suggest several review processes that can identify areas of potential liability; and
  - Share successful management practices currently in use by other institutions of higher education.

This paper is not intended to replace the traditional educational approach to extracurricular activities with an economic or liability analysis. It is our goal to suggest ways in which the administration can undertake a systematic and careful review of the risks posed by students' activities, and to help create a process to integrate risk management into its existing approach.
While an institution is not normally held responsible for the independent behavior of each student, its responsibilities can be very different when that behavior occurs in the context of an organization or group that carries with it the actual or implied approval, recognition, sponsorship, or control of the institution. For example, an institution generally will not be held liable for injuries resulting from an automobile accident caused by a group of intoxicated students driving back to campus from an off-campus bar. If, however, the intoxication or driving occurred during a university-sponsored field trip or club outing, institutional liability is more likely.

Under tort law there is no duty to control the conduct of a person to prevent injury to that person or others unless there exists what the law calls a "special relationship." In the past, courts found that a person's status as a student created a special relationship with a university sufficient to impose a general duty to control and protect. This doctrine of *in loco parentis* has been rejected unanimously under the current law.

Increasingly, however, courts have held colleges and universities liable for organized student activities by finding other special relationships between student organizations and the institution. Special relationships have been found based on:

- the college's status as a property owner or landlord and the student organization's status as a tenant or invitee; and
- the involvement of the college in a student organization or activity to the extent that the organization is viewed as an agent acting on behalf of the institution.

The way in which an institution interacts with or treats a student organization or other organized activity may also raise liability concerns. For example, censorship of a publication, or refusal to recognize a group with an unpopular philosophy, raises constitutional issues that can create liability for an institution.

In addition to potential tort liability created by a special relationship, an institution may be subject to duties prescribed by statute or assumed under a contract, i.e., a contract that has been executed by the institution or executed by a student organization that has apparent or actual authority to bind the institution.

**When Can the Campus be Found to Have Legal Responsibility for Student Activities?**

**Glos•sa•ry (gloz•se•re)**

*agency*—relationship in which one person acts on behalf of another with the authority of the latter. "The acts of an agent will be binding on his principal."

*dramshop acts*—acts which strictly regulate licensed establishments engaged in the sale of alcoholic beverages and impose civil liability for dispensing alcohol to an intoxicated patron.

*tort*—A wrongful act, damage, or injury done willfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought.

**When the University is the Property Owner**

The trend in both the media and the law increasingly holds colleges and universities accountable for providing students with a reasonably safe campus environment. As a landowner or landlord, an institution is obliged to maintain reasonably safe premises.

**Duty to Inspect & Duty to Warn**

Although the specifics vary from state-to-state, a landowner generally does not have a duty to ensure the safety of those on its property, but rather is required to exercise reasonable care in inspecting the premises and protecting or warning against any known or foreseeable dangers. Therefore, while there is not an obligation to ensure the absolute safety of students involved in organized activities on campus, liability may be imposed if a university fails to regulate a pattern of dangerous conduct, or warn of
prior occurrences or reasonably foreseeable instances of danger.

Sometimes it is difficult to predict what will be required of an institution in a given situation. For example, in one case in which an annual pushball game had been held between the first year student and sophomore classes for 38 years, a court held that the college had no duty to supervise the game because there had been no previous serious injuries and because the event was not inherently dangerous. Another court held that a university was not liable to a student injured during roughhousing at a fraternity party because there was no duty to safeguard or warn against that type of injury. Yet in another case, a court held that a university had a duty to take reasonable precautions to protect those who attend its football games in light of known tailgating and drinking.

Duty Dependent on Foreseeability of Harm

Some courts will not hold a college responsible for injuries on its property unless there have been similar incidents and, therefore, a duty on the part of the university to protect. Other courts, however, require only that the danger be reasonably anticipated.

In one case where a college student was abducted outside a gym following a basketball game, the court held that the college could not be found liable given the absence of a repeated pattern of criminal activity. In another case, a college was held liable for a rape because the presence of thick untrimmed bushes made it foreseeable that an attacker could hide from view, even though there was no history of attacks in the area.

When It Voluntarily Assumes a Duty

When a college voluntarily undertakes a duty to provide certain protection or security, the law requires that the duty be carried out with significant care and consistency. Liability may result if the duty, although undertaken voluntarily, is performed negligently.

Adoption of policies or prohibitions against known dangerous behaviors that are not consistently and effectively enforced can operate to create a more expansive duty. This was the case in the recent Furek v. University of Delaware, in which the institution promulgated policies prohibiting hazing by its off-campus fraternities. A fraternity which merely rented the land on which its house was located injured a pledge by burning him with a lye-based substance. The State Supreme Court found that the university did not carry out its anti-hazing policy in an effective manner, citing the fact that the campus police were unaware of this policy and had seen, but not responded to, evidence of hazing activities on the campus.

Another court found a university liable for a rape on campus because the university routinely left the doors to the campus building unlocked, even though prior incidents had occurred in that building. Conversely, yet another court held that a university satisfied its assumed duty of supervising the safety of a canoe outing by providing a motorboat escort, a light in each canoe, the participation of veteran canoeists, and by monitoring of local weather forecasts, even though two stu-

THE ISSUE

Most educators believe extra-curricular and co-curricular activities are important to student development and a complete education. Since some risk exists in all activities — rugby clubs, concerts, community service projects, or political action groups — our goal is to suggest ways that the administration of an institution can review the liability imposed by student activities and take appropriate action to mitigate that exposure.

The liability issues and risk management options proposed in this issue of Managing Liability will be of interest to student affairs administrators, risk managers and counsel, as well as business officers. We encourage you to distribute copies to anyone responsible for policy and the direction of student organizations and activities.

—Burton Sonenstern, President

STUDENT ACTIVITIES
Students drowned during the outing in an unexpected storm. Institutions often ask whether it is necessary to protect against a foreseeable danger or merely to warn of the danger. The decision is usually not a legal one. Warning of a potential danger will often suffice to protect an institution against liability, but warning against all dangers is not possible. New laws, such as the Campus Security Act (discussed infra) require the college to provide "timely" notice of crimes committed on the campus. The Furek case suggests that some activities that are known to the administration, which are obviously dangerous and able to be controlled, may impose a greater duty on the institution to intervene. One recent court case has followed Furek's reasoning in holding a university liable for "encouraging" sledding in certain areas, resulting in serious injury to a student.

When the Student Organization is Viewed as Acting on the College's Behalf

In addition to liability created because of a duty imposed by law or assumed voluntarily by an institution, a college or university may be held vicariously liable under the law of agency, if it exerts a certain level of control over the acts of student organizations or activities. The general rule is that liability is imposed on an institution for the acts of its agent, namely a person or entity acting under the control of, or for the benefit of, the institution. The most common agents for an institution are its employees, who, when acting within the scope of their employment, can create liability for the institution.

CASE BOX 1

The faculty advisor of the canoeing club calls to ask if she should issue a new waiver form when the club goes skydiving.

If the institution has an arm's-length relationship with student groups (which a number of institutions would necessarily do with such a risky, hard-to-manage activity), it may take the following steps to ensure that this relationship is reinforced:

- Have each participant sign a statement indicating that he/she understands that the university is not involved in this activity, that skydiving is dangerous even with supervision and instruction (specifying the harm that can befall students involved in skydiving), and that they understand that the institution has not had a part in selecting the skydiving facilities or operations that will be used by the club.
- Include in the student handbook a list of activities that the university will not sponsor because of the physical risks and the inability to provide for students' safety.
- Make clear that the involvement of faculty is personal and not part of the staff member's responsibilities to the institution (some schools have a special status for clubs that are unique areas of interest).

If the institution is willing to embrace the activity, it will want to take steps to ensure that its involvement is consistent and of a qualified level.

- Have university counsel review the contract for airplane and equipment services to ensure that it places responsibilities for injury or death on the service provider.
- Review the adequacy of the insurance and underlying financial resources of the service provider before entering into any contract.
- Make sure that the faculty or other advisor is well trained, safety conscious and able to instruct students about the activity.
- Require the club to clear any skydiving activities beforehand and to limit dispersals to only those outings that meet that requirement.
Duties

An institution that assumes control over a student group's activities assumes the duty to assert that control consistently and in a careful manner that will prevent foreseeable harm. It is not clear how much involvement or control over a student organization or activity is necessary to create an agency relationship, or whether mere registration of an organization can create this relationship so that the acts of the organization become the acts of the institution. Similarly, the involvement of faculty advisors in an organization's activities could establish the institutional control necessary to create an agency relationship. In each case, the determination will depend on the nature of the organization and the extent of the university's involvement.

A college should recognize, however, that once it requires a faculty member to act as an organization's advisor on behalf of the university, rather than voluntarily as an individual, the institution may have created an agency relationship and may be responsible for not only the negligence of the advisor, but also for its own failure to adequately train the advisor.

In one case, a student's participation in a lacrosse club did not make that student an agent of the university in injuring another student when the injuring student used his own equipment, received no compensation for playing, and the institution charged no admission to the games, even though the school provided transportation to the games and provided the players with a coach and uniforms.12

Student Publications

Control of student publications and their content can make the publication an agent of the university and create institutional liability for defamation. Courts generally hold that an institution is not liable for the defamatory statements made by a student newspaper when the institution only furnished the space and services and exercised no control over content.13

Contractual Liability

The agency relationship between an institution and a group of students or student organization advisor can also create contractual liability for an institution. Student organizations and those students or faculty advisors in charge of organized student activities may be tempted to enter into various contractual arrangements that could bind the institution not only to the performance of the obvious obligations of the contract, but also to provisions concerning indemnification and insurance. These agreements can range from contracts with performers and speakers for engagements, to agreements allowing the use of university facilities or to sponsor promotions. Commitments can also take the form of publicity and advertisement for events on campus. If students or faculty represent themselves as acting on behalf of, or in the interest of, the institution, a court may find that it is reasonable for third parties to rely on the student's or faculty member's apparent authority to bind the institution.

When the College's Action Becomes a Constitutional Violation

Student constitutional rights that limit a public institution's authority include:

- First Amendment rights of speech, press, religion and association;
- Fourth Amendment rights to be free of unreasonable searches and seizures; and
- Fourteenth Amendment rights of due process and equal protection, including those protected by federal and state discrimination laws.

Public Institutions

Refusal of a public university to recognize unpopular student organizations without a compelling reason has been held to be a violation of students' First Amendment rights of speech and association.14 Public institutions, however, have been held to have the authority to prohibit student organizations from discriminating on the basis of race, sex, ethnic origin and handicap, even if it infringes on students' rights
CASE BOX 2

The transportation director calls to report that six undergraduates were injured when a university van, driven by a student, hit a car downtown while returning from a dormitory-sponsored tutoring project.

If the college operates on an arms-length basis with student groups such as this, it may decide not to permit such groups to use university vehicles. If the university decides to maintain such a policy, it will need to decide answers to the following questions:

- Do its handbooks and policies make it clear to the advisors, directors of the transportation program and the student groups that use of university vehicles is not permitted for such groups?
- Does the institution want its own liability or automobile policies to be triggered in the event of such a serious accident? Whatever the decision, the institution needs to be very clear with both the students and the broker about its intent with respect to insurance.

If the college chooses to embrace such student volunteer activities, it should set up a process to satisfy its need to be involved. To minimize the risks of such an outing, the university could require:

- that the student group clear its travel times and plans with the administration;
- that student drivers provide the university's motor vehicle department with the information necessary to review the student's driving record;
- that all student drivers undergo training in the safe operation of the van or any other university fleet vehicles to be used; or
- prompt disciplinary action when any students violate rules, such as permitting an unauthorized driver to operate a vehicle or driving after drinking.

Some colleges do not permit students to use university vehicles, but may reimburse students or faculty who drive personal vehicles for particular uses. Some institutions condition eligibility for reimbursement upon:

- screening of the driver, after the institution has conducted driving record and insurance coverage review; and
- review and approval in advance of the travel plans.

of association. One court found that the suspension by a university of a fraternity for race discrimination served a sufficiently compelling interest to justify the intrusion on association rights.13 Similarly, while a public institution retains authority to impose reasonable rules and regulations on the use of campus facilities by student organizations, once a public forum has been designated, content-based exclusions are prohibited.14 For example, if a campus approves an area for posting announcements or holding meetings, approval may not be withdrawn based on the views of the organization planning to use the area.

A public institution may not interfere with, review or control the content or editorial policy of a recognized student publication, but may place reasonable time, place and manner restrictions on publication.15 Also, an institution has a recognized right to charge a mandatory student fee to support all organizations, even if certain organizations are repugnant to those students paying the fee.16 This right, however, does not extend to the on-campus sponsorship of off-campus groups, such as Public Interest Research Groups.17

Private Institutions

Private institutions are not held to the same constitutional standards as are public institutions, except in the case of discrimination laws that prohibit the exclusion or discriminatory treatment of protected groups. In addition, some state consti-
tutions' First Amendment or other constitutional protection may apply to private institutions. Otherwise, students at private institutions are entitled only to have the institution follow its own rules and regulations and provide procedures that are fundamentally fair.

Following a hazing incident, one private university withdrew recognition from a fraternity based on a handbook regulation that placed "collective responsibility" on such organizations. The action was upheld by the court, which emphasized the organization's participation in the original drafting of the regulations.21

Local regulations, as well as state constitutions, may impose additional restrictions on private institutions. In one case, a local human rights law was held to prevent a private religious institution from withholding the benefit of official recognition (use of facilities and funding) from a gay rights organization, although the court did not require official recognition of the organization.22

When Federal and State Laws Impose Additional Duties

Through statutes and regulations, governments impose duties and add to liability concerns for institutions. Of particular concern to colleges and universities are laws and regulations concerning drugs and alcohol, discrimination, safety and security.

Drug and Alcohol Laws

While courts in the past have been reluctant to impose the duty to enforce drinking laws on institutions of higher education, recent legislation places that duty squarely on the shoulders of colleges and universities.23 The Drug-Free Schools and Communities Act requires each college and university receiving federal funds to implement a program to prevent the unlawful distribution of illegal drugs and alcohol by students and employees and to conduct biennial reviews to determine the effectiveness and consistency of enforcement.24

In addition, state dramshop laws and social host liability statutes are being stringently enforced. These laws create a duty on the part of institutions to adopt policies and procedures—and enforce them—concerning alcohol use on campus. Failure to perform this duty with reasonable care may result in institutional liability.

**CASE BOX 3**

A resident assistant calls to report that a female first year student returned to her dorm from a fraternity party with severe bruises and bleeding. Her friends told the RA that she had been served drinks at the fraternity house and was subsequently raped by three fraternity members.

All institutions that have resident assistants will want to ensure that the RA's understand the nature and scope of their responsibilities on behalf of the institution and that they are properly trained to carry out those functions at such a time. Those functions should include:

- **Letting the student know how to proceed if she wants to bring charges against the perpetrators;**
- **Knowing how to treat such issues when the student does not wish to bring a formal complaint, including maintaining confidentiality and reporting to the dean or other appropriate administrator; and,**
- **Knowing what the RA's role is if she later concludes that the student is encountering personal problems arising from the incident (i.e., what behaviors to look for, who to notify, how to treat the information confidentially, etc.).**

Institutions that embrace fraternities and seek to directly regulate their conduct will want to have disciplinary procedures in place that will permit the university to conduct an investigation into the activities at the fraternity house that evening. In particular, the institution may wish to require:

- **that any parties at which alcohol is served be registered with the campus and be supervised appropriately by the institution;**
- **that all social clubs undergo training which includes information about sexual harassment and assault; and,**
- **that any complaints concerning alcohol and sexual assault brought against student organizations be heard in an expedited process and include sanctions against the student group as well as the individuals.**

Institutions that keep arms length from fraternities may still want to impose rules that permit the university to undertake investigations and discipline in cases involving illegal consumption of alcohol and complaints alleging physical assault, sexual or otherwise.
**Discrimination Laws**

State and federal discrimination laws prohibiting discrimination based on sex, handicap, race, color or national origin appear broad enough to cause institutional liability for discrimination by student organizations and activities. The sex discrimination laws specifically do not apply to social fraternities and sororities. We know of no cases in which the discriminatory behavior of a student organization resulted in a suit against the college, however, colleges are increasingly attentive to discriminatory behavior in recognized student organizations, and are moving more quickly to impose immediate discipline.

**The Campus Security Act**

Complying with recent legislation on campus security could conceivably create liability in several ways. First, the Campus Security Act requires campuses to give timely warning of crimes on campus. If an institution does not provide such a warning, it could lead a court to find a liability. Secondly, the publication of security policies and procedures, if those policies and procedures are not carefully stated, could be interpreted as a voluntary assumption of a duty to protect or ensure the safety of those on campus, including those participating in student activities. Finally, a recent amendment to the Act requires colleges and universities to adopt mandatory programs designed "to prevent sexual assault and to inform students of its investigatory and hearing process, as well as sanctions that will be imposed for sexual assault," including date rape. These more extensive requirements become effective in 1993, but could be used as proof of a duty to warn and to protect victims, as well as those accused of such acts.

### CASE BOX 4

The president calls to insist that the anti-abortion advocacy group on campus not be allowed to run an advertisement in the university newspaper announcing a rally with the head of Operation Rescue as speaker. The president feels that the issue is confrontational, and he fears that the rally will block access to the university hospital, which performs abortions.

**Advertising:** If the student newspaper is embraced by the institution (i.e., funded by the institution, accountable through a faculty advisor), policies for accepting advertising should be established with input from the administration.

For example, an institution could set a policy that prohibits the acceptance of advertising from outside advocacy groups—i.e., only affiliated student groups may run advertising.

If the student newspaper is independent of the institution and does not receive direct funding for, or supervision of, its operations, the university will not be able to intervene in either the policies or practices of selecting advertising.

Public institutions, in particular, will face significant constitutional challenges if the administration takes steps to deny advertising based on the issue involved.

**Demonstrations:** By contrast, the institution does have control over the use of their campus for demonstrations, assuming that it sets policies that are neutral with respect to content and that it regulates the time, place and manner of activities:

- The institution can set more restrictive rules with respect to demonstrations that will disrupt its ability to carry out medical care in the hospital, such as restricting the proximity of demonstrations to hospital access points.

- The institution can require that it be notified of any outside speakers who will be appearing on the campus, so that it is able to prepare adequately for security, facilities and crowd control.
One of the key challenges facing institutions of higher education today is the need to identify and realistically evaluate the risks posed by student activities. All too often, key administrators become aware of the institution’s exposure to, and the consequences of, particular activities only after they are faced with a serious lawsuit. A review of this issue before that happens permits thoughtful discussion of such key questions as:

- the mission of the institution,
- the value of the activities, and
- management options.

It also lays a framework in which the institution can focus on key financial decisions such as insurance and indemnification.

**How Can the College Address These Issues?**

The last step in the process allows administrators to refine the techniques selected and to repeat this management cycle.

**Form a Student Issues Working Group**

As illustrated by the examples at the beginning of this paper, students touch the life of the institution at many points. Consequently, an institution that seeks to effectively integrate risk management into its programs will need to identify campus administrators whose responsibilities touch student activities.

While the list of eligible members will vary from campus-to-campus, it is important to include individuals with responsibility for:

- insurance and risk management,
- student affairs,
- legal affairs,
- student sports,
- resident life,
- university transportation, and
- security.

**Inventory Student Activities**

One of the first steps an institution must take is to identify all student organizations and ongoing activities with any affiliation to the campus (see Audit Guide). Such a list can help the working group to prioritize which activities pose liability concerns to the institution. The list should include all organizations officially recognized by the campus, as well as all groups that use the institution’s name (i.e., the X University Bungee Jumping Club), and those that are regularly permitted access to the campus bulletin board and student papers to announce activities.

It is also important to identify any benefits the organization received (i.e., funding, access to meeting space, campus mail), use of campus vehicles, use of public space), as well as their point of connection to the institution (i.e., faculty advisor, recipient of student government funds, meeting in the dormitory). Such a review must also include a review of the institution’s policies toward student organizations and goals in granting privileges to those organizations. Years may...
CASE BOX 5

The head of the student government calls to inform the university that he just signed a contract with Guns 'N Roses to perform a live concert in the university's stadium next month.

It is common to structure a close relationship with the student government, even where the school keeps other student organizations and activities at arm's length. A close relationship with the student government can be set up to limit liability risks by requiring:

- all student officers and advisors to complete a training program about the school's requirements and the administrative responsibilities of the officers and advisors;

- that any contracts entered into by student groups be reviewed by university counsel or administrators to ensure that they contain sufficient protection for the group and the university, such as indemnification provisions (some universities and colleges require that the institution sign any significant contracts with service providers or entertainers to ensure that they have full control over the contract provisions);

- that outside service providers have their own insurance that meets specified requirements, including that the institution be a named insured; and

- approval well in advance of finalizing plans to use campus facilities for large events (such approval is typically dependent on the details of the event, the crowd and the duration, and the development of a crowd control and security plan by campus security).

A few institutions have structured a distant relationship between the student government and the institution. This can be done by:

- requiring the student government to purchase separate event insurance, possibly through the school's own insurance program;

- requiring the student government to separately incorporate and to purchase insurance for its own events and the events of funded student groups;

- permitting the student government to make decisions about funding and approval of student groups without the involvement of the administration; and

- limiting the involvement of the institution to administrative assistance, rather than policymaking assistance.

have passed since the institution reviewed its own standards for granting privileges to groups, and it may be operating under principles that do not match its current practices and goals.

Review and Clarify the Institution's Role in Student Activities

Risk identification and assessment requires clarification of the institution's policies toward student organizations and their relationship to the educational mission of the institution. The enclosed Audit Guide will serve as a basis for a systematic risk management evaluation of student organization activities. This review should encompass a review of the institution's mission, and how this mission is expressed to student groups, especially as it concerns funding, accountability, ownership of purchased property, contractual authority, safety training and insurance coverage.

Assess the Likelihood of the Risk

Every professional involved in student affairs is aware of the increased volume and seriousness of student litigation. Recent judgements against institutions, such as the $1.5 million verdict in a campus rape case, and the court's willingness to hold a university responsible for off-campus fraternity hazing incidents, underline the need to keep abreast of current liability developments. Each campus needs to find a way to review particular areas of
liability in order to assess the adequacy of its loss control and risk financing approach. The review process is an essential step toward solving known problems. An institution should not identify known dangerous behaviors in writing and then do nothing. It may also be advisable to indicate to counsel that this project is being undertaken, so that you can receive advice on the laws in your state and how to shield the review document from discovery if there should be subsequent litigation.

Based on our review of claims trends, we would identify the following risk categories for attention:

- **Use of Alcohol:** Although courts have been reluctant to impose a duty to enforce drinking laws on colleges or universities, media attention to drinking incidents on campus and increased public awareness that most serious incidents (transportation deaths, sexual assaults, and even non-vehicular accidents on campus) involve alcohol, make this issue an important one. In addition, federal law requires effective and consistent enforcement of alcohol and drug policies. (See the American Council on Education’s excellent paper, *Institutional Liability for Alcohol Consumption*, August, 1992.)

- **Transportation of Students:** Students involved in group activities often travel together to reach a project site, to participate in an athletic event, or to transport third parties (such as children) to a campus activity. These transportation activities inherently involve the risks of multiple injuries, even when the vehicle is used safely. The risk factor increases when the vehicle is owned by the institution and loaned to students (particularly when operation requires special instruction). Weather, drinking, or lack of sleep can also multiply the risks. In addition, contractual liability can result from some methods of arranging for student groups to lease a rental car or from reimbursement of a student or faculty member for the use of their personal vehicle.

- **Use of University Facilities:** Whenever a college or university permits student groups to use its space for large crowds, opportunities exist for serious injuries and contractual liabilities. A particularly tragic example occurred at the City University of New York last year when a larger-than-expected crowd attended a basketball game between two popular rap groups. Seven people were killed when the crowd surged past an inadequate security force. Later, it was also discovered that neither the sponsoring student group nor the promoter had insurance to cover the event.

Access to facilities necessarily involves security and crowd control, food and beverage licenses, attention to the safety of lighting or other university technical systems, and contracts with outside service providers or entertainment groups. There is much that can go awry.

- **Each campus needs to find a way to review particular areas of liability in order to assess the adequacy of its loss control and risk financing approach.”**

- **Rugby and lacrosse can involve injuries, some of which are serious and hard to avoid even with training and supervision.**

- **Bungee jumping, waterskiing, deep-sea diving, sailing or skydiving, even with commercial entities, can result in death or permanent injuries. With deep-sea diving and skydiving, training is an essential component of safety.**

- **“Traying”, or the use of cafeteria trays to sled down steep hills, can result in serious accidents.**

- **Swimming or diving injuries can occur in the university’s swimming pool, but may also happen in lakes or ponds on or near campus, particularly at night.**

- **Student-run publications are not immune from libel and**
LOOKING AHEAD

According to the Wall Street Journal, colleges and universities are facing a new wave of personal-injury lawsuits by students claiming that the schools should have protected them from their own youthful mistakes:

For example:

- A young couple at the University of Alaska decided to take an inner-tube ride down a snowy hill in October of 1988. They ignored the school’s posted warnings, ran into a tree, and the woman died. A few months ago, the Alaska Supreme Court upheld a judge’s ruling that the university was partially responsible because the signs were inadequate. The school was ordered to compensate the male student $50,000 for his injuries.

- An undergraduate at Princeton University is suing for injuries he sustained after he climbed on top of a small commuter train that stops at a station owned by the school.

- A student at Brown University in Providence, RI, sued the university because she cut her upper arm on a broken soap dish while showering with her boyfriend in a dormitory bathroom. A federal court jury found in favor of the university after hearing testimony from a janitor that the soap tray was intact before the couple showered. The student lost her appeal, but not before Brown had spent $35,000 on outside counsel and court fees, and its in-house attorneys had put in about 100 hours.

- A study last year by the University of Iowa showed that the nationwide total of cases brought by medical students against universities totaled 60 from 1985 to 1989, compared with 19 in the previous five year period.

—Source: Wall Street Journal, November 18, 1992

Slander. The recent controversy and litigation regarding the Dartmouth Review is one nationally-publicized example. Public universities in particular must contend with confrontations over content, advertisement and editorial license.

Select Appropriate Risk Management or Loss Control Steps

There are three general techniques for addressing the risks that have been identified as likely to occur. They may be used alone or in combination.

First, an institution may choose to avoid or abandon the activities that give rise to the risks. An institution that encourages or even modestly supports organized student activities may be reluctant to abandon them to limit its exposure. However, there are schools that have discontinued certain sports, such as lacrosse, or banned some traditions, like post-game goal post dismantling, to avoid experiencing the costly impact of player or participant injury. Student organizations and activities that are “rites of passage” are also difficult to abandon in the face of alumni resistance and enrollment retention. One realistic alternative may be the partial abandonment of high risk activities, such as sky-diving clubs, to reduce overall student organization risk.

Secondly, an institution may transfer to an insurance company or other entity the cost of, or the legal responsibility for, the consequences. Colleges and universities have traditionally purchased insurance to help finance potential liabilities. Typically, an institution purchases comprehensive general liability, errors and omissions and excess liability policies to cover those claims brought against the institution, its employees or directors. Each of these policies potentially covers student claims, naming the institution, unless the cause of action itself is excluded. However, it is less clear whether students and their organization will be covered under the institution’s liability policies, particularly
when the institution has taken steps to distance itself from the student organization.

The technique of transferring the cost or responsibility for incidents which may occur is limited in several regards. The new risk-bearer usually charges for the privilege and the transfer often fails to account for all the costs and immovable legal responsibilities associated with experiencing the risks. An insurance recovery may not include deductibles, attorneys' fees and staff time. Also, financial indemnification may not repair the damage to an institution’s reputation arising out of a tragic injury or an irreplaceable property loss. Finally, institutions cannot be released from their regulatory and legal responsibilities to meet life-safety standards or to avoid discrimination.

Finally, the institution may undertake steps to manage the activity and to ensure that the risks will be acceptable. Although the first two techniques are imperfect on their own, they can be combined with this technique to effect a practical management of risk. This requires that an institution acknowledge that it has a stake in the appropriate management of student activities for its own protection, and take steps to identify and implement courses of action to reduce the risk. While there is no single loss prevention program that will work in every

instance, there are a variety of steps that can be consistently and effectively applied to address known risks.

**Implement and Enforce Standards**

This final element underscores the most important risk management ingredient, which is timely and thorough communication of your risk management strategy to all institutional constituencies, including faculty, alumni, parents and affiliate organizations. These constituencies need to understand and, wherever possible, reinforce the goals of a risk management strategy. Having policies that

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**ENDNOTES**

1. Restatement of Torts 2d §315, et seq.
14. Gay Student Services v. Texas A&M University, 737 F.2d 1317 (5th Cir. 1984).
24. Id. at Section 22.
25. Title VI, Title IX, §504 of the Rehabilitation Act.
26. Student Right To Know and Campus Security Act.
are ignored or inconsistently enforced may be, in and of itself, reason to change to a policy that can be effectively carried out.

It is most important to communicate the institution’s policies and its commitment to enforce those policies directly to the student organizations and their faculty advisors or supervisors. An increasing number of institutions are requiring faculty advisors to participate in half-day orientation programs about risk management policies and the institution’s expectations. Several institutions are also requiring the heads of recognized student organizations to undergo training in order to be eligible for the benefits of institutional support.

Traditionally, student organizations had their sole contact with the institution through an academic dean. Often the offices of risk management, counsel and transportation maintained little or no direct contact with students. It is becoming more important to centralize (or at least coordinate) administrative responsibilities for student organizations. This approach improves the chances of identifying problems in advance of crisis and building on experience.

Even if administrative responsibilities are not centralized, it is important to ensure that systems are in place to enforce policies within both the institution and the student organizations. Spontaneous student behavior is always difficult to predict or control, but repeated violations of policies and procedures will expose the institution to claims of lack of adequate supervision or meaningful enforcement of rules. Assigned staff must audit group compliance with student organization policies. Further, institutions must be prepared to discipline groups and individuals or to otherwise withdraw student privileges in the event of serious or repeated violations.

**REVIEW LIABILITY DILEMMAS TO FINE TUNE ADMINISTRATIVE PRACTICES**

One of the best ways to review the sufficiency and comfort level of university practices is to review liability dilemmas with key administrators and then use such a review to discuss management options. The management options you discuss can be limited (i.e., requiring student activities to purchase insurance), or broad (i.e., placing a well-trained campus staff contact with each activity group). Either way, when management policies are integrated with the philosophy and approaches of the institution they can be very effective.
HIGH RISK STUDENT ACTIVITIES:
EXCUSPATORY AGREEMENTS AND AGREEMENTS TO PARTICIPATE

PRESENTED BY:

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Presented at the Stetson University
College of Law Conference:

14th ANNUAL NATIONAL CONFERENCE ON
LAW AND HIGHER EDUCATION: ISSUES IN 1993
Sheraton Sand Key Resort Hotel
Clearwater Beach, Florida
February 14-17, 1993
I. Exculpatory Agreements in General.

A. The Clash of Contract and Tort Principles. Exculpatory agreements are analyzed under usual principles of contract law. However, since the intent of an exculpatory agreement is to relieve a party from liability for its own negligence, courts are faced with the clash of two contradictory legal premises, i.e., a basic premise of tort law which holds parties responsible for their own negligence versus a basic premise of contract law which states that competent parties should have the freedom to fashion their own agreements.

B. Contrary to Public Policy. Before addressing the specific language of the documents, courts decide whether the document should be enforceable as a matter of public policy. Jurisdictions vary in their assessment of what is contrary to "public policy". However, the case of Tunkl v. Regents, 60 Cal.2d 92 (1963) is cited quite often for its six-factor test used to determine whether a release violates public policy.

1. The agreement concerns an endeavor of a type generally thought suitable for public regulation....

2. The party seeking exculpation is engaged in performing a service for any member of the public who seeks it,
or at least for any member coming within certain established standards....

3. Such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards....

4. Because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services....

5. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence....

6. The person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

C. Parties to the Contract. Under contract law principles, a minor who has signed an exculpatory agreement may ratify or void the agreement upon reaching majority. Also, a parent or guardian can't release or waive the potential claims of the minor. See, e.g., Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989). But see Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559 (1990).

E. Language Must Be Conspicuous, Clear, and Unambiguous. Any ambiguity in a contract will be resolved against the drafter of the document. This principle is even more strictly construed because parties are giving up valuable rights in this situation.


2. Using the Term "Negligence". The courts are split on whether the "magic word" negligence need appear in order to be sufficiently clear. Even if the term "negligence" is not in the document, it must be somehow conveyed to the plaintiff what is

3. Risks/Injuries Addressed with Specificity.

Generally, the exculpatory agreement will not be upheld if the risk which caused the injury is not one which ordinarily accompanies the activity because this is not within the contemplation of the parties when the document is signed. See, e.g., Simpson v. Byron Dragway, Inc., 569 N.E.2d 579 (Ill. App. Ct. 1991) (drag strip racer killed when he collided with deer which ran onto track; not a risk which ordinarily accompanied activity); Dobratz v. Thomson, 486 N.W.2d 654 (Wis. 1991) rev'g 455 N.W.2d 639 (Wis. Ct. App. 1990) (a water ski performer was run over by approaching boat - language not sufficient to cover this situation); Hohe v. San Diego Unified Sch. Dist., 224 Cal. App.3d 1559 (1990) (high school student signed release to participate in hypnotism show and suffered physical injury - release ambiguous because it focused on mental and nervous disorders, defamation and broadcast rights); Macek v. Schooner's Inc., 586 N.E.2d 442 (Ill. App. Ct. 1991) (tavern patron's arm broken by arm wrestling machine - release insufficient because it did not specify covered activities). But see Garrison v. Combined Fitness Centre, 559 N.E.2d 187 (Ill. App. Ct. 1990) (health club member injured on bench press - language stating
members bore "sole risk" of injury that might result from use of
weights, equipment or other apparatus covers injury by defective
equipment).

II. Exculpatory Agreements for High Risk Student's Activities in
the College/University Setting.

A. Intercollegiate Competition.

1. Wagenblast criteria. The question of whether an
exculpatory agreement signed by a student-athlete will be
enforceable has not yet been addressed by the courts. However,
there is one case from Washington which gives a lengthy treatment
of the public policy considerations which make exculpatory
clauses unenforceable in the context of interscholastic
athletics. In the case of Wagenblast v. Odessa Sch. Dist., 758
P.2d 968 (Wash. 1988), the Washington Supreme Court applied the
Tunkl factors discussed above to invalidate release forms used to
exculpate the school district from liability for its own
negligence in connection with interscholastic sports. The more
factors which are present the more likely a court is to hold that
the exculpatory agreement violates public policy. The Wagenblast
court applied the factors as follows.

a. Suitable for public regulation. The activity
was suitable for public regulation based on the extensive

Please note that this discussion is based on the assumption
that the students signing the exculpatory agreement in question
are of majority age.
regulation by the Washington Interscholastic Activities
Association.

b. Activity of great importance to public.
Although participation in sport is legally considered a privilege
rather than a fundamental right, interscholastic sports have
become a part of the public education tradition. There is great
societal value in sports participation as evidenced by the large
investment of time and money made in these programs.

c. Services held open to general public.
Interscholastic sports are open to all students who meet skill
and eligibility requirements.

d. Disparate bargaining power due to essential
nature of service. Students who wish to compete in sports do not
have other alternatives with the same "inherent allure".
Further, their public importance makes interscholastic sports
essential.

e. Standardized adhesion contract. The releases
were not bargained for by both parties. Students who wished to
participate in interscholastic sports had no choice but to sign
the form as is.

f. Control over recipient of service. Students
participating in interscholastic athletics are under the control
of the coach and may be subject to injury if the school and/or
coach is negligent.

2. Wagenblast extended. Applying the Wagenblast
criteria to intercollegiate athletics, whether offered by a
public or private university, seems to warrant a similar conclusion, i.e., the use of exculpatory agreements for intercollegiate athletic competition is contrary to public policy considerations. (Note that the public policy test does not focus on whether the activity is offered by a public or private entity but instead looks at the nature of the activity and the parties' relationships). See Childress v. Madison County, 777 S.W.2d 1 (Tenn. App. Ct. 1989) (businesses which operate under "public duty" can execute valid exculpatory contracts when the transaction in question is not under the public duty). Using the Wagenblast/Tunkl criteria the following argument may be made.

a. Suitable for public regulation. Intercollegiate athletics are extensively regulated by the NCAA (or other national governing body).

b. Activity is of great importance to public. It would be difficult to envision higher education totally devoid of athletics. There is an even greater investment of resources in intercollegiate sports as evidence of a very strong societal interest.

c. Services held open to general public. As with Wagenblast, students who meet skill and eligibility requirements may participate.

d. Disparate bargaining power due to essential nature of service. Perhaps even more with intercollegiate sport, there are no other alternatives with the same "inherent allure". Additionally, athletes may argue that if they are not allowed to
participate in intercollegiate athletics, they have no opportunity to showcase talents which might lead to employment in professional sports. The *Wagenblast* argument that public importance makes the program essential is also applicable.

e. **Standardized adhesion contract.** As in *Wagenblast*, there would be no bargaining about the content of the form; it would be a "take it or leave it" situation as it is currently with universities which require student-athletes to sign a form "consenting" to drug testing.

f. **Control over recipient of service.** The coach controls student-athletes in the university setting and can cause injury to athletes through his/her negligence.

3. **Use Agreements to Participate.** If courts would invalidate exculpatory agreements for intercollegiate athletics, it is still essential that information regarding the risks of an activity be conveyed to participants. This disclosure serves two purposes: 1) to enhance the use of the defense of assumption of risk and 2) to avoid claims of negligence based on "failure to warn". Both of these concepts will be discussed hereafter. It is interesting to note that the court in *Wagenblast* did not invalidate the language relating to risks in the release form; it only invalidated the exculpatory language.

**B. Activities Required as Part of Curriculum.**

1. **Tunkl revisited.** The Tunkl six-factor test may be reduced to essentially two components: whether the program/service in question is essential to the public and
whether there is disparate bargaining power. See Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920 (Minn. 1982).

2. Tunkl applied.

a. Using the Tunkl/Wagenblast rationale the educational function of a university is certainly "essential to the public" if the athletic program may be held to be so.

b. There is also disparate bargaining power if a student has to sign a release form to participate in an activity for which the student receives academic credit. For example, in Whittington v. Sowela Technical Inst., 438 So.2d 236 (La. Ct. App. 1983) a student signed a release which was required for students going on a field trip. The trip was mandated as a part of the course requirements - no alternative was provided to meet the requirement. In this situation, the release was not upheld because there was no real consent under the circumstances.

C. Intramurals/Other Recreational Programs.

1. Tunkl applied-not contrary to public policy.

a. Intramural and other recreational programs provided by a university are not "essential to the public". Recreational or leisure services, even if offered by a public entity, are not considered to be public or essential services. See, e.g., Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989) (use of exculpatory clause by defendant Special Olympics relative to a swimming program did not violate public policy - even if a business normally operates under a public duty it may execute a valid exculpatory contract when the transaction
in question is not under the public duty); Mann v. Wetter, 785 P.2d 1064 (Or. Ct. App. 1990) (diving school business that provided recreational activities did not provide essential public service); Banfield v. Louis, 589 So.2d 441 (Fla. Dist. Ct. App. 1991) (city defendant co-sponsor of triathlon - it was not against public policy for the governmental entity to use an exculpatory agreement since the triathlon was not an activity of great public interest nor a necessary service); Bauer v. Aspen Highlands Skiing Corp., 788 F. Supp. 472 (D. Colo. 1992) (recreational service, i.e., skiing, is not a matter of practical necessity nor of great public importance); Bodyslimmer, Inc. v. Sanford, 398 S.E.2d 840 (Ga. Ct. App. 1990) (exculpatory clauses in health/fitness clubs don't violate public policy - weight loss establishments aren't publicly regulated nor is the service of great importance to the public).

b. Since recreational programs do not offer essential public services, there is no concern regarding disparity in bargaining power sufficient to make the exculpatory agreement unenforceable. See, e.g., Banfield v. Louis, 589 So.2d 441 (Fla. Dist. Ct. App. 1991) (the relative bargaining strengths of the parties do not come into play absent a compelling public interest in the transaction [here a triathlon]); Bauer v. Aspen Highlands Skiing Corp., 788 F.Supp. 472 (D. Colo. 1992) (there is no unfair bargaining advantage absent the provision of essential services - recreational services not essential); Williams v. Cox Enterprises, Inc., 283 S.E.2d 367 (Ga. Ct. App. 1981)
(participant argued that since race was the only one of its kind in the area he was under enormous pressure to enter - court found this proposition "ludicrous").

c. Intramural/recreational programs, therefore, do not fall within public policy concerns. However, exculpatory agreements must still contain language which is conspicuous, clear and unambiguous. Also, the agreement will normally be effective only to deny a recovery based on negligence (see I.D. above).

(1) Use of the term "negligence". As discussed above courts are split on the question of whether the word "negligence" must be used. The law specific to each jurisdiction on this point should be researched. In addition to the cases cited above, see also Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291 (Ariz. Ct. App. 1990) (skier hurt when bindings failed to release - release didn't reflect clear intent to bargain away right to hold defendant responsible for its own negligence); Doyle v. Bowdoin College, 403 A.2d 1206 (Me. 1979) (hockey clinic - release not upheld because no express reference to defendants' liability for their own negligence made);

(2) Risks/injuries addressed with specificity. The risks/injuries in question must be delineated in the exculpatory agreement or the agreement will not be upheld

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to bar actions for injuries. This is based on the principle that a plaintiff who signs an exculpatory agreement only gives up his/her rights to sue if the injury is within the contemplation of the parties when signed. See, e.g., Calarco v. Ymca, 501 N.E.2d 268 (ill. App. Ct. 1986) (plaintiff injured by weight-lifting equipment - need more explicit language such as "use of gymnasium or facilities and equipment thereof" to make it clear that negligence relating to facilities/equipment was included in release); O'Connell v. Walt Disney World, 413 So.2d 444 (Fla. Dist. Ct. App. 1982) (horseback riding - "inherent risks" of riding do not include injuries resulting from defendant's negligence unless expressly stated). See also the cases listed above in I.E.3.

III. Agreements to Participate.

A. Exculpatory Agreement Unenforceable. In those situations in which an exculpatory agreement may be unenforceable, e.g., a minor is involved or the agreement is contrary to public policy, it is still important that participants be apprised of the risks inherent in an activity. This information is important in order to maximize the ability to use assumption of risk as a defense. See, e.g., O'Connell v. Walt Disney World Co., 413 So.2d 444 (Fla. Dist. Ct. App. 1982) (for express assumption of risk to be valid it must be clear that plaintiff understood that he was assuming the risk of particular conduct by defendant which caused injuries); Restatement of Torts 2d, Section 496 B, comment d.
The dissemination of risk information is also important to prevent a plaintiff from making a claim in negligence based on the failure to warn concept. See, e.g., Thompson v. Seattle Pub. Sch. Dist., unpublished decision.


1. Nature of the activity.
2. Possible injuries which may occur.
3. Expectations of the participant.
4. Condition of participant.
THE LIABILITY OF STUDENTS AND STUDENT ORGANIZATIONS: MANAGING HIGH RISK STUDENT ACTIVITIES

PRESENTED BY:

James R. Vander Lind
Dean of Students
University of Tulsa

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THE LIABILITY OF STUDENTS AND STUDENT ORGANIZATIONS: MANAGING HIGH RISK STUDENT ACTIVITIES

James R. Vander Lind, Dean of Students
The University of Tulsa

February 1993

I. Introduction and Philosophical Base

A. We exist in an educational environment

B. Our mission is to educate students; in regard to student life issues, this must include educating them as to the law and risks related to the law

C. The executive student affairs officer and his or her staff are primarily educators

D. We also have the mission to promote personal growth and mature citizenship

E. Students have "the right to know" and student affairs officers have the "duty to teach" and "duty to care"

II. The Nature of the University and "Our Duty to Care"

A. A complex organization requires regulation

B. Our relationship with students and student organizations needs to be reexamined in regard to "duty to care"

C. The University of Tulsa and Leadership Development and Risk Management

III. The Importance of Reasoned Control Over Risk Situations

A. Students must be educated as to how to reduce risk

B. Other organizations that recognize risk on the college campus

IV. The University of Tulsa Approach to Leadership Development and Risk Management

A. Alcohol Education Seminars

B. Emerging Leader

C. Leadership II

D. Leadership Retreat