VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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CLERK, CIRCUIT COURT
FAIRFAX, VA

GRAFTON WILLIAM PETERSON, Administrator of the Estate of Erin Nicole Peterson, deceased,	)	
Plaintiff,	)	
v.	)	Case No. CL-2009-5670
JOHN W. THYDEN, Administrator of the Estate of Seung-Hui Cho, deceased, et al.	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEMURRER OF DEFENDANTS NEW RIVER VALLEY COMMUNITY SERVICES BOARD, HARVEY M. BARKER, Ph.D., AND H. LYNN CHENAULT

COME NOW, Defendants, New River Valley Community Services Board (hereinafter, "CSB"), Harvey M. Barker, Ph.D. (hereinafter, "Barker"), and H. Lynn Chenault (hereinafter, "Chenault"), by counsel, and for their memorandum in support of demurrer state as follows:

Defendants had no duty to protect Plaintiff's decedent from the third-party criminal acts of Cho.

In Nasser v. Parker, 249 Va. 172, 455 S.E.2d 502 (1995), the Court held that the defendant psychiatrist and psychiatric hospital did not have a duty to warn the former girlfriend of a man whom they released from the psychiatric hospital who had previously held a gun to the former girlfriend's head and threatened to kill her. The sole issue in the case was whether or not the defendants were under a duty to notify the girlfriend of the man's departure from the hospital. The parties agreed on the general rule that there is "no duty to control the conduct of third persons in order to prevent harm to another." Marshall v. Winston, 239 Va. 315, 318, 389

S.E.2d 902, 904 (1990), cited at 249 Va. 176. The plaintiff relied upon the exception that a duty to protect may exist because of a special relationship. Id. The court held that the defendants must take charge of a patient, "meaning that the doctor or hospital must be vested with a higher degree of control over the patient than exists in an ordinary doctor-patient or hospital-patient relationship before a duty arises concerning the patient's conduct." Id. at 180.

In this case, Plaintiff's Complaint contains no allegation that these Defendants took control of Cho. If anything, these Defendants had less control over Cho than the defendants in Nasser had over their patient. Therefore, Plaintiff's allegations are insufficient at law and the Court ought to sustain the Demurrer of Defendants CSB, Barker, and Chenault.

Defendants CSB, Barker, and Chenault are protected from liability by the public duty doctrine.

"The public duty doctrine has been described as follows:

> '[I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be addressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.'

2 Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independently of Contract § 300 (D. Avery Haggard ed., 4th ed. 1932)."

Commonwealth v. Burns, 273 Va. 14, 17, 639 S.E.2d 276, 278 (2007).

The Virginia Supreme Court has only applied the public duty doctrine in cases when a public official owed a duty to control the behavior of a third party, and the third party committed acts of assaultive criminal behavior upon another. Id.

This is precisely the type of case in which the public duty doctrine should apply. Defendants Barker and Chenault are public employees of CSB. They had no special relationship

with Plaintiff's decedent and as such can have no special duty toward her. Plaintiff attempts to avoid the public duty doctrine by pleading in conclusory fashion that Plaintiff's decedent was a member of an identifiable class which consisted of the faculty, staff, and student body at Virginia Tech. (See Complaint ¶ 279.) Although the pleading appears to be taken from Marshall v. Winston, 239 Va. 315, 320, 389 S.E.2d 902, 905 (1990), the allegations fail because of their conclusory nature and because they do not establish why the Defendants would owe a special duty to Virginia Tech students or faculty. In sum, Defendants respectfully urge the Court to sustain their Demurrer and to dismiss the Complaint.

Defendants are immune from liability by the virtue of the doctrine of sovereign immunity.

As Plaintiff recognizes (see ¶245 of the Complaint), the CSB is a creature of statute. As an administrative division of the Commonwealth, it is an agency of the Commonwealth. The Rector and Visitors of the University of Virginia v. Carter, 267 Va. 242, 246, 591 S.E.2d 76, 78 (2004). As an agency of the Commonwealth, the CSB retains its sovereign immunity. 267 Va. at 244-45, 591 S.E.2d at 78. Therefore, the CSB cannot be held liable to the Plaintiff under the allegations in the Complaint.

Employees of the Commonwealth are also entitled to sovereign immunity. 267 Va. at 246 citing Lohr v. Larsen, 246 Va. 81, 88, 431 S.E.2d 642, 646 (1993); Gargiulo v. Ohar, 239 Va. 209, 215, 387 S.E.2d 787, 791 (1990). The Court has established a four-part test to determine whether or not to apply sovereign immunity to employees of the Commonwealth. James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980). In this case, the first two prongs of the test (employees' function and Commonwealth's interest and involvement therein) support a finding of sovereign immunity. The functions of Barker and Chenault are essential to a governmental objective and the government has a great interest and involvement in their function. The third

prong involves the Defendants' use of judgment and discretion. It is clear that the positions occupied by Barker and Chenault required substantial use of judgment and discretion which militates in favor of a finding of sovereign immunity. Finally, the fourth test is the Commonwealth's control and direction of Barker and Chenault. Plaintiff cites several statutes which demonstrate that the Defendants did not have absolute discretion and were somewhat under the control of the Commonwealth in making decisions. As in Lohr v. Larsen, 246 Va. 81, 431 S.E.2d 642 (1993), Defendants Barker and Chenault are entitled to sovereign immunity. The allegations in the Complaint do not rise to the level of gross negligence or intentional conduct that are necessary to overcome individual sovereign immunity. Accordingly, Defendants respectfully urge the Court to sustain their Demurrer.

Conclusion

For the foregoing reasons, Defendants respectfully urge the Court to sustain their Demurrer and dismiss the Complaint with prejudice and for such other relief as the Court may deem appropriate.

NEW RIVER VALLEY COMMUNITY SERVICES
BOARD, HARVEY M. BARKER, Ph.D., and
H. LYNN CHENAULT

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of May, 2009, served the foregoing by mailing a true and correct copy of the same to:

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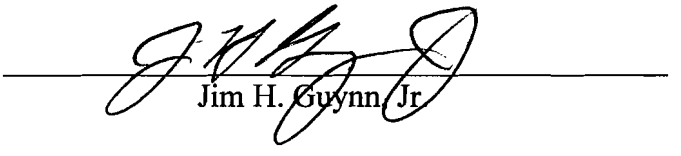

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