



POSITION STATEMENT

National Collegiate Athletic Governance Organizations Should Implement Rules Related to Athlete Sexually Harassing Misconduct and Physical Violence¹

Executive Summary

The Drake Group² examined current issues related to college athlete sexually harassing misconduct and sexual and other physical violence (behavior ranging from verbal, cyber, and written misconduct to sexual assault and murder). Other than the U.S. Office for Civil Rights rules that have general applicability to educational institutions receiving federal funds, no uniform approach exists at any level of policy-making to address the misconduct risks unique to college athletics. Significantly, no concerted and coordinated effort by the NCAA and other national collegiate athletic governance organizations, conferences, or member institutions confront athlete sexual misconduct and physical violence in a way that will meaningfully deter such behavior. The lack of a nationally uniform policy, coupled with the pressure at the institutional level to win at any cost, results in huge disparities across institutions in the way athlete misconduct is treated. Prospective and current college athletes do not hear a clear message indicating that violent behavior is unacceptable. Worse yet, institutions often enable misconduct by supporting athletes who engage in such behavior, by helping them avoid normal student discipline procedures, obtaining pro bono legal representation for athletes (but not other students), or pressuring local police or victims not to bring charges. Institutions also continue to recruit, enroll, and allow athletes convicted of or disciplined for sexual or other physical violence to participate in athletics and receive athletic scholarships. And the efforts by institutions that do try to deal directly with such behavior are often nullified by the ease with which accused athletes can freely and quickly transfer to another institution with no penalties.

¹ Preferred citation: Lopiano, D., Gurney, G., Porto, B., Polite, F., Ridpath, B.D., Sack, A., Willingham, M. & Zimbalist, A. (2020, November) The Drake Group Position Statement: Need for National Collegiate Athletic Governance Organization Rules Related to Athlete Sexual Misconduct and Other Physical Violence. Retrieved from <https://www.thedrakegroup.org/2016/09/11/institutional-integrity-issues-related-to-college-athlete-sexual-assault-and-other-forms-of-serious-violence/>

² The Drake Group is a national organization of faculty and others whose mission is to defend and achieve educational integrity and freedom in higher education by eliminating the corrosive aspects of commercialized college sports. For further information see <http://thedrakegroup.org>

Accordingly, we suggest rules that national collegiate athletic governance organizations and institutions of higher education should enact to address both sexual misconduct and physical violence. These rules are necessary due to the scope and seriousness of the problem of sexual misconduct among athletes, the recognition that a college campus should be a safe learning environment, and the failure of the OCR and NCAA rules to sufficiently address the problem. Moreover, uniform rules are necessary to make certain that institutions do not try to game the system and obtain a competitive advantage by allowing star athletes to compete despite their misconduct.

Proposed rules, briefly summarized below, seek to protect all parties' rights in the fairest way possible: victims are protected from further harm; accused are presumed innocent until proven guilty (unless the degree of alleged harm requires a temporary measure); athletes found responsible are appropriately penalized; and all students are provided a safe educational environment. We recommend sanctions that are unique to athletes and athletic departments but existing penalties pursuant to the respective school's code of conduct or Title IX would continue to apply.

National athletic governance organizations must:

1. Dictate that institutional membership in any national athletic governance organization is conditioned on demonstration of Title IX compliance and state and local gender equity laws.
2. Require member institutions to have athlete code of conduct rules (whether as part of the general student code of conduct or separately) that apply to athletes' sexual and other physical violence with compliance of the code as a condition of athletics eligibility.
3. Expand and enforce current athlete and recruit obligations requiring complete annual disclosure statements regarding their background relating to sexually harassing misconduct found to be in violation of Title IX and sexual and other physical violence. Also, athletes must disclose accusations that have been made but where the Title IX or code of conduct investigation and adjudication has not been completed. Further, the athletic departments must perform formal background checks on all prospective athletes including transfer students.
4. Require any athlete found responsible by an institution of sexual and other physical violent conduct, or guilty pursuant to the US Safe Sport process or law enforcement of a sexually violent misdemeanor or felony (or pled no contest or plea bargained to a lesser charge) to be permanently barred from intercollegiate athletics, including the prohibition of any athletic aid. Further, if the disclosures in 3 above reveal sexual violence or other physically violent behavior, such athletes shall be presumptively ineligible for intercollegiate sports participation and receipt of athletic scholarships. Such ineligibility decisions shall be subject to a waiver process that would be overseen by an independent group so that mitigating circumstances including rehabilitative measures and good behavior for a long length of time may be considered. Require that findings of sexually harassing misconduct will have prescribed sanctions commensurate with their severity.

5. Require athletic departments to provide athlete and staff sexual misconduct and physical violence education, including restorative justice practices, bystander-prevention, and a commitment to gender transformative programming.
6. Establish an athlete ombudsperson office to provide confidential assistance to athletes seeking advice on these and other issues affecting their eligibility.
7. Prohibit athletic departments from providing special benefits to student athletes alleged to have committed sexually harassing misconduct or physical violence such as arranging legal assistance, protecting athletes once formal allegations made, or being involved in any subsequent investigation and adjudication of such charges (other than as mandated by the investigation or court process).
8. Require that anyone in an athletic department who becomes aware of an allegation of sexually harassing misconduct or sexual and other physical violence by an athlete, regardless of whether the conduct is on campus or not or during an official school event, must report such to the institution's athletic director, Title IX office, and office that adjudicates code of conduct violations.
9. Prohibit member institutions from using special "escorts" or "hostesses" for entertaining prospective athletes during campus visits.
10. Mandate disclosure of all accusations of sexual and other physical violence to the NCAA along with their resolution for the purpose of maintaining a database of such activity accessible to researchers, with a process for removing any accusation found to be false.
11. Require penalties against the institution and respective athlete for violations of the above rules and impose appropriate sanctions for false reporting.

Introduction

Intercollegiate athletics is a beneficial extracurricular activity for students that also helps build community and alumni affinity on college campuses. But these benefits are fundamentally threatened by serious problems related to campus sexual misconduct and physical violence by athletes. Indeed, it would not be an understatement to say that there is a crisis regarding sexual misconduct by and of athletes. Athletic administrators, coaches, and college presidents must be held accountable when they enable talented athletes to evade discipline for committing acts of violence, when they create a culture of entitlement that results in athletes believing they can get away with such misconduct, or in some cases when they foster an unhealthy climate in which misogyny and sexism are rampant and the sexual conquest of women is celebrated. The Drake Group believes national athletic governance organizations must adopt uniform policies holding athletes accountable for engaging in acts of sexual misconduct and physical violence and institutions for failing to abide by the organizations' rules. The athletes, institutions, and national athletic governance organizations all owe a duty of care to victims of such conduct. Institutions thus should immediately enact codes of conduct that incorporate the rules suggested herein aimed at mitigating this crisis.

The Drake Group examined the current issues related to collegiate sport sexual misconduct and physical violence, concluding that (1) no effective uniform approach exists at any level of policymaking to deal with the issue, (2) such conduct is condoned by an unacknowledged collegiate athlete subculture that neither educational sport leaders nor college presidents have adequately addressed, and (3) institutions of higher education are frozen by self-interest, hence unlikely to address such misconduct unless immersed in a media or legal crisis, in which case they act alone. Neither the NCAA nor other national collegiate athletic governance associations have confronted this issue in a comprehensive way with rules and punishments that will deter such athlete behavior over the short or long term.

A key contributor to this crisis is the absence of governance association or institutional rules that prohibit the recruitment or athletic participation of athletes found responsible for or guilty of sexual misconduct or physical violence. While some conferences like the Big 12, Pac-12, SEC, and Big Sky and some schools like Indiana University, the University of Texas at San Antonio, and Slippery Rock University have enacted athletics participation bans, in varying degrees, on recruits or athletes found responsible for or guilty of committing such acts, the problem requires national, uniform rules or else athletes will continue to transfer to those institutions where they will not be held accountable. Athletes, especially the most talented prospective and enrolled athletes, must receive the message that sexual misconduct and physical violence will not be tolerated. Institutions must impose consistent penalties that will deter such serious misconduct.

Furthermore, not only do institutions ignore the problem too frequently, but they also actively contribute to the problem. For example, too many institutions have knowingly enabled athlete sexual misconduct and other physical violence by providing pro bono legal assistance to alleged perpetrators (assistance not provided to other students, including victims), obstructing investigations or judicial proceedings, encouraging and even paying for women to sexually engage with recruits, providing public relations assistance, intimidating or blaming victims, imposing weak penalties inconsistent with the treatment of nonathletes, and using their influence with campus and local police departments to reduce the possibility of formal criminal charges. Institutions typically act only after transgressions have already occurred and been mishandled. Indeed, frequently, it is only in the face of extraordinary media-fueled public outrage that institutions condemn such behavior, usually by employing attorneys or others to conduct superficial, so-called independent investigations, removing selected individual enablers, such as coaches or administrators and creating mostly face-saving policies that only begin to address athlete sexual misconduct. The schools fail to promote broader policy change by calling upon the NCAA, state legislatures or other larger groups to do more to prevent a repetition of such behaviors. As a result, decades of documented athlete sexual misconduct and physical violence remain substantially unaddressed.

Failure to specifically address these factors with national rules that reject and deter sexual misconduct and physical violence perpetuates the current athletics' subculture that condones and enables such athlete behavior. This problem is a crisis for all involved that must be boldly addressed now. If not, the generally understood benefits of athletic participation will be greatly diminished. The NCAA or other national collegiate athletic governance associations

must make this a membership requirement that is enforced, and institutions must make compliance a top priority.

Definitions and Fair Process

Throughout this paper, we broadly reference behavior that must be deterred as “sexually harassing misconduct” and “sexual and other physical violence.” We use the term **“sexually harassing misconduct”** to include acts ranging from bullying, hazing, stalking, voyeurism, displaying inappropriate sexual images, exposing private parts, making verbal, cyber or written expressions of a sexual nature and any other inappropriate conduct of a sexual nature that is not violent but “distracts students from their education,” thereby creating a **“hostile educational environment.”** The term **“violence”** as used herein is defined in 18 U.S.C. § 16. That statutory provision states: “The term ‘crime of violence’ means— (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” **“Sexual violence”** includes rape, sexual assault, dating and domestic violence. **“Nonsexual physical violence”** includes behavior other than that of a sexual nature involving physical force or threatened use of physical force that typically creates a serious concern about the safety of others, not just of the victim. Within each of these nonviolent and violent categories, there is a continuum of severity.

We believe that all these activities in an educational environment must be addressed and prohibited. The behavior should be placed on a continuum of severity with the penalties for engaging in such activity least severe for minimally invasive and reasonably least offensive activity but more severe if it is repetitive or engaged in by groups of individuals (e.g., full teams against team members of the opposite sex) and most severe for violent behavior. Accordingly, one stupid insult on social media may require no more than a verbal warning; while a rape may require expulsion from athletics. Using these violent versus nonviolent misconduct distinctions, we attempt to capture a wide range of sexually deviant and other forms of misbehavior and to develop rules and penalties that match the severity of the alleged misconduct. The recommended sanctions that are proportional to the severity of the violation, range from formal warnings to counseling to disciplinary probation to suspension to permanent expulsion from athletics and termination of athletic aid.

We recognize that sexual misconduct that is not physically violent—which we refer to as “sexually harassing misconduct”—can be gateways to more sexually violent behavior. All sexual misconduct harms victims in fundamental ways, has been engaged in by athletes much too much including in high profile situations, and has been more pervasively engaged in by athletes compared to nonathletes, as we demonstrate in other sections of this paper.

Current Title IX Regulations and First Amendment Protection

We do not suggest that conduct is punishable only if severe, pervasive **and** objectively offensive as required by the recently enacted Title IX regulations. Rather, we recognize the

definition used by the US Center for SafeSport³ that a hostile environment can be created by persistent or pervasive conduct or a single or isolated incident that is sufficiently severe. And, as explained above it is necessary to have rules with penalties that address conduct that is short of that definition but can immediately cause or lead to destructive behavior that leads to or has, in fact, turned the college educational experience into a hostile learning environment. Moreover, The Drake Group believes that the new OCR rules, already being challenged in the courts, fall short in a variety of additional ways including that they only apply to conduct occurring on campus or at official events. Further, they do not require coaches to report knowledge of their athletes' sexual misconduct to the campus Title IX office—coaches are no longer defined as responsible persons with reporting obligations. Finally, Title IX is too frequently not enforced against athletes.

We are mindful of a student's First Amendment rights of freedom of speech and expression and seek to protect those. However, we believe it is appropriate to subject athletes to greater restrictions than the general student body. Further, while we seek to provide due-process-like rights to the accused (as discussed in the most recent OCR rules and commentary), such constitutional rights do not apply in most circumstances involving athletes. Participation in athletics is a privilege, not a right protected by the Constitution. Thus, our proposed rules focus on all investigatory and adjudication processes being just and reasonable and not restricted by legally specified due process or First Amendment protections. Indeed, our proposed rules seek to protect all parties' rights in the fairest way possible: victims are protected from further harm; those accused are presumed innocent until proven guilty (unless the degree of alleged harm requires a temporary measure); athletes found responsible are appropriately penalized; and all students are provided a safe educational environment.

A Continuing Disgrace

A federally funded study in 2007 that has been cited widely revealed that one in five college women (and one in sixteen men) is a victim of sexual assault.⁴ A 2015 Association of American Universities survey supported that finding, revealing that 23% of female undergraduates reported experiencing sexual assault since enrolling in college.⁵ As of July 2016, 146 private and 139 public institutions of higher education were under U.S. Office of Civil Rights investigation for inadequately handling 309 campus sexual assault complaints.⁶ These facts understate the campus sexual assault problem in that "more than 90% of sexual assault

³ See [Safesport Code for the U.S. Olympic and Paralympic Movement \(April 1, 2020\)](https://uscenterforsafesport.org/wp-content/uploads/2020/03/2020-SafeSport-Code-04.01.20.pdf) Retrieve at: <https://uscenterforsafesport.org/wp-content/uploads/2020/03/2020-SafeSport-Code-04.01.20.pdf>

⁴ Krebs, C. P., Lindquist, C., Warner, T., Fisher, B., & Martin, S. (2007). The Campus Sexual Assault (CSA) Study: Final Report. Retrieved from the National Criminal Justice Reference Service <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>

⁵ Cantor, D., et al. (2015, September 21) Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct. The Association for American Universities. Retrieved from <https://www.aau.edu/Climate-Survey.aspx?id=16525>

⁶ The Chronicle of Higher Education. (2016) Title IX Sexual Assault Tracker API Documentation. Retrieved on July 27, 2016 from <https://projects.chronicle.com/titleix/api/v1/docs/>

victims on college campuses do not report the assault”;⁷ the prevalence of false reporting is between 2% and 10%.⁸ These data should inform the consideration of issues related to college athletes and sexual assault.

In the spring of 2016, the President, Athletic Director, and Head Football Coach at Baylor University resigned in the wake of rapes and sexual assaults of at least six women by football players. In the summer of 2016, the University of Tennessee reached a \$2.48 million settlement with eight women regarding sexual assaults by football and basketball players. Baylor and Tennessee are just two high-profile examples of the many cases in which universities treated athletes accused of sexual assault or other forms of misconduct differently than nonathlete students. The literature appears to support the contention that Division I athletes in football and basketball are more likely than other athletes to be involved in violent crimes and are more likely to be favorably treated in the case of sexual conduct transgressions than athletes in other sports and nonathletes.

A 2019 *USA Today Network* research effort⁹ revealed:

Over the past five years, universities disciplined NCAA athletes for sexual misconduct at more than three times the rate of the general student population. Football players were disciplined the most. Almost three dozen NCAA Division I universities contributed data, including Ohio State University, the University of Florida, and Michigan State University. Fewer than 3% of their students were athletes, but athletes made up nearly 9% of the students found responsible for sexual offenses. And while representing less than 1% of the overall student population at the schools with football teams, gridiron standouts accounted for more than 6% of those found responsible for sexual misconduct. But these results from a USA TODAY Network investigation may be understated because many rapes and sexual assaults on campus go unreported and because many

⁷ Fisher, B., Cullen, F., & Turner, M. (2000). The Sexual Victimization of College Women (NCJ 182369). Retrieved from the National Criminal Justice Reference Service: <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

⁸ The National Sexual Violence Resource Center cites three studies in support of this range: (1) a study of eight U.S. communities, which included 2,059 cases of sexual assault, found a 7.1% rate of false report by Lonsway, K. A., Archambault, J., & Lisak, D. (2009). False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-stranger Sexual Assault. *The Voice*, 3(1), 1-11. Retrieved from the National District Attorneys Association: http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf; (2) a study of 136 sexual assault cases in Boston finding a 5.9% rate of false reports by Lisak, D., Gardinier, L., Nicksa, S. C., & Cote, A. M. (2010). False allegations of sexual assault: An analysis of ten years of reported cases. *Violence Against Women*, 16, 1318-1334. doi:10.1177/1077801210387747); and (3) a research study of 812 reports of sexual assault from 2000-03 finding a 2.1% rate of false reports by Heenan, M., & Murray, S. (2006). Study of Reported Rapes in Victoria 2000-2003: Summary Research Report. Retrieved from the State of Victoria (Australia), Department of Human Services:

http://www.dhs.vic.gov.au/__data/assets/pdf_file/0004/644152/StudyofReportedRapes.pdf.

⁹ Jacoby, K. (2019, December 12) Athletes overrepresented in sex cases: Concealed public records hide extent of problem. *USA Today Network*. Retrieved from <https://stories.usatodaynetwork.com/predatorpipeline/athletes-overrepresented-in-sex-cases/>

universities refuse to inform the public about one of the biggest problems they face.¹⁰

USA Today Network sought disciplinary records from 226 NCAA Division I public institutions but only 35 responded.

The rest either claimed state laws protect the names of students who commit rape and sexual assault, demanded exorbitant sums to provide the information, said they weren't required to release the records, or still haven't processed the requests. That's 191 schools — 85% of the total — that shielded the identities of alleged abusers at the expense of women's safety and the public's right to know.¹¹

Jeff Benedict, Southern Virginia University Distinguished Professor of English and author of four books on athlete crime, led a national study of 20 Division I institutions with highly successful football and basketball programs and looked at all types of violence.¹² In his 2010 *Sports Illustrated* article, Benedict reported that in the eight-month period from January to August of that year, 125 college and professional football and basketball players were arrested on "serious" felony or misdemeanor charges involving violence, weapons, or substance abuse, characterizing the rate as "pretty astounding."¹³ And he found that although male college athletes comprised just 3.3 percent of the total male population on campus, they represented 19 percent of sexual assault perpetrators.

Furthering his research, in 2011, Benedict teamed up with CBS News chief investigative correspondent Armen Keteyian to produce a *Sports Illustrated* investigative report in which 2,387 criminal background checks were run on players of the preseason top 25 college football teams.¹⁴ They found that one in fourteen players (7%) had arrest records, more than 200 players were arrested or cited by police 277 times in one season, and one-fifth of all college sports-related crimes included domestic violence. Thirty-nine percent of those who had been arrested had been charged with serious crimes such as assault and battery, domestic violence, burglary, cocaine possession or driving under the influence. This study did not break out the criminal records according to whether they involved sexual violence. Only two institutions (Texas Christian University and the University of Oklahoma) conducted background checks and these were flawed in that only adult records were included.¹⁵

¹⁰ Id.

¹¹ Id.

¹² Benedict, J. (2010, September 8) An Alarming Number of College Athletes Charged with Serious Crime. *Sports Illustrated*. Retrieved from <http://www.si.com/more-sports/2010/09/08/athletes-crime>

¹³ Ibid.

¹⁴ Benedict, J. and Keteyian, A. (2011) Criminal Records in College Football. *Sports Illustrated*. (March 2, 2011)

¹⁵ Israelsen-Hartley, S. (2011, March 2) Utahns respond to SI, CBS News Investigation of College Football, Crime. *Deseret News*. Retrieved from <http://www.deseretnews.com/article/700114789/Utahns-respond-to-SI-CBS-News-investigation-of-college-football-crime.html?pg=all>

ESPN's Outside the Lines (OTL) program examined the extent to which athletes participating in football and men's basketball from 2009 through 2014 at 10 top-ranked universities were referenced in police reports from 20 campus and city police departments as being accused of crimes.¹⁶ The institutions and percentages of players found to be accused were Auburn (5%), Florida (24%), Florida State (18%), Michigan State (15%), Missouri (14%), Notre Dame (2%), Oklahoma State (11%), Oregon State (18%), Texas A&M (15%), and Wisconsin (14%).¹⁷ These percentages were significantly higher than those of nonathlete students.

The professional literature is not clear about whether these higher rates among college athletes are restricted to more competitive and successful athletic programs or successful football and basketball programs and do not always identify which crimes involved sexual violence. The *USA Today* study discussed above is the most recent study that demonstrates the correlation between athletes participating in certain sports and the commission of personal sexual violence. It would be extremely useful to have more complete data and to extrapolate to a larger athlete population to determine the degree to which, at least certain, athletes are more likely than nonathletes to be involved in sexual violence. The NCAA could remedy this data deficiency, but to date, has not elected to research this issue. Even if the NCAA were to do so, the data would likely not be available for researchers' use because the NCAA generally does not share data with researchers to whom it lacks direct ties. Equally troubling, when the NCAA collects data, it does not include adequate control groups to provide meaningful comparisons (i.e., a sample of students who do not participate in athletics or sufficient sample sizes to allow comparisons among all sports).

Regardless of the dearth of data, the current athlete versus non-athlete debate does not appear to be helpful. The literature on violence against women suggests the need for a more nuanced understanding of causality given the athletics environment. This literature reveals factors that can be more instructive regarding deterrence. In a 1999 seminal review¹⁸ of studies of male athletes' violence against women, Crosset points to six factors that should be confronted, no one of which should be categorized as directly causal:

¹⁶ Lavigne, P. (2015, June 15) How OTL Completed Its Investigation. *ESPN.com*. Retrieved from http://espn.go.com/espn/otl/story/_id/13039153/how-lines-completed-athletes-police-investigation-10-schools Outside the Lines (OTL) "selected 10 schools in various conferences and geographies, leaning toward colleges in quintessential college towns and in states that had public records laws that seemed favorable to accessing police and court records. Other considerations were the programs' revenues, fan bases and overall rankings of the football and men's basketball programs over the time period studied. Once the 10 colleges were selected, Outside the Lines compiled the schools' football and men's basketball rosters from 2009 through 2014 -- a total of six sets. From summer 2014 to October, public records requests were filed to 20 campus and city police departments in all, for incident reports containing player names that appeared on the selected rosters.... With few exceptions, Outside the Lines counted each case in which an athlete was involved in a criminal incident if the player was arrested or named as a suspect in a police report or the police report narrative included information that indicated an officer witnessed the player committing a criminal act or noted evidence to the same; a witness or alleged victim described him engaged in a crime; or the athlete admitted to wrongdoing." See full article for further methodology details and a full explanation of why percentages are underreported.

¹⁷ Ibid.

¹⁸ Crosset, T. (1999) Male Athletes Violence Against Women: A Critical Assessment of the Athletic Affiliation, Violence Against Women Debate. *Quest*, 55:244-257.

- A strong association exists between drinking and sport – “athletes drink, get drunk and drink to get drunk at a higher rate than nonathletes.” Drinking plays a prominent role in some men’s “premeditated strategy to coerce women into unwanted sex or to be violent; it may also be a convenient and socially acceptable means by which men can distance themselves from their violence.”¹⁹
- Impaired reasoning or impulse control caused by head injury plays a role in many instances of sexual violence. “Sport related injuries were the third most likely type of head injury, behind car accidents and falls; most occurred before the age of 16.”²⁰
- Training athletes to be violent in sport affects behavior off the field of play. Training athletes to be physically dominant coupled with socialization that treats women disrespectfully may contribute to hostility and violence against women and may support rape attitudes.²¹
- Research on male athletic teams and fraternities yields similar results; “peer support of abuse and social ties with abusive peers are predictors of violence against women...the more peer support for violence against women, the more likely a member of that group is to commit these crimes.”²²
- “Institutional support for alleged perpetrators often blames women and fails to hold athletes responsible for their actions...athletes bring more resources (financial and otherwise) into the judicial process and are better able than nonathletes to escape punishment for their crimes against women. The impediments in prosecuting athletes who perpetrate violence against women, real or imagined, may contribute to the likelihood that an athlete will commit this sort of crime.”²³
- “Star athletes, whose mediated images represent an idealized masculinity, and lesser male athletes, by association, enjoy elevated status within the masculine status hierarchy... [and] can garner considerable access to resources for demonstrating masculinity. Within some subworlds of sport, crimes against women (both the act and the recounting of it) may be a demonstration of masculinity.”²⁴

Crosset also concluded that “[F]actors that increase the likelihood that an athlete will perpetrate a crime against a woman may also vary depending on his class, race, team culture, sport culture, and level of sport.”

Sabo, Messner and others similarly assess the athletics subculture being supportive of sexual violence, homophobia, aggression, militarism, and the denigration of women, resulting in a dysfunctional masculinity ideal dominated by strength, physical dominance, and impressive

¹⁹ Id., p. 250

²⁰ Rosenbaum, A., Hoge, S.K., Adelman, S., Warnken, K., Fletcher, K., & Kane, R. (1994) Head injury in partner-abusive men. *Journal of Consulting and Clinical Psychology*. Dec. 62(6):1187-93.

²¹ Crossett., p. 250-251

²² Id., p. 251

²³ Id., p. 252

²⁴ Id., p. 253

virility.²⁵ Most authors agree that the popularity of sport in every society, its significance as a cultural institution, its dominance by men, and its effect on the perceptions of ideal masculinity severely limit male athlete choices of acceptable behavior and thought expression, thereby supporting sexual violence. While these phenomena have been studied in depth over the last four decades, educators and sports administrators have not used this information to change sport systems in this regard. Clearly the research supports the need to do so now. Multiple approaches must be used.²⁶

Institutional Actions and Justifications That Enable Athlete Violence

Media reports (in addition to the recent *USA Today* report discussed above) corroborate research findings of institutions enabling athlete misconduct. Numerous cases are cited in which athletes with a history of criminal offenses or previous school disciplinary actions are knowingly recruited to participate in athletics. Or, if the athlete is already enrolled and commits such violence, the institution acts to support the athlete by imposing minimal institutional penalties, blaming the victim, providing extraordinary legal or other assistance, impeding investigations, delaying adjudication to the end of the playing season so athletes can remain eligible to compete, or intimidating victims to drop or not bring charges. The reality of the college athlete recruiting process is that college coaches are under tremendous pressure not to question recruits about past criminal or other misconduct for fear they will lose the recruit to institutions that do not ask. In other words, the need for outstanding talent trumps any concern about the athlete's moral character and how it may affect the safety of other students. Once athletes are enrolled, the pressure to maintain their eligibility to play results in special treatment.

Astoundingly, institutions attempt to justify turning a blind eye to athlete violence. They express concern for the athlete, not wanting to ruin his life, or alternatively, wanting to provide an opportunity for the athlete to turn his life around. They hope he will use education to steer a course toward future success, and they insist that violent behavior is not consistent with his family or religious upbringing. Sometimes, a "slip of the tongue" sends a clear misogynist "boys will be boys" message to college athletes. For example, *USA Today* reported that Bob Bowlsby, Commissioner of the Big 12 Conference, stated during a July 2016 press conference about the athlete sexual violence issue at Baylor: "It almost goes without saying that when you combine alcohol and drugs and raging hormones and the experiences of 18-22 years old, it's probably unrealistic to think that these kinds of things are never going to

²⁵ E.g., see Messner, M. A. and Sabo, D. (1994) *Sex, Violence and Power in Sports: Rethinking Masculinity*. Freedom, CA: The Crossing Press; McKay, J., Sabo, D. and Messner, M. A. (Ed.). (2000), *Masculinities, Gender Relations and Sport*. Thousand Oaks, CA: Sage Publications. Messner, M. A. (1992). *Power at Play: Sports and the Problem of Masculinity*. Boston, MA: Beacon Press.

²⁶ See, e.g., Genardo, David, "An intersection of Gender, Race, and Sports: Guidelines for Universities Determining Whether to Suspend Athletes Accused of Title IX Violations," 9 *Berkeley J. Ent & Sports L.*, Vol. 1 (2020), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3446738

happen.”²⁷ Statements of concern for the victim or possible future victims are seldom, if ever, voiced.

These institutional excuses are familiar, consistent, and regularly documented by the media:

Letter-of-Intent signee Jeffrey Simmons, a highly ranked football prospect recruited by Mississippi State University (MSU), allegedly used physical force in attempting to intervene in a domestic fight between his sister and another woman and was charged with misdemeanor assault for striking a woman. Simmons, a football player, was suspended for the first game of the season, a penalty equal to that imposed if a player commits a targeting foul during a game. MSU’s athletic director made the following statements concerning the incident. “Based on conversations our staff has had with school, community, and church leaders in Noxubee County, this incident appears to be uncharacteristic of Jeffery.” “It’s a highly unique circumstance to administer discipline to a student for an incident that occurred prior to that individual joining our university.” “We expect the structure and discipline Jeffery will be a part of in our football program to benefit him. Jeffery will be held accountable for his actions while at MSU, and there will be consequences for any future incidents.” “Five seconds of a really poor choice shouldn’t preclude an individual from going to school.”²⁸

Additionally, consider the way in which the University of Nebraska handled the case of football player Laurence Phillips, who committed suicide while serving a 31-year prison sentence for convictions that included domestic violence, spousal abuse, false imprisonment, and vehicle theft and was awaiting trial for first-degree murder:

Phillips, who brutally beat an ex-girlfriend (separation assault), was temporarily suspended from play. University officials argued that severing relations with Phillips would be detrimental to the young man in this time of need. The charges against Phillips were dropped and he returned to action in time to play in Nebraska’s bowl game.²⁹

Other examples were reported by *InsideHigherEducation.com* in July of 2015:

Earlier this year, a female University of Oregon student sued the university, alleging that it recruited the basketball player accused of assaulting her, even though it knew he had previously been accused of a separate sexual assault at Providence College. Oregon suspended the player, as well as two others involved in the assault, but the suit also states that the university scrubbed the players’

²⁷ Mandell, N. (2016, July 18) “Big 12 commissioner: Combination of ‘alcohol ... and raging hormones’ make eradicating sexual assault ‘unrealistic’” *USA Today*. Retrieved from <http://ftw.usatoday.com/2016/07/big-12-commissioner-combination-of-alcohol-and-raging-hormones-make-eradicating-sexual-assault-unrealistic>

²⁸ Mississippi State University Athletic Department. (2016, June 2) Jeffrey Simmons Allowed to Enroll at MSU with Conditions. *HailState.com*, June 2, 2016. Retrieved from <https://hailstate.com/news/2016/6/13/football-jeffery-simmons-allowed-to-enroll-at-msu-with-conditions.aspx>

²⁹ Crossett, p. 252.

transcripts of any references to sexual misconduct, making it easier for them to transfer to play elsewhere.

The university maintains it was not aware that the player had faced sexual assault allegations at Providence, and the state of Oregon does not require colleges to note such offenses on transcripts.

All three Oregon players have since transferred to play basketball at other colleges, despite the widespread media coverage of their suspension. Last season, Alcorn State University's football team included two players who had left their previous colleges after being accused of sexual assault. Both were high-profile cases, but neither player had trouble finding a new team to play for.³⁰

Recent events at Baylor particularly highlight the wrongdoing by institutions. Numerous complaints regarding sexual misconduct and instances of violent behavior by Baylor University football players were filed and ignored by coaches, athletic administrators, and university officials. Eventually, arrests were made and, following convictions, there were numerous resignations of University officials.³¹ Similarly, officials at LSU, either doubted the stories of women who were raped, failed to investigate, didn't inform campus or municipal police, or failed to report allegations to the Title IX office thereby allowing their superstar running back Derrius Guice to continue playing football unimpeded over a two year period. Nine other football players over a four-year period were reported for sexual misconduct and dating violence, with the handling of those complaints still remaining a secret in November, 2020.³²

Division I institutions commonly arrange legal assistance for accused athletes, and the rules of the NCAA and other national collegiate athletic governance organizations do not prohibit the practice. The University of Tennessee, as part of a \$2.48 million athlete-sexual-assault settlement, admitted that "it did prepare a list of six local lawyers for athletes to call. The lawyers, all Tennessee graduates, included two former members of the university's athletic board, a football color commentator for its television network, and a prominent booster. Other students at Tennessee accused of crimes -- and those who file complaints that they have been

³⁰ New, J. (2015, July 10) Requiring a Red Flag. *InsideHigherEd.com*. Retrieved from <https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts>

³¹ Ladika, S. (2017). Sports and sexual assault. *CQ Researcher*, 27:16, 361-384. Retrieved from <http://library.cqpress.com/cqresearcher/document.php?id=cqresre2017042800>. The judicial system too has contributed to the crisis that occurs on college campuses involving athletes. For example, at Stanford, Brock Turner, a Stanford University swimmer, was convicted for sexually assaulting an unconscious woman, but served only half of a six-month sentence.

³² Jacoby, K, Armour, N. and Luther, J. November 16, 2020. LSU mishandled sexual misconduct complaints against students, including top athletes. *USA Today*. Retrieved from: <https://www.usatoday.com/in-depth/sports/ncaaf/2020/11/16/lsu-ignored-campus-sexual-assault-allegations-against-derrius-guice-drake-davis-other-students/6056388002/>

the victims of assaults or other crimes -- did not receive the list.”³³ “For decades, a lawyer in Baton Rouge provided pro bono legal services to more than 100 Louisiana State University athletes until the university asked him to start charging athletes in 2011. Throughout the 1980s, an Orlando attorney and Florida State University booster represented athletes for free... FSU officials and Tallahassee police worked together to help prepare a defense for Jameis Winston, the university’s star quarterback at the time, after he was accused of sexually assaulting a female student.”³⁴

Legal and Public Relations Risks Created by Special Treatment of Athlete Sexual Violence

While Title IX requires education environments to be safe and students protected from hostile environments that impede the education process, institutions have an enormous amount of flexibility on how to ensure such, which makes it more likely that athletes are provided with special treatment. During the past few years, hundreds of lawsuits were brought by both survivors and accused students, many by or against athletes. These have been filed in state and federal courts with varying causes of action, from Title IX violations to negligence, deliberate indifference and breach of contract.³⁵

A 2014 survey of 440 institutions commissioned by the office of U.S. Senator Claire McCaskill found that many schools use investigatory and adjudication processes that fail to comply with best practices.³⁶ For example, experts maintain that students should not participate in adjudication panels in campus sexual assault cases owing to privacy concerns for victims or conflicts of interest because they may know peers who are victims or perpetrators. But 27% of institutions in the national sample, 43% among large public institutions and 30% among large private institutions allow such student participation.³⁷ Incredibly, many institutions polled in the McCaskill survey reported setting up different investigation and adjudication procedures for their athletes. “More than 20% of institutions in the national sample give the athletic department oversight of sexual violence cases involving student athletes. Approximately 20% of the nation’s largest public institutions and 15% of the largest private institutions allow their athletic departments to oversee cases involving student athletes.”³⁸ The report concluded:

³³ New, J. (2016) Pro Bono. *InsideHigherEd.com* (July 7, 2016). Retrieve at: <https://www.insidehighered.com/news/2016/07/07/ncaa-rules-allow-boosters-help-athletes-accused-sexual-assault>

³⁴ Ibid.

³⁵ See, e.g., *Weckhorst v. KSU*, Case No. 2016-cv-02255, dismissed with prejudice Nov. 26, 2019.

³⁶ U.S. Senate Subcommittee on Financial & Contracting Oversight – Majority Staff. (2014) Sexual Violence on Campus: How Too Many Institutions of Higher Education are Failing to Protect Students. Retrieved from <https://www.mccaskill.senate.gov/media-center/news-releases/campus-sexual-assault-survey>

³⁷ Ibid, p. 11.

³⁸ Ibid.

Institutions are failing to comply with the law and best practices in handling sexual violence on campus. These failures include failing to have a Title IX coordinator, not knowing the scope of the problem on their campuses because of inadequate outreach, not responding to reports of sexual violence made by students, not training students, faculty, and staff on preventing and responding to sexual violence, and having biased or harmful sexual assault adjudication procedures.³⁹

Under these circumstances, it is not surprising that differential treatment of athletes occurs even when athletic departments are not responsible for handling sexual assault cases. The purpose of the Outside the Lines investigation previously cited was not only to reveal the extent to which athletes were involved in criminal activity, but also to examine how athletes were treated differently than nonathletes with regard to investigation and adjudication of sexual assault allegations. The report concluded:

... athletes from the 10 schools mainly benefited from the confluence of factors that can be reality at major sports programs: the near-immediate access to high-profile attorneys, the intimidation that is felt by witnesses who accuse athletes and the higher bar some criminal justice officials feel needs to be met in high-profile cases.

Athletic department officials inserted themselves into investigations many times. Some tried to control when and where police talked with athletes; others insisted on being present during player interviews, alerted defense attorneys, conducted their own investigations before contacting police, or even, in one case, handled potential crime-scene evidence. Some police officials were torn about proper procedure—unsure when to seek a coach's or athletic director's assistance when investigating crimes.

Some athletic programs have, in effect, a team lawyer who showed up at a crime scene or jail or police department—sometimes even before an athlete requested legal counsel. The lawyers, sometimes called by athletic department officials, were often successful in giving athletes an edge in evading prosecution -- from minor offenses to major crimes.

The high profiles of the athletic programs and athletes had a chilling effect on whether cases were even brought to police and how they were investigated. Numerous cases never resulted in charges because accusers and witnesses were afraid to detail wrongdoing, feared harassment from fans and the media, or were pressured to drop charges in the interest of the sports programs.⁴⁰

³⁹ Ibid, p. 4.

⁴⁰ Id., See also Lavigne, P. (2015). How OTL Completed Its Investigation. ESPN.com (June 15, 2015). Retrieved from http://espn.go.com/otl/story/_/id/13039153/how-lines-completed-athletes-police-investigation-10-schools

All of these institutional practices increase the risk of the institution being held liable under Title IX for failing to prevent hostile educational environments created by athlete sexual misconduct. But even if these practices are not technically within the scope of Title IX, we believe that institutions should be held accountable-hence our proposed rules.

One way to make certain that institutions uniformly enact sexual misconduct or physical violence rules is to have Congress require such. Indeed, responding to the sexual assault crisis on college campuses, Congress is currently considering a bipartisan bill, the Campus Safety and Accountability Act (S.976⁴¹). Included among the provisions is a sport-specific requirement to use a uniform process for campus disciplinary proceedings that would no longer allow athletic departments or other subgroups to handle complaints of sexual misconduct for members of that subgroup alone.⁴²

The NCAA's Response to the Sexual Violence Issue

The NCAA has no rules or codes of conduct that prohibit athletes from engaging in sexual misconduct or physical violence under the threat of loss of eligibility for collegiate athletics participation. It does not prohibit the recruiting of athletes with records of sexually harassing misconduct or even with criminal records. It permits athletes found to have committed sexually harassing conduct or sexual or other forms of physical violence and dismissed from NCAA member institutions to transfer, enroll and participate in athletic programs at other NCAA member institutions. While the NCAA prohibits unethical behavior (*NCAA Division I Manual*, 10.1), such is defined only in relationship to the violation of NCAA rules and there are no rules prohibiting athletes' sexually harassing misconduct or violent misconduct, whether sexual or not. While the NCAA requires individuals employed by or associated with athletic departments to have high moral values and always engage in exemplary conduct, there is no similar requirement for athletes. (*NCAA Division I Manual*, 19.01.2). At best, other than a most recent policy that generally requires schools to attest that they have become knowledgeable of their potential and current athletes' history of violence (sexual or not) based on required athletes' disclosure statements and if the athlete transfers that the original (transferor) school inform the transferee school regarding such violence (see page 19 for the exact requirements), the NCAA has issued unenforceable resolutions, guidelines and recommendations that its members have the option to implement and published educational "toolkits" to assist in this regard. In fact, as the following summary of NCAA activity on this subject reveals, the NCAA claims no responsibility to promulgate rules that prevent college athlete sexual misconduct and physical violence.

⁴¹ Filed in the 116th Congress (2019-20), this is the third time the bill has failed to be considered by the Senate after passing in the House. Retrieve at: <https://www.congress.gov/bill/116th-congress/senate-bill/976/actions>

⁴² Interestingly, for many years the NCAA has had a policy regarding athletes who were suspended or disqualified from their institution (not from a team) for any reason. The bylaw provides that in such circumstances if an athlete transfers then he or she must complete one calendar year of residence at the new school. Bylaw 12.5.1.2 (1/14/97, revised 10/4/17). The NCAA has absolutely no similar rule regarding suspension or disqualification from a team. Plus, sitting out one year is obviously not a substantial penalty or deterrent.

In August of 2014, the NCAA Executive Committee adopted a resolution that urged athletic programs to “assure that student-athletes are neither advantaged nor disadvantaged by special treatment” in the event of allegations against college athletes accused of sexual violence.⁴³ Further, the resolution stated that member institutions’ athletics departments must:

- Comply with campus authorities and ensure that all athletics staff, coaches, administrators and student-athletes maintain a hostility-free environment for all student-athletes regardless of gender or sexual orientation; know and follow campus protocols for reporting incidents of sexual violence; report immediately any suspected sexual violence to appropriate campus offices for investigation and adjudication.
- Educate all student-athletes, coaches, and staff about sexual violence prevention, intervention and response.
- Ensure compliance with all federal and applicable state regulations related to sexual violence prevention and response.
- Cooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence, ensuring that investigations involving student-athletes and athletics department staff are managed in the same manner as all investigations of students and staff on campus.⁴⁴

The resolution does not have the force of NCAA rules, which carry penalties for noncompliance. Neither does the resolution address athletic department practices such as arranging for athletes to receive early legal advice or representation in the event of allegations of criminal conduct or interfering with external criminal investigations or adjudication. Last, the resolution focuses only on sexual violence, which does not include lesser, but still egregious sexual misconduct, and ignores violent behavior other than sexual violence.

In September 2014, the NCAA issued an education publication titled *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses*.⁴⁵ The stated purposes of the publication are to assist member institutions “in developing their own approaches to preventing or reducing the incidents of sexual assault and other acts of interpersonal violence on their campuses” and to “provide information on responding appropriately to acts of violence and other matters relevant to complying with federal law.”⁴⁶

⁴³ National Collegiate Athletic Association. (2014) Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution (August 8, 2014). Retrieved from <http://www.ncaa.org/governance/committees/executive-committee-statement-sexual-violence-prevention-and-complaint-resolution>

⁴⁴ Ibid.

⁴⁵ Wilson, D. (2014) *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses*. National Collegiate Athletic Association. Retrieved from www.NCAA.org/violenceprevention

⁴⁶ Ibid, p. 5.

Notably the publication does not acknowledge the high rates of athlete involvement in sexual violence that appear to exist in Division I football and basketball, appearing to deny or mitigate its existence among aggregated data:

The research does not show significant differences between student-athletes and their nonathlete peers on probabilities of perpetrating acts of violence. It appears there may be more differences among student-athletes than between student-athletes and nonathletes.⁴⁷

Neither does the publication mention specific concerns about recruiting athletes with criminal records, specific ways in which athletic departments have acted inappropriately in investigating and adjudicating sexual offenses, or other issues discussed in this paper. No NCAA rule requires mandatory distribution of such important educational material. Moreover, even if such a rule existed, it would not end athlete violence because although education is an important intervention, it is not sufficient to solve the problem.

In 2016, an NCAA Board of Governors Commission to Combat Campus Sexual Violence was charged with addressing sexual violence issues.⁴⁸ In 2016, on the recommendation of the Sexual Assault Task Force, the NCAA's Sports Science Institute produced a sexual violence prevention toolkit. A second edition was produced in August 2019.⁴⁹ The toolkit recognizes the extent of the problem and provides many helpful suggestions especially regarding education and bystander interventions but only specifies that the member institutions have a duty to protect their students, including athletes, from sexual violence. It clearly attempts to avoid placing any responsibility on the NCAA.

Also, in August 2016, the NCAA Board of Governors announced that it was asking the leaders of all three competitive divisions to "consider legislation to deal with athletes accused of sexual violence" and suggested that its 2014 resolution "could serve as the basis for new rules that would address topics such as compliance with campus authorities as well as state and federal laws, proper reporting protocols, and more education within the athletic department about prevention and intervention."⁵⁰ The result was that in August 2017, the NCAA Board of Governors adopted a sexual violence policy that required the school president or chancellor, athletics director, and Title IX coordinator on each member institution campus to attest annually that coaches, athletics administrators and student-athletes were educated in sexual violence prevention.⁵¹

⁴⁷ Ibid, p. 11.

⁴⁸ Hanebutt, R., Judge, J., Kalle, H., Kirkland, C., Wilson, D., & Wyrick, D. (2019) Sexual Violence Prevention: An Athletics Tool Kit for Healthy and Safe Culture, Second Edition. NCAA Sports Science Institute. Retrieved from https://ncaaorg.s3.amazonaws.com/ssi/violence/SSI_SexualViolencePreventionToolkit.pdf

⁴⁹ National Collegiate Athletic Association. (2016) NCAA Commission appointed to combat sexual violence. Retrieved from <http://www.ncaa.org/governance/committees/ncaa-commission-combat-campus-sexual-violence>

⁵⁰ Associated Press. (2016, August 5) NCAA Asks School Leaders to Look at Sexual Violence Measures. Retrieved from <http://www.wthr.com/article/ncaa-asks-school-leaders-to-look-at-sexual-violence-measures>

⁵¹ NCAA Board of Governors. (2017, August 10) Board adopts sexual violence policy. Retrieved from <http://www.ncaa.org/about/resources/media-center/news/board-adopts-sexual-violence-policy>

In June 2018, the NCAA Commission to Combat Campus Sexual Violence recommended that athletes' participation be directly linked to their behavior off the field but two months later, the Board of Governors disbanded the Commission and did not act upon the Commission's recommendation to pass more definitive rules.⁵²

The latest attempt by the NCAA to deal with the problem was, on May 1, 2020, when the Board of Governors updated the 2017 attestation policy adding the following disclosure requirements:

- All prospective, continuing, and transfer athletes must complete an annual disclosure form revealing any prior sexual, interpersonal or other act of violence that resulted in an investigation, a Title IX disciplinary proceeding, or criminal conviction.
- Member institutions must confirm such athletes' disclosures.
- When an athlete attempts to enroll in another institution, the member institution must share such disclosure and confirmation information.
- If an institution chooses to recruit or accept a transfer athlete, that institution must have a policy in place to require staff members to query the former institution for the purpose of obtaining such information.
- Athletes' failing to fully and accurately disclose may result in penalties including loss of eligibility to participate.
- Institutions failing to attest to their compliance with the violence policy mandates will be prohibited from hosting any NCAA championship competitions in the next academic year.⁵³

Inexplicably, six months later, a "unanimous, closed-door NCAA board vote" delayed implementation of the policy for two years—the 2022-23 academic year.⁵⁴

Significantly, while athletes who do not truthfully disclose prior sexual, interpersonal, or other violence may lose their eligibility to compete, amazingly there is no loss of eligibility as a penalty for committing such acts. The NCAA should also require background checks of incoming and current athletes to verify the accuracy of the disclosures. Further, the NCAA's policy is focused on sexual, interpersonal and other violence. It does not include forms of sexually harassing misconduct short of violence such as bullying, stalking, verbal, cyber or written harassment or other forms of sexual abuse that can cause a hostile education environment. Also, it does not require disclosure of credible accusations that involve violence or sexually

⁵² NCAA Board of Governors Meeting (2018 August 7). Retrieved from http://www.ncaa.org//sites/default/files/Aug2018BOG_Report_2018.pdf)

⁵³ NCAA Board of Governors. (2020, May 1) Policy on Campus Sexual Violence. Retrieved from <http://www.ncaa.org/about/resources/media-center/news/board-adopts-sexual-violence-policy>

⁵⁴ Perez Jr., J. (November 18, 2020) NCAA delays new sexual violence policy, months after approval. *Politico*. Retrieve from: <https://www.politico.com/news/2020/11/18/ncaa-sexual-violence-policy-delay-437106>

harassing misconduct, opening a hole for athletes to slip through once they are accused. Indeed, there are media reports of just that—athletes transferring to other schools once accused and before any formal investigation by the school or law enforcement is begun.⁵⁵ One can only guess how many times such transfers have actually occurred given how easy it is to get away with such behavior if the individual is a valued athlete.

Not only has the NCAA failed to recognize that athletes' sexual misconduct and physical violence is a serious and insidious problem that occurs with intolerable frequency in the intercollegiate athletic community and that has adverse consequences on the student populations of its member institutions, but it claims it has no duty to be more involved in the prevention of such misconduct. In April of 2020, sued by seven athlete and non-athlete females (*Aldrich v. NCAA*) who allege that the NCAA has failed to protect them from sexual violence alleged to be committed by male athletes, the NCAA denied any responsibility while saying the opposite to Congress:

In response to the lawsuit, the NCAA and its Board of Governors contend that it has no duty, imposed either by law or by contract, to protect student-athletes at NCAA member schools from sexual abuse. This position is in sharp contrast to NCAA president Mark Emmert's statement during a Senate committee hearing several years ago, when he was asked how he would reconcile the NCAA's public statements that its priority is the health and safety of student-athletes with its private legal arguments that the NCAA doesn't have a legal duty to protect student athletes. Emmert responded: "I will unequivocally state we have a clear moral obligation to make sure we do everything we can to protect and support student-athletes."⁵⁶

It appears clear that the NCAA is more concerned with protecting itself from legal liability than protecting victims of sexual misconduct and physical violence committed by college athletes.⁵⁷ Indeed, its failure to have rules prohibiting sexual abuse by athletic

⁵⁵ Baylor recruited Sam Ukwuachu, a prominent football player, after he was accused of committing rape at Boise State. He then was convicted while at Baylor for committing additional rapes there. See Jessica Luther, Silence at Baylor, TEXASMONTHLY (Aug 20, 2015), <http://www.texasmmonthly.com/article/semce-at-baylor/>.

⁵⁶ Fermani, M. (2020) The NCAA Claims it Owes No Legal Duty to Protect NCAA Student-Athletes in Legal Filings According to FeganScott and Lieff Cabraser Law Firms. *BusinessWire.com* (May 28, 2020). Retrieve at: <https://www.businesswire.com/news/home/20200528005813/en/NCAA-Claims-Owes-Legal-Duty-Protect-NCAA>

⁵⁷ At least two lawsuits have recently been brought against the NCAA by women who alleged that they were sexually assaulted by college athletes. The lawsuits allege that the NCAA should be liable based on the following causes of action: negligence (NCAA breached its duty of care when it recognized the foreseeable harm to women and failed to warn, adopt rules and enforce rules to minimize the risk to female students), breach of contract (NCAA states in its literature that it promotes safety), intentional and negligent infliction of emotional distress, negligent supervision and fraud. See *Roedel et al v. NCAA*, Case 1:20-cv-0037 (filed April 29, 2020) (W. D. Michigan). Based on the NCAA's jurisdictional arguments there, the plaintiffs recently moved the case to state court: Case 2020-000297-NO (Circuit Court for the 19th, Ingham Cty, Michigan). The NCAA has yet to file a substantive motion in response to the complaint. The seven women in *Aldrich v. NCAA*, Case No. 5:20-cv-01733 (N.D. Ca), made similar claims and the NCAA too made jurisdictional arguments to avoid addressing the substance of the complaint. Accordingly, the court granted the NCAA's motion to dismiss on

personnel or athletes was the proffered reason in September 2018 for the NCAA dropping, after less than nine months, its investigation of Michigan State for its handling of the Larry Nassar sexual assault of female gymnasts tragedy. Subsequent allegations against Michigan State football and men's basketball players that surfaced during the Nassar investigation were also dropped. No rules, no violations.⁵⁸

Historically, the NCAA has not been inclined to act in a rule-making and enforcement capacity on the tough issues (i.e., concussion and medical policies, academic integrity, etc.), choosing instead to defer to individual institutional responsibility. However, rulemaking and enforcement are the primary mechanisms of a national governance organization. Indeed, the NCAA has had no trouble implementing rules for coaches making too many calls to recruits or limiting the number of meals that can be provided to athletes (which has been amended due to public outcry). Requiring barely minimal education standards and mandating athlete disclosure of past misconduct are only first "check-the box" steps that are not aimed at truly eliminating the problems. The missing element is effective deterrence, namely, the athlete understanding that committing any act of sexual or other physical violence will result in permanent loss of eligibility to participate in college athletics at any NCAA institution and the school will be subject to strict consequences for failure to enforce such.

Given the current NCAA denials in court of any responsibility for athlete sexual misconduct, it is highly unlikely that it will voluntarily take the independent office (i.e., U.S. Center for Safe Sport) approach mandated by Congress to address sexual misconduct and physical violence in nonschool Olympic and Paralympic sports. Meyer (2017) recommended such an office which would also develop sexual misconduct materials for use of member institutions:

The NCAA must establish an Independent Office (the "Office") that would be charged with effectively and uniformly addressing this crisis. The Office would (1) maintain lists of recruits presumed ineligible and current athletes suspended temporarily or permanently from athletics due to acts of sexual misconduct; (2) maintain the disclosures, background checks, and related information, (3) conduct its own research based upon, *inter alia*, the data discussed above; and (4) provide databases (with confidentiality protections) to independent researchers.

Additionally, the Office would review any applications for a waiver by recruits who have been presumed ineligible due to past sexual misconduct. The Office

September 3, 2020, ordering the case be sent to the S. D. Indiana where the NCAA is domiciled. Thus, the NCAA to date has relied on procedural arguments to not address the merits in both of these cases. Based on the NCAA's defense in other cases involving similar claims but different facts (e.g., concussions), it is reasonable to assume that the NCAA will mount a vigorous defense on the merits, including arguing that its member institutions have the duty to protect athletes, not the NCAA.

⁵⁸ The result is similar to that involving the allegations of fake classes and other educational malfeasance at UNC where after many years the NCAA found that no rules had been violated. See Bauer-Wolf, J. (October 16, 2017) *NCAA: No Academic Violations at UNC.* *InsideHigherEducation.com.* Retrieve at: <https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc>

would conduct an investigation and write a report of its findings, taking a holistic view of all the facts including the degree of violence, the age of the recruit at the time of the incident(s), the rehabilitative steps taken, etc., which would be included in a database along with the respective recruits' subsequent history in school if they are granted a waiver.⁵⁹

Unfortunately, the NCAA has clearly indicated that it intends its member conferences and institutions to "go at it alone."

Conferences and the Athlete Sexual Violence Issue

Wiersma-Mosley and Jozkowski⁶⁰ reported that NCAA Division I higher education institutions experienced higher rates of sexual assault against women compared to Division II and III member institutions and universities with no athletic programs and that certain conferences, specifically the Ivy League within the Football Championship Division and the Big 10, Big 12, Pac-12 and SEC within the Football Bowl Division had significantly higher reports of sexual violence. In a 2018 examination of sexual misconduct complaints at Power Five (ACC, Big Ten, Big 12, Pac-12 and SEC) institutions, Lavigne⁶¹ found that at every institution responding to an open records request for Title IX complaints involving sexual assault, domestic violence, sexual exploitation, sexual coercion, stalking or retaliation, the percent of complaints against athletes exceeded their percent of the student body.

In 2015 the Southeastern Athletic Conference (SEC) became the first conference to ban the recruiting of transfer athletes previously disciplined by their current institution for acts of sexual violence. The SEC adopted a rule that prohibited member institutions from recruiting any athlete dismissed from another SEC institution for sexual assault, domestic violence, or other forms of sexual violence.⁶² This rule was revised in 2016 to expand the definition of the types of misconduct to include "dating violence or stalking, or conduct of a nature that creates serious concerns about the safety of others" and to require members to "conduct appropriate inquiry into a transfer student-athlete's background prior to providing athletically related aid or allowing him/her to practice or compete."⁶³ Apparently, conference recruiting competition was the motivational force behind the SEC actions. The University of Georgia, an SEC member, had dismissed a football player from its team after his arrest on a domestic violence charge. The

⁵⁹ Meyer, J. "It's on the NCAA: A Playbook for Eliminating Sexual Assault". *67 Syracuse Law Review*, (417) (2017)

⁶⁰ Wiersma-Mosley, J.D. and K.N. Jozkowski. (2019) A Brief Report of Sexual Violence among Universities with NCAA Division I Athletic Programs. *Behavioral Sciences*. (February 4, 2019)

⁶¹ Lavigne, P. (2018) Conference Breakdown: Sexual misconduct complaints at each Power 5 school. *ESPN.com*. (October 25, 2018) Retrieved from: https://www.espn.com/espn/otl/story/_/id/25080028/otl-analysis-tracking-title-ix-complaints-athletes-power-5-schools#SEC

⁶² Staples, A. (2015, May 29) SEC Passes Rule Banning Transfers Dismissed for "Serious Misconduct." *Sports Illustrated*. Retrieved from <http://www.si.com/college-football/2015/05/29/sec-transfer-rule-serious-misconduct-domestic-violence>

⁶³ Dopirak, D. (2016) SEC Debates Punishment System for Incoming Freshmen. *Knoxville News Sentinel*. Retrieved from: <http://www.knoxnews.com/sports/vols/football/sec-debates-punishment-system-for-incoming-freshmen--3454e026-a07a-3f2c-e053-0100007f63b4-381823301.html>

University of Alabama, another SEC member, recruited him after a year spent in junior college. Georgia proposed the rule change. In 2016, the transfer sexual misconduct rule was expanded to include dating violence, stalking, or conduct threatening the safety of others and, in 2018, it was further expanded to include high school signees.⁶⁴

In February of 2016, prompted by the athlete rape scandal at Baylor University, the Big 12 conference passed a similar rule affecting prospective freshmen or transfer student-athletes but not enrolled student-athletes. The rule declares freshmen and transfers who previously committed serious misconduct “as defined by the Member Institution but that definition must include sexual assault and domestic violence” as ineligible for financial aid, practice, or competition.⁶⁵ Serious misconduct by enrolled student-athletes is subject to unspecified “applicable institutional procedures.”⁶⁶

In March of 2016, the Pac-12 “approved a policy prohibiting a transfer from receiving athletic aid or participating in athletics if the transfer student-athlete is unable to reenroll at a previous institution due to student misconduct...issues such as assault, harassment, academic fraud, and other violations of campus behavior conduct policies.”⁶⁷ Formal criminal background checks are not required, but Pac-12 members are required to ask transfers to disclose whether they are eligible to reenroll at their previous institutions.⁶⁸ However, each member institution is permitted to “create an appeal process for student-athletes who are deemed ineligible by this policy”.⁶⁹

To date, it appears that, among the Power Five conferences, only the Big 12 and the SEC prohibit recruiting freshmen who have criminal records or who have otherwise engaged in serious misconduct and none have rules mandating ineligibility of currently enrolled athletes who have been convicted of or disciplined for sexual violence.

Notably, in 2018, the Big Sky Conference,⁷⁰ a member of the Football Championship Division (a competition level below the Power Five and Group of Five Football Bowl Subdivision conferences) adopted a serious misconduct rule that prevents athletes with a history of convicted violence to receive athletic-related financial aid or participate in practice or competition. Specifically, “serious misconduct” is defined as any act of sexual violence,

⁶⁴ Kercheval, B. (2018) SEC expands its serious misconduct policy to include high school players. *CBSSports.com*. Retrieve from: <https://www.cbssports.com/college-football/news/2020-big-ten-expert-picks-most-overrated-and-underrated-teams-order-of-finish-bold-predictions/>

⁶⁵ See Big 12 Handbook Bylaws Sections 6.7, 6.8 and 6.10 at page 35, available online at https://big12sports.com/documents/2020/4/24/2019_20_Conference_Handbook_04_24_20_.pdf

⁶⁶ Ibid.

⁶⁷ Pac-12 Conference. (2016, March 12) Pac-12 Announces New Policy Dealing with Misconduct Issues of Transfer Student-Athletes. Retrieved from <http://pac-12.com/article/2016/03/12/pac-12-announces-new-policy-dealing-misconduct-issues-transfer-student-athletes>

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Big Sky Conference. (2018) Big Sky Conference Adopts Serious Misconduct Rule. Press release retrieved at: <https://bigskyconf.com/news/2018/6/4/general-big-sky-establishes-serious-misconduct-rule.aspx?path=general>

domestic violence, dating violence, stalking, sexual exploitation, or any assault that employs the use of a deadly weapon or causes serious bodily injury.⁷¹ ⁷²

Institutional Athlete Sexual Violence Policies

Faced with significant pressure from the Office for Civil Rights (OCR) and based on an OCR “Dear Colleague” letter in 2014 that provided meaningful guidance to institutions on how to best comply with Title IX sexual harassment provisions, institutions of higher education adopted more robust policies governing all students, faculty, and staff designed to prohibit sexual harassment. The OCR Dear Colleague letter specified how sexual misconduct is to be reported, investigated and adjudicated. The OCR guidance also included prohibitions against retaliation. Unfortunately, the Obama’s Dear Colleague letter was mere guidance, not formal regulations and thus in 2018 the Trump administration was easily able to withdraw it, resulting in a lack of uniformity by institutions. The Trump administration then engaged in a formal rule making process that required an extensive notice and comment period. And, in May of 2020, it enacted new Title IX regulations that carry the force of law (so are not just guidelines), and are intended to impose more uniformity in the investigation and adjudication of sexual misconduct on college campuses.⁷³

For numerous reasons, these new rules are aimed mostly at protecting the rights of accused students (including athletes). They narrow the definition of sexual harassment (conduct must be severe, pervasive **and** objectively offensive), limit the location of acts that fall within Title IX’s jurisdiction (on campus or at official institution activities off campus), severely limit the scope of persons who are mandatory reporters (coaches and athletic personnel no longer need give notice to the school once they become aware of misconduct), provide for court-like methods of cross-examination of parties and witnesses (making it less likely that survivors will come forward), and encourage schools to use a higher standard of evidentiary proof (clear and convincing proof resulting in it being more difficult to hold schools legally responsible for addressing sexual misconduct). While lawsuits have been brought to enjoin the new rules, in the meantime, they also contribute to the crisis involving athletes and are further reason why the NCAA and institutions must enact their own rules relating specifically to athletes. Our recommendations focus on this need.

⁷¹ Id.

⁷² Frustrated with the lack of action by the NCAA and conferences, Brenda Tracy, a victim of a gang rape by college athletes, has established a non-profit organization to combat this problem and developed “The Tracy Rule” that specifies rules for “serious sexual misconduct” by athletes, including zero tolerance of athletes committing sexual violence. Tracy is on a mission to get schools to adopt her Rule. The University of Texas at San Antonio, was the first school to adopt it last year. See generally “She reported college football players for gang rape. Now She’s on a Mission”: *USA Today*, December 16, 2019 and her websites: BrendaTracy.com and SetTheExpectation.org

⁷³ U.S. Department of Education. Non-discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. 34 CFR Part 106 [Docket ID ED-2018-OCR-0064] Unofficial version (not yet published in the Federal Register). Retrieved on May 18, 2020 at: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regulations-unofficial.pdf>

Neither the previous guidance nor the new rules adequately address sanctions that institutions should impose on students found responsible for sexual misconduct. Institutions still have broad discretion, ranging from moving an offender out of a dorm to dismissal from the institution. Questions remain about whether institutions are effectively implementing their policies, and, concerning misconduct by athletes, whether accused athletes are treated more favorably than nonathlete students.

In this section we undertake a limited examination of the types of policy actions by one state and several representative institutions that specifically address sexual or other acts of violence by athletes. Generally, state legislatures delegate authority for all matters concerning the operation of public institutions of higher education to a governing board (e.g., Board of Trustees, Board of Regents, etc.) and, in turn, these boards generally transfer authority over athletics to the president or chief executive officer of the institution. Private colleges and universities are incorporated as nonprofit organizations with fiduciary responsibility vested in a similar Board of Directors that also typically transfers authority to the chief operating officer. Thus, state and governing board policies are general in nature and seldom refer to specific programs and activities within the institution. Exceptions to this general lack of policies specific to individual programs within institutions may be precipitated by institutional crisis.

For instance, to our knowledge, only Idaho has initiated state legislation applicable to all state institutions of higher education regarding specifically violent athlete misconduct, as opposed to generally student sexual and violent misconduct. In 1995, seven athletes attending two different Idaho state universities who were accused of rape and assault. Within days of the seventh arrest, the legislature created the following student-athlete code of conduct:⁷⁴

1. Each public college and university shall have a written policy governing the conduct of student athletes. At a minimum, those policies shall include:
 - a. A disclosure statement completed and signed by the student athlete prior to participation in any intercollegiate athletic endeavor, which shall include a description of (1) all prior criminal convictions, (2) all prior juvenile dispositions wherein the student was found to have committed an act that would constitute a misdemeanor or felony if committed by an adult, and (3) all pending criminal charges, including juvenile proceedings alleging any act which would constitute a misdemeanor or felony if committed by an adult.
 - b. This statement will be kept in the office of the athletic director. Failure to accurately disclose all incidents may result in immediate suspension from the team.
2. Institutions shall not knowingly recruit any person as a player for an intercollegiate athletic team who has been convicted of a felony or, in the

⁷⁴ Donnellon, S. (1996, February 22) Crime Doesn't Play Idaho's Code of Conduct Closes College Doors to Athletes Convicted of Felonies: Is This the Way To Go? Is Idaho's Code the Way to Go? *Philly.com*. Retrieved from http://articles.philly.com/1996-02-22/sports/25656988_1_athletic-code-assault-charges-cedric-dempsey

case of a juvenile, who has been found to have committed an act which would constitute a felony if committed by an adult. Exemptions to this restriction shall be granted only by the President of the college or university upon recommendation of the athletic director and faculty athletics representative. Such decisions shall be reported in writing to the Executive Director of the State Board of Education at the time the exception is granted.

3. A student athlete convicted of a felony after enrollment, including a plea of nolo contendere on a felony charge, shall be removed from the team and shall not be allowed to participate again in intercollegiate athletics at any Idaho public college or university. Further, an institution may cancel any athletic financial aid received by a student who is convicted of a felony while the student is receiving athletic financial aid subject to NCAA regulations and the institution's applicable student judicial procedure. Nothing herein shall be construed to limit an institution from exercising disciplinary actions or from implementing student athletic policies or rules that go beyond the minimum requirements stated herein.⁷⁵

Many states have legislation that is directed to preventing sexual assault in school environments. Generally, these provide greater protection for victims than does Title IX.⁷⁶ While these do not apply solely to athletes, some of the bills have provisions that impact athletics, including requiring coaches, assistant coaches and athletics trainers be mandatory reporters. And some proposed bills were a direct result of what transpired to athletes, including bills in Michigan as a result of the Larry Nassar travesty⁷⁷. As far as we are aware, no state has a law equivalent to Idaho's law that comprehensively applies to athletes.

Institutional governing boards react similarly. Following the infamous Sandusky affair at Pennsylvania State University, the NCAA mandated and the University's Board of Trustees adopted a student-athlete code of conduct and acknowledged its oversight responsibility over the integrity of the athletic department.⁷⁸ Similarly, the Board of Trustees of Michigan State University adopted the following policy following a 1993 incident in which an athlete was not suspended from the football team after pleading guilty to assault, battery, and entering a premises without permission:

⁷⁵ Idaho State Board of Education. (2012) Governing Policies and Procedures, Section III. Post-Secondary Affairs, Subsection T. Student-Athlete Affairs. Retrieved from https://boardofed.idaho.gov/policies/iii_policy.asp

⁷⁶ Many states have sexual misconduct laws that apply to educational institutions. For example: Brett Sokolow, president of the Association of Title IX Administrators, said he believes Illinois, California, New York, Connecticut, New Jersey, North Carolina, North Dakota, and Virginia may have provisions that conflict with Title IX. See "A Direct Contradiction," *InsideHigherEd.com*, December 13, 2018.

<https://www.educationdive.com/news/california-bill-likely-conflicts-with-new-title-ix-regulation/5>

⁷⁷ See "A review of the 37 bills legislators have introduced in response to Larry Nassar scandal", <https://www.michiganradio.org/post/review-37-bills-legislators-have-introduced-response-larry-nassar-scandal>

⁷⁸ Pennsylvania State University. (2012, November 16) Board Approves Athletics Code of Conduct. Penn State News. Retrieved from <http://news.psu.edu/story/144542/2012/11/16/board-approves-athletics-code-conduct>

Any student-athlete who, while a member of an MSU intercollegiate athletic team, is convicted of a felony will be suspended from the MSU intercollegiate athletic team of which he or she is a member and thereby precluded from participation in games and all other benefits related to team membership. The student-athlete may request an exception to this rule. The President, upon recommendation of the coach and after consultation with the Director of Intercollegiate Athletics may grant such an exception.⁷⁹

Similarly, at the institutional level, the code of conduct and disciplinary processes applicable to all students may or may not include athlete-specific provisions. They are more likely to do so after a highly visible sexual assault or other acts of violence by athletes have occurred. The same is true at the athletic-department-policy level, where policies related to athlete sexual assault or other serious athlete misconduct vary greatly in detail and complexity based on the extent to which the athletic program has suffered from athlete transgressions. For example, Fresno State University Athletic Department's policies specify that athlete discipline matters are the responsibility of a Conduct Review Committee (with the exception of academic dishonesty which is addressed through standard University procedures applicable to all students). This athletics committee consists of "the Deputy Director of Athletics, two coaches, up to three Director of Athletics' designees, a Faculty Athletics Representative (FAR), a faculty member approved by the Athletics Advisory Committee, and two student-athletes. Coaches and student-athletes on the committee are excused from deliberating on cases involving their sport. Hearings may be conducted when a quorum (majority) of the committee members are [sic] present." Sexual violence, a Category 2 violation (Category 1 includes minor violations such as underage drinking, substance abuse, etc.), is handled as follows:

"Category II Sanctions: When there is reasonable and credible evidence that a student-athlete has committed a Category II violation, the Conduct Review Committee will consult appropriate University officials before imposing at least one of the following: suspension from practice, suspension from competition, prohibiting the student-athlete from using any Athletics Department facilities or services, reduction and/or termination of athletic aid, and/or permanent dismissal from the team. If athletic aid is reduced or terminated, it will occur in accordance with procedures outlined in the Student-Athlete Handbook.

- If reasonable and credible evidence exists that a student-athlete may have engaged in Category II misconduct, the Director of Athletics or his/her designee may temporarily suspend a student-athlete from practice, competition, or all athletics activities and services until a formal review is conducted.
- Charge of Felony: If charged with a felony, a student-athlete will be automatically suspended from athletics participation by the Director of Athletics pending the Athletics Department's investigation. After the internal

⁷⁹ Michigan State University. (2001, June 18) Student-Athlete Conduct Policy. Board of Trustees Policy Manual. Retrieve at: <https://trustees.msu.edu/policy-manual/06-18-01.html> Originally enacted 3-7-96.

review, appropriate disciplinary action will be taken, which may include suspension from competition and suspension or continued suspension from the team.

- Conviction of Felony: If convicted of a felony, a student-athlete will be immediately removed from his or her athletic team.
- Note: Penalties will be greater if any of the following are involved in the violation:
 1. Failure to disclose the alleged violation to the Head Coach, an Athletics administrator or the FAR as soon as possible
 2. Alcohol and/or drugs or a history of a violation(s) of the Athletic Department's Substance Program
 3. Repeated misconduct including academic dishonesty
 4. Multiple violations within a single act of misconduct
 5. Repeated association with acts of misconduct in which guilt may be implied

All sanctions will be commensurate with the severity of the violation as determined by the Conduct Review Committee. The Director of Athletics is the sole appeal body for the assigned sanctions.”⁸⁰

The problems with policies such as the above are multiple: (1) most committee members are athletic department staff, so the committee has an inherent conflict of interest, (2) the athletic department determines if there is reasonable and credible evidence warranting a temporary suspension--also an inherent conflict of interest, (3) best practices dictate that students not be involved in the adjudication of sexual-assault claims, and (4) the list of possible penalties lacks a strong deterrent.

In the spring of 2017, Indiana University’s athletic department adopted the “Indiana Rule,” a policy disqualifying any prospective student-athlete or transfer with a record of sexual violence (including dating violence, domestic violence, rape, sexual assault, or sexual violence defined by the IU Policy on Sexual Misconduct that applies to all students).⁸¹ In addition to the mandatory disqualification of any prospective athletes with records of sexual violence, prospective athletes “may and should be” disqualified for other demonstrated unacceptable misconduct (such as serious and/or repetitive criminal, school discipline or other misconduct

⁸⁰ Fresno State Department of Athletics. (2015, August) Student-Athlete Code of Conduct. Retrieved from <https://www.google.com/#q=Fresno+State+Department+of+Athletics.Student-Athlete+Code+of+Conduct+Updated+August+2015+>

⁸¹ Osterman, Z. (2017, April 19) New IU policy bans athletes with history of sexual or domestic violence. *IndyStar*. Retrieved from <https://www.indystar.com/story/sports/college/indiana/2017/04/19/indiana-hoosiers-sexual-violence-athlete-ban-fred-glass/100660758/>

issues). The policy does not apply to current athletes—only prospective athletes including transfer and incoming students.

On September 17, 2019, the University of Texas at San Antonio announced adoption of the Tracy Rule, which it claimed was the most comprehensive Serious Misconduct Rule in the NCAA:

A current or prospective student-athlete who has been convicted of, pleaded guilty or no contest to a felony or misdemeanor involving Serious Misconduct, has been found a delinquent in relationship to a juvenile code equivalent, or has been disciplined by the university or athletic department at any time during enrollment at any collegiate institution (excluding temporary disciplinary action during an investigation) due to Serious Misconduct shall not be eligible for athletically related financial aid, practice, or competition at The University of Texas at San Antonio.⁸²

Slippery Rock University followed suit in 2020.⁸³ The Tracy Rule⁸⁴, named after an athlete rape survivor, has been adopted by only twelve athletic departments, seven of which are members of the Big Sky Conference in the Football Championship Subdivision. Although the program was presented to the Power Five of the Football Bowl Subdivision, only one (Indiana University) of these sixty-five institutions have adopted the policy.⁸⁵

Conclusions and Recommendations

This review of the current issues related to college athlete sexual misconduct and physical violence demonstrates that, other than the OCR rules that have general applicability to institutions, and the NCAA's most recent rules regarding disclosures, no uniform, systemic approach exists at any level of policymaking to address issues unique to college athletics. Significantly, no concerted and coordinated effort by the NCAA and other national collegiate athletic governance organizations, conferences, or member institutions confronts athlete violence in a way that will meaningfully deter such violence. The lack of a nationally uniform policy, coupled with the pressure at the institutional level to win at any cost, results in huge disparities across institutions and even among athletes at the same institution in the way athlete misconduct is treated. Thus, athletes do not hear a clear message indicating that violent sexual behavior is unacceptable. In other words, there is no consistent deterrent for such behavior. Worse yet, institutions often enable sexual misconduct and physical violence by

⁸² Izbrand, J. and Stephens, K. (2019, September 17) UTSA codified zero tolerance misconduct policy for student-athletes. *UTSA Today*. Retrieved from <https://www.utsa.edu/today/2019/09/story/BrendyTracyRule.html>

⁸³ Fritz, B. (2020) Rule Makes It Harder for Sexual Offenders to Transfer. *AthleticBusiness.com*. (January 2020) Retrieved from: <https://www.athleticbusiness.com/college/tracy-rule-makes-it-harder-to-transfer-after-sexual-offenses.html>

⁸⁴ The Tracy Rule Informational Packet. (2020) Retrieve from: <https://static1.squarespace.com/static/5a8708afc81e0af0493fe6b/t/5df001438594a9745b93bb7c/1576010057768/The+Tracy+Rule+Information+Packet+12.10.19.pdf>

⁸⁵ Id.

supporting athletes who engage in such behavior or by continuing to recruit them, enroll them, and allow them to participate in athletics. And the efforts by institutions that do try to deal directly with such behavior are often nullified by the ease with which accused athletes can freely and quickly transfer to another institution with no penalties.

The Drake Group proposes recommendations developed based on a litmus test of whether each respective recommendation advances campus safety and educational opportunities and the well-being of athletes and students more generally. More specifically, in developing each recommendation, we asked whether the adoption of the proposed policy or practice would deter an institutionalized practice or individual behavior that contributes to sexual misconduct and physical violence by athletes. We also asked whether the recommendation would prevent higher education institutions from enabling the current athletics subculture that supports such misconduct. The recommendations reflect our recognition that participation in extracurricular activities is a privilege, not a constitutional right. Therefore, suspension or permanent expulsion from competition or athletics ineligibility is an appropriate deterrent to reprehensible behavior. It is equally appropriate, absent a constitutional right, to examine allegations with a level of scrutiny that is less than would apply if athletic participation were constitutionally protected.

We recognize that many of these recommendations are complex because (a) precision is necessary to afford fair process to accused students, (b) a racial bias in the high school disciplinary and law enforcement system must be acknowledged, and (c) the rules must target sexual behavior that harms others on or off campus. Precision is also required to clarify behavioral expectations, eliminate self-interested institutional responses to athlete violence, and make athletes aware that special treatment will not be forthcoming.

Of critical importance, given the continued failures of the NCAA to enact meaningful rules, there is a need for national collegiate athletic governance organizations and higher education institutions to plug these gaps immediately. Specifically, we recommend that athletics governance organizations require member institutions to enact more comprehensive provisions, either under their codes of conduct or as separate codes of conduct specifically related to athletic departments. Under such provisions, athletes would be immediately suspended from athletic participation if credibly accused of sexual violence on or off campus. Coaches and other athletic-department personnel would be required to report to the institution's Title IX coordinator and the office responsible for enforcing its code of conduct any knowledge of sexual misconduct and physical violence by or against athletes. If an athlete were accused of such misconduct, athletic-department involvement, other than their reporting obligations and formally participating in an investigation or adjudication, in the matter would cease immediately. Finally, an athlete found responsible for or liable or guilty of sexual or other violence would be permanently banned from participating in college athletics and receiving athletic aid. Additionally, in appropriate circumstances, nonviolent sexually harassing misconduct could arise to such a severe, persistent or objectively offensive level that athletes committing such misconduct should similarly be banned from collegiate athletics and/or receiving athletic aid. Less severe sexually harassing misconduct should be proportionally sanctioned.

Last, The Drake Group notes that the recommendations advanced below apply to both male and female athletes because both are affected by the dysfunctional athletics subculture and engage in sexual misconduct. Competitive sport teaches physical dominance and aggression. Lack of respect for women may not play the same role for female athletes as it does for male athletes, but all other elements of the subculture blueprint are present, including anecdotal evidence of top-level female athletes being involved in domestic and other violence.⁸⁶

Recommendation 1. Compliance with Title IX Regarding Gender Equity Should Be a Condition of Membership

National collegiate athletics governance organizations should establish, as a condition of membership, that institutions demonstrate, through a once-in-every-four-years certification or independent third-party assessment, compliance with the athletics and sexual harassment provisions of Title IX of the Education Amendments of 1972. With respect to athletics' equities, if inequities are identified, remedies must be identified and satisfied within twelve months following submission of the assessment. With regard to Title IX's sexual harassment regulations and guidelines applicable to all students, the assessment should examine the investigation and adjudicative process of any athlete alleged to have committed an act prohibited by Title IX. This assessment should determine whether the athlete has been treated like any nonathlete student with regard to investigatory and adjudication processes to make certain that no special treatment was provided.

Rationale

- An NCAA principle currently exists addressing this issue:

“2.3.1 Compliance with Federal and State Legislation. It is the responsibility of each member institution to comply with federal and state laws regarding gender equity.⁸⁷

However, no enforceable NCAA regulation exists that implements the principle. Previously, NCAA Division I imposed a once every ten years peer-certification requirement that included a Title IX athletics participation assessment, but no assessment of compliance with the law’s sexual harassment provisions. This certification program was eliminated in 2011.

⁸⁶ E.g., Brittney Griner and Glory Johnson of the WNBA were arrested for assault and disorderly conduct (see King, J. (2015) “Women Pro Athletes Have a Domestic Violence Problems Too” at <http://www.takepart.com/article/2015/04/23/brittney-griner-and-untold-story-lgbt-domestic-violence>) and U.S. national team superstar goalie Hope Solo was arrested and charged with two counts of domestic violence in 2014 (see Fainaru-Wada, M. (2014) “Documents Reveal New Details About Hope Solo’s Actions Last June” at http://espn.go.com/espn/otl/story/_/id/12976615/detailed-look-hope-solo-domestic-violence-case-includes-reports-being-belligerent-jail

⁸⁷ 2019-2020 NCAA Division I Manual, p. 3

- When institutions fail to give female athletes equal treatment and equal opportunities to participate, which is still true almost fifty years after the passage of Title IX, they inadvertently support an athletics subculture that devalues women.
- Twenty percent of the nation's largest public institutions and fifteen percent of the largest private institutions as of 2014 allowed their athletic departments to oversee Title IX sexual harassment cases involving student-athletes, a conflict of interest that contributes to athletes being treated differently than nonathletes. Such practices would not pass muster if compliance with Title IX was a membership requirement of the NCAA and other national collegiate athletic governance organizations.⁸⁸
- The NCAA currently requires independent assessment of the rules compliance systems of members on a regularized basis. The assessment requirement recommended here is no different.
- OCR's May 2020 revised Title IX regulations permit institutional codes of conduct requirements to be more restrictive (i.e., disciplinary penalties to include ineligibility for athletics). Thus, national collegiate athletics governance organizations may require their members to adopt and enforce such athletics code of conduct standards.

Recommendation 2. Compliance of Athlete Code of Conduct Requirements as a Sub-part of or in addition to the Member Institution's Student Code of Conduct That Address Sexual Misconduct and Athlete Violence Should Be a Condition of Membership.

Establish, as a national collegiate athletic governance organization membership obligation, the inclusion of a provision within or in addition to the institution's student code of conduct that eligibility in intercollegiate athletics shall be subject to additional athlete code of conduct rules as specified by the national governance association.

Rationale

- New Title IX regulations issued on May 6, 2020, specify that:

Section 106.45(b)(3)(i) ("The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.")⁸⁹

⁸⁸ Id. U.S. Senate Subcommittee on Financial & Contracting Oversight – Majority Staff. (2014) Sexual Violence on Campus: How Too Many Institutions of Higher Education Are Failing to Protect Students, p. 11.

⁸⁹ U.S. Department of Education. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. 34 CFR Part 106 [Docket ID ED-2018-OCR-0064] Unofficial version (not

*The bolded provision above permits the adoption of institutional athlete codes of conduct that eliminate gaps created by the new 2020 regulations. The new regulations narrowed the definition of the conduct that falls within Title IX's jurisdiction to that which is pervasive, severe **and** objectively offensive such that it creates a hostile educational environment. Previously, the guidance was all such conduct that was pervasive, severe, **or** objectively offensive fell within Title IX's jurisdiction. This is potentially a big difference—which gap should be covered by institutions' codes of conduct. As demonstrated by incidents penalized at Princeton, Harvard, Amherst, and Columbia,⁹⁰ verbal and written sexual messages by team members against an opposite sex's team members or female athletes can be so misogynistic and disrespectful that the behavior must not be tolerated and must be specifically punished. Another gap in the new OCR regulations is that the new regulations do not require coaches to be mandatory reporters—such that if a coach becomes aware of sexual misconduct of any types, they have no obligation to report it to the Title IX office. Also, the regulations require an investigation only if a "formal" report is made. Finally, the new regulations do not cover conduct occurring off campus if not an official university event.*

The national athletics governance associations should require that these gaps be covered by institutional codes of conduct that would specify prohibited athlete non-violent sexual misconduct (defined as sexually harassing misconduct herein), expand who must report the athlete misconduct, investigate allegations that are not been made in a "formal" report, include misconduct conducted off campus, and provide the specific athletics eligibility penalties to fill in the gaps left by the revised 2020 Title IX regulations.

Recommendation 3. Prospective and Current Athletes Must Disclose Whether They Have a History of Sexually Harassing Misconduct found to Be in Violation of Title IX or Sexual or Other Physical Violence. Additionally, Athletic Departments Must Conduct Background Checks on All Athletes.

- a. **Sexual or Other Physical Violence Disclosure Statements.** High school or two- or four-year college transfer students seeking to participate in athletics at a member institution or returning to participate in athletics and every current athlete each semester shall complete and sign a disclosure statement as a condition of participation in athletics or consideration for athletics financial aid. The disclosure statement should require a description of:

yet published in the Federal Register). Retrieved on May 18, 2020 at: <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regulations-unofficial.pdf>

⁹⁰ See [https://www.teenvogue.com/story/ Princeton-Men's-Swimming-and-Diving -Team-Suspended-for- Misogynistic-and-Racist-Message-Board-Comments](https://www.teenvogue.com/story/Princeton-Men's-Swimming-and-Diving-Team-Suspended-for-Misogynistic-and-Racist-Message-Board-Comments). See also Sanford G. Thatcher, Donna Lopiano, Brian Porto, Gerald Gurney, Fritz Polite, B. David Ridpath, Allen Sack, and Andrew Zimbalist (2018), "The Drake Group Position Statement: College Athlete Codes of Conduct and Issues Related to Freedom of Speech and Expression," The Drake Group, November 2018: <http://thedadragroup.org>.

- (1) any prior sexual, interpersonal, or other act of violence that resulted in a criminal complaint, investigation, settlement, finding of responsibility, plea, or conviction;
- (2) all prior juvenile dispositions wherein the student was found to have committed an act of sexual or physical violence that would constitute a felony if committed by an adult;
- (3) all pending criminal charges, including juvenile proceedings, alleging any act of sexual or physical violence that would constitute a felony if committed by an adult;
- (4) all pending accusations made to an institution or criminal authority involving sexual or other violence whether currently the subject of an institution or criminal investigation or not yet the subject of such; and
- (5) any sexual or other physical violence in high school or at a previous institution of higher education that resulted in a past or pending Title IX or student code of conduct investigation or disciplinary proceeding and the outcome of such proceeding, if complete.

The statement shall also require the athlete to give permission to share such disclosure with the national collegiate athletic governing organization and other institutions of higher education to which the athlete subsequently transfers, subject to FERPA and other confidentiality laws. Athletes failing to fully and accurately disclose are subject to penalties including loss of eligibility to participate. Institutions failing to administer and verify disclosure statements and, in the event of athlete transfer, share such statements with the institution to which the athlete transfers, shall be suspended from membership for at least one year.

- b. Disclosure of nonviolent sexually harassing misconduct. High school or two- or four-year college transfer students seeking to participate in athletics at a member institution or returning to participate in athletics and every current athlete each semester shall complete and sign a disclosure statement as a condition of participation in athletics or consideration for athletics financial aid. The disclosure statement should require a description of:
 - (1) any finding of sexually harassing misconduct pursuant to a Title IX or code of conduct process; and
 - (2) any accusation of sexually harassing misconduct prior to completion of formal reporting, investigation or adjudication processes.
- c. Athletic departments must conduct formal background checks on all prospective athletes.

Recommendation 4. Any Athlete, Prospective or Current, with a History of Sexual or Other Physical Violence, Must Be Barred from Athletic Participation and Not Entitled to Athletic Aid. Any Athlete Committing Sexually Harassing Misconduct Must Be Subject to Penalties on a Sliding Scale. Every Member Institution Must Enforce an Athlete Code of Conduct That

Specifies Athletics Department and Athletics Eligibility Sanctions Related to Allegation, Investigation, and Adjudication of Both Violent and Nonviolent Behavior.

- a. **Sexual and Other Physical Violence Revealed on Disclosure Statements/Determination of Eligibility of High School Prospects and Transfers.** All disclosure statements containing positive responses to 3. a. (1) - (5) above should be submitted to a national collegiate athletic governance association Eligibility Center. Based upon a review of such statements and other documentation submitted by the athlete, the Eligibility Center shall disqualify prospects or current athletes from eligibility for intercollegiate athletics in the following manner:
 - (1) Institutions should be prohibited from recruiting any individual to participate or permitting any current athlete to participate in intercollegiate athletics (e.g., practice, compete, or receive athletics financial aid) who has been:
 - (a) convicted of any sexual or other violence (e.g., nonconsensual, coerced or forced sex, physical sexual advances, battery, assault, dating or domestic violence, actual or threatened use of physical force that creates a serious concern about the safety of others, etc.) or has pled nolo contendere to such an act or agreed to reduced charges;
 - (b) in the case of a juvenile, found to have committed such an act; or
 - (c) suspended, expelled, or otherwise disciplined by any educational institution for such an act.
 - (2) Athletes who have been declared ineligible under this provision should have an avenue of appeal to a national college athletic association appointed independent panel comprised of both youth-development and law-enforcement experts not employed by any member institution. "Independent" means an individual who has not held a paid or unpaid position within the college or university and its systems, nor has provided support to the university as a booster, alumnus, consultant, or person of influence. The panel shall make timely decisions, within no less than sixty days.
 - (3) The Eligibility Center should maintain such disclosure statements as confidential documents. Doing so would also enable the organization to produce valuable research on athlete violence.
- b. **Allegations of Sexual and Other Physical Violence against Currently Enrolled College Athletes.** If not already required by the institution's student code of conduct, the following rules and procedures must apply to currently enrolled athletes alleged to have committed sexual or other physical violence (e.g., nonconsensual, coerced or forced sex, physical sexual advances, battery, assault, dating or domestic violence, actual or

threatened use of physical force that creates a serious concern about the safety of others, etc.) in on-campus or off-campus settings.⁹¹

- (1) Athletes should be treated at least as comprehensively as all other students accused of such misconduct with regard to institutional investigative and adjudicative processes.**
- (2) The school should have an immediate preliminary hearing process (less than 72 hours) conducted by an independent body to determine the plausibility of allegations (which we favor for all students).⁹²**
- (3) If allegations are determined to be plausible, the accused athlete shall be temporarily suspended from participation in athletics practice and competition, but shall remain eligible for athletics financial aid and academic services until the completion of the campus adjudication and/or criminal processes applicable to all students.**
- (4) In the case of a victim going straight to law enforcement with no report to the institution, temporary suspension of athletic eligibility should occur when the institution learns of the allegation. Such knowledge shall trigger the beginning of the institution's investigation (determination of plausibility). If an arrest or indictment follows, suspension should continue until the case is resolved.**
- (5) If the accused athlete is found responsible for sexual or other physical violence pursuant to a campus Title IX or student disciplinary proceedings, liable in a civil proceeding, or is convicted or pleads nolo contendere to a felony charge or misdemeanor, the athlete shall be permanently ineligible to practice, compete, and receive athletics financial aid at any member institution of the national collegiate athletics governance organization.**

⁹¹ Title IX no longer applies to off-campus incidents or certain conduct like online harassment unless the school has exercised substantial control over both the harasser(s) and the context in which the harassment occurs, or it occurs in a building owned or controlled by an officially recognized student group, such as a sorority or a fraternity. This change is problematic because experience demonstrates that sexual misconduct by athletes occurs most frequently in off-campus housing, notably housing occupied by a group of athletes. And recent years have witnessed several high-profile incidents of online harassment of female athletes by male athletes in the same sport. Thus, for the purpose of penalties related to athletics eligibility, off-campus misconduct allegations should be prohibited by the national collegiate athletics governing organization athlete code of conduct even if it is not considered by the institution with regard to Title IX violations that might involve other penalties such as suspension from the institution.

⁹² Determining whether an athlete has been plausibly accused requires a review of the totality of circumstances involved—more evidence than the victim saying he or she did not give consent or the accused saying he or she did. It is practical, non-technical, and requires the reviewer(s) to apply their experience and common sense to determine if allegations are reasonably trustworthy (i.e., have an appearance of truth, honesty, or sincerity). For example, while not necessary, evidence of bruising or other trauma, a third party observing an altercation, records of communications regarding the incident, would be types of evidence that might lead to context-specific determination of reasonable suspicion or the plausibility of the conduct having occurred.

c. Nonviolent Sexually Harassing Conduct Determined to Be in Violation of Title IX or a School's Code of Conduct as Revealed on Disclosure Statements/Determination of Eligibility of High School Prospects and Transfers

- (1) All disclosure statements containing positive responses to 3. (b) above should be submitted to a national-collegiate-athletic-governance association Eligibility Center. Based upon a review of such statements and other documentation submitted by the athlete, the Eligibility Center determines whether the athlete is (a) immediately eligible, (b) immediately eligible with one or more years of probation or (c) ineligible for one year with or without probation for one or more years. This determination shall be dependent on the number and severity of the misconduct, age or other extenuating considerations.
- (2) Athletes who have been declared ineligible under this provision should have an avenue of appeal to a national college athletic association appointed independent panel comprised of both youth-development and law-enforcement experts not employed by any member institution. "Independent" means an individual who has not held a paid or unpaid position within the college or university and its systems, nor has provided support to the university as a booster, alumnus, consultant, or person of influence. The panel shall make timely decisions, within no less than sixty days.
- (3) The Eligibility Center should maintain such disclosure statements as confidential documents. Doing so would also enable the organization to produce valuable research on athlete violence.

d. Accusation of Non-Violent Sexually Harassing Conduct Prior to Completion of Reporting, investigation, or Adjudication Process as Revealed on Disclosure Statements/Determination of Eligibility of High School Prospects and Transfers

- (1) All disclosure statements containing positive responses to 3. b (2) (accusations) above should be submitted to a national collegiate athletic governance association Eligibility Center. Based upon a review of such statements and other documentation submitted by the athlete, the Eligibility Center determines whether the accusation is plausible and the alleged behavior is "severe or pervasive or objectively offensive and likely leads to or creates a hostile educational environment." Such a determination shall result in a ruling that the athlete is ineligible to compete for one year and shall be on probation for one or more years dependent on the number and severity of the misconduct, age or other extenuating considerations.
- (2) Athletes who have been declared ineligible under this provision should have an avenue of appeal to a national college athletic association appointed independent panel comprised of both youth-development and law-enforcement experts not employed by any member institution. "Independent" means an individual who has not held a paid or unpaid position within the college or university and its systems, nor has provided support to the university as a booster, alumnus, consultant, or

person of influence. The panel shall make timely decisions, no less than within 60 days.

- (3) The Eligibility Center should maintain such disclosure statements as confidential documents. Doing so would also enable the organization to produce valuable research on athlete violence.
- e. Allegations of Nonviolent Sexually Harassing Conduct against Currently Enrolled College Athletes.

If not already required by the institution's student code of conduct, the following rules and procedures should apply to currently enrolled athletes alleged to have committed nonviolent sexually harassing conduct (e.g., acts ranging from bullying, hazing, stalking, voyeurism, exposure of private parts, written, verbal and cyber expressions of a sexual nature and any other inappropriate conduct of a sexual nature that is not violent but distracts students from their education, thereby likely to create or creating a hostile educational environment), including whether occurring on-campus or off-campus.⁹³

- (1) Athletes should be treated at least as comprehensively as all other students accused of such misconduct with regard to institutional investigative and adjudicative processes.
- (2) The school should have an immediate preliminary hearing process (less than 72 hours) conducted by an independent body to determine the credibility of allegations (which we favor for all students).
- (3) If allegations are determined to be credible, the accused athlete shall remain eligible for athletics financial aid and academic services until the completion of the campus adjudication applicable to all students. However, temporary restrictions must be immediately imposed to remedy any hostile educational environment affecting the victim such as altering training schedules, requiring curfews, implementing contact limitations, both physically and online, etc. If the alleged victim is on the same team, temporary restrictions may include suspension from practice and/or competition.
- (4) If the accused athlete admits to or is found responsible for the alleged misconduct, in addition to any penalties imposed under regular student disciplinary proceedings, penalties ranging from formal warnings to suspension from athletics practice and competition shall be imposed for a time certain, commensurate with the severity of the misconduct. In addition, any temporary athletics restrictions previously imposed to remedy a hostile educational environment may be imposed permanently or for a time certain to ensure restoration of a safe educational environment for the victim(s).

Rationale

⁹³ See footnote 89.

- *Athletics participation is a privilege, not a right. Thus, immediately suspending athletes who have been accused of sexually violent or other violent behavior from play and prohibiting student participation in athletics or otherwise restricting athletics-related privileges do not demand the heightened level of due process required in civil or criminal proceedings. Besides, the suspended athlete retains athletics financial aid, which supports continuation as a student until a determination of responsibility. Allowing the continued participation of athletes accused of violent behavior would place the institution at risk for knowingly enabling a hostile or dangerous campus environment to exist. Suspension of athletic eligibility pending the outcome of a determination of the plausibility of the allegations (within seventy-two hours) and, if determined to be plausible, until the adjudicative process is completed is reasonable because of the need for the strongest possible response to the risks of sexual and other violence posed by the athletics subculture. Preventing the accused from interacting with large number of students and the general public reduces this risk.*
- *Imposing immediate consequences on athletes accused of sexual misconduct short of violence and penalties on students found responsible for such nonviolent misconduct does not impose a great burden on the athlete requiring First Amendment or Due Process type protections. With respect to First Amendment type considerations, the intent is not to chill speech that expresses political, religious, ideological or academic ideas. Instead, it is to prohibit speech that is not necessary to the express of such ideas, that interferes with or diminishes other students' ability to participate in or benefit from the educational environment and personally describes or is personally directed to one or more specific individuals. The prohibition should be as specific as possible but may be broader than that which might be permitted for nonathlete students. The recommendation is to match the severity of the allegation with the degree of immediate measures/sanctions temporarily imposed until there can be some finding of plausibility of the allegation and then to match the severity of the proven misconduct with the sanction imposed.*
- *Creating a clear and strong deterrent to sexual and other violence is more important than allowing an accused athlete to continue playing. Concerns about false allegations resulting in unfairness to the accused should not supersede protecting the larger campus community. Research indicates the prevalence of false allegations is between two and ten percent and that more than ninety percent of sexual assaults are not reported.⁹⁴ Thus, overwhelming evidence supports the need to prioritize protecting others from a potentially hostile environment, rather than protecting the accused individual.*
- *These provisions are necessarily complex. Precision is necessary to afford a fair process to accused students and to emphasize that the target of the rule is misconduct ranging from sexually harassing conduct to sexual violence and other physically violent behavior –all of which cause harm to others on or off campus. Sexually harassing misconduct and sexual and physical violence are unacceptable characteristics of the existing athletics subculture. Precision is also required to clarify behavioral expectations, eliminate the institutional*

⁹⁴ Id. U.S. Senate Subcommittee on Financial & Contracting Oversight – Majority Staff. (2014) Sexual Violence on Campus: How Too Many Institutions of Higher Education Are Failing to Protect Students, p. 11 and Fisher, B., Cullen, F., & Turner, M. (2000).

determination of athletics eligibility, and send a clear message to athletes that special treatment will not be forthcoming.

- *Such clear, unambiguous, and uniform requirements, applicable to all members of national collegiate athletic governance organizations will deter institutions from supporting alleged athlete perpetrators, blaming the victim, failing to hold athletes responsible for their actions, and impeding the investigation or adjudication of such misconduct.*
- *Creating a clear and strong deterrent to sexually harassing misconduct or sexual or other violence is important for both returning and new athletes especially because, with regard to the latter, their previous educational institutions may have practiced the same kind of special treatment and enablement that has failed to address athlete sexual misconduct and physical violence.*
- *Waiving normal admissions standards or admitting talented athletes who are academically underprepared, even when the institution knows they have previously been alleged to have or found to have committed felonies or sexual or other violence, suggests that such behavior is acceptable and does not result in negative consequences. Allowing a known felon or student who has previously endangered the safety of classmates places the institution at risk for knowingly fostering an unsafe campus environment. Further, such misconduct can stifle the educational learning environment.*
- *Clear, unambiguous, and uniform requirements applicable to all member institutions of national collegiate athletic governance organizations will deter admissions' decisions based solely on the potential contributions of a prospective student to winning college sports teams and establish the safety of the general student body as a priority.*
- *The proposed avenue of appeal is especially important to high school students, recognizing that the conduct of juveniles is more prone to error than that of adults and may be subject to a racial bias in the school or law enforcement system. Both factors warrant the possibility of an appeal. An appeals process conducted by independent experts removes institutional conflicts of interest and, in the case of sexual and other violence, enables the consideration of a psychological evaluation.*
- *Required returning-athlete disclosure statements of recent allegations or findings of sexual or other violent acts will reveal disqualifying violent behaviors, whenever or wherever they have occurred. The submission of disclosure updates to a central repository will ensure that data applicable to athletes' entire college careers are available for research.*

Recommendation 5. Athlete and Staff Must Be Required to Take Violence Education

- a. All national collegiate athletic governance organizations should convene the nation's top athlete gender violence educators to develop a comprehensive curriculum and establish a national program to deliver gender violence programming to member institutions. They should examine programs that have already demonstrated success with fraternities and the military, and the professional athletic leagues, groups facing similar dysfunctional subcultures. Key to success is a commitment to the delivery of "gender transformative"

programming. Such programming includes restorative justice practices and bystander-prevention education. It requires understanding important racial subtexts and confronting cultural beliefs about manhood, not only how they affect male athletes, but also how female athletes trained with similar expectations of physical dominance over others may fall into the same behavioral traps.

- b. Athlete interactive programming must address the underlying gender, sexual, and social norms that underlie the dysfunctional athletics subculture. Sufficient time allocations and small group settings are required for such transformative work with athletes. No one-hour quick-fix solution or educational short-cut exists in this area. Institutions must make annual multiple day time commitments for such programming.**
- c. Education of athletic-program leaders, especially coaches and athletic administrators, is imperative. These groups must be held accountable for creating an athletic program and team climate that rejects the dysfunctional athletics subculture. Again, the time commitment for such transformational programming must be sufficient. For example, athletic administrators and coaches, team captains and co-captains, and athletes' advisory council members should have a minimum of one full day of training annually. Leadership programming must be framed with athletics as a major partner in a coordinated campus response to sexual-assault and relationship-abuse issues.**
- d. National collegiate governance organizations should fully fund program development and delivery. In the case of the NCAA, the FBS conferences that are the sole beneficiaries of significant College Football Playoff revenues (the NCAA does not own the College Football Playoff) should fund the cost of delivery. National collegiate governance organizations that lack the financial resources enjoyed by the NCAA should seek grant support to develop and deliver this training.**

Rationale

- To shift the underlying social norms that support the described athletics subculture will require the enforcement of rules and policies that create deterrents to sexual misconduct and physical violence. That shift will also require prevention education that examines gender and sexual norms and how these norms sometimes intersect with race or ethnicity.*
- A growing, if not established, consensus among those working in gender-violence prevention and other health-related behaviors teaches that for programs to be effective, they must be "gender transformative." In other words, men, and young men in particular, must discuss and think through, often in same-sex group settings, how cultural beliefs about manhood affect behavior. This is serious work that cannot be accomplished by participating in an online educational program or by putting 300 to 600 student-athletes in a room to hear a one-hour speech or theatrical performance about consent or "healthy relationships."*
- Coaches spend an extraordinary number of hours training athletes to be aggressive and physically dominant and have done little to shift player attitudes and bragging about sexual conquest. We must spend the time needed to address violence in non-sport settings and to confront the "group think" surrounding lack of respect for women.*

- A program that teaches athletes how to recognize sexually harassing conduct and sexual violence and how to deal with violence when they observe it—a “bystander intervention” approach—is required but insufficient as a singular education intervention. Such programming may prevent or interrupt an assault, but it does not challenge underlying norms. Similarly, educational programming should include sessions for mixed groups of males and females, presentations by victims of violence, and discussions of restorative justice.

Recommendation 6. A National Collegiate Athletic Governance Organization Athlete Ombudsman Office Must Be Established.

National collegiate athletic governance organizations respectively should establish independent athlete ombudsman offices (modeled after the USOC athlete ombudsman operation⁹⁵). Those offices will provide confidential assistance to athletes seeking advice on responding to team situations, questions and answers about national athletic governance organization rules and other issues of concern to athletes. The office should have access to a wide variety of expert resources specializing in various health, legal, and other issues. Consideration should be given to making available a 1-800 number, live online counseling, and/or resources that athletes may access at any time. The office should maintain data about such contacts to use for research purposes. Member institutions should be required to annually distribute contact instructions and information on the services of the Ombudsman Office to every athlete. Although the national collegiate athletic governance organization should pay the salaries of employees staffing the office and its operating expenses, the selection and annual evaluation of its staff and services should be delegated to a special committee of distinguished former athletes who have completed their eligibility and who are not employed by any member institution.

Rationale

- The power imbalance between athletes and their coaches, who control their scholarships and many aspects of their lives, may discourage athletes from raising important health, treatment, and other concerns for fear that coaches will (a) think they are challenging the coach’s authority, (b) believe they are not tough enough to handle their own problems, or (c) label them as complainers. Similar concerns prevent athletes from consulting others in the athletic department or school officials. They fear the other person will side with a coach or place the interest of the institution above that of the athlete. Athletes need access to advice from a trusted and confidential expert not bound by institutional affiliation.

⁹⁵ See <http://www.teamusa.org/Athlete-Resources/Athlete-Ombudsman> for a description of the USOC Ombudsman program.

- *Making athlete health and well-being primary should be the mission of a collegiate athletics governance organization. After all, athletes generate significant revenues for the organizations and their member institutions.*
- *Many institutions provide their students with access to professional counselors. Still, assembling a staff and others who are expert in issues specific to the college athlete experience is necessary. An ombudsman service may be as simple as letting athletes know that campus student health centers provide confidential counseling.*

Recommendation 7. Athletic Department Staff Must Be Prohibited from Interfering in All Stages of the Process from Allegations to Adjudication and Must Be Required to Report to Appropriate Offices Any Sexual Misconduct or Other Violence of Its Athletes

The literature reveals the role of athletic department personnel and other institutional employees in protecting athletes from student disciplinary and criminal proceedings related to sexual misconduct. Every national collegiate athletic governing organization should adopt and enforce the following rules regarding responsibilities of institutional employees related to athlete involvement in sexual misconduct.

- a. Coaches and athletic department staff members are critical actors in recognizing athlete sexual misconduct. While the May 2020 revised Title IX regulation eliminated coaches, trainers, and other athletic-department personnel as “mandatory reporters,” national collegiate athletics governance organizations should require, as a condition of membership, that all athletics staff members report knowledge of any sexually harassing misconduct or sexual or other physical violence committed by any athlete or suffered by any athlete victim to the athletic director or other employee with the authority to “institute corrective measures” or directly to the offices responsible for Title IX and code of conduct violations. For college athletes, coaches and trainers in particular, but also other athletics supervisor and athlete wellness professionals, most often know the athletes best and often serve as de facto parents, counselors, and mentors for four years. These employees closely observe the mental, physical, and emotional well-being of athletes and changes in team culture. They may be the first individuals to become aware of athlete distress, the pain of the victim, and the team's knowledge of athlete perpetrator misconduct.
- b. Athletic department employees should be prohibited from involvement (except for their reporting obligations and subsequent participation required in the formal adjudication process) in any campus or external investigation and adjudication processes, including arranging for attorneys to assist athletes, unless the institution provides all students with the same legal assistance. Athletic department staff should also be prohibited from communicating with victims, campus or local law enforcement, district attorney's offices and potential or listed witnesses (unless subpoenaed or as part of a formal process).
- c. Athlete departments must, prior to recruiting any high school or transfer athlete, confirm with the national collegiate governing organization Eligibility Center or other entity

responsible for being the central depository of athlete sexual misconduct disclosure forms and the athlete's previous institution to verify that the athlete has not previously been declared ineligible under code of conduct rules or pursuant to Title IX investigations/adjudications. They must also obtain the most recent copy of the athlete's disclosure form for review of a transfer prospect and ensure that all high school prospects complete a disclosure statement prior to the initiation of recruitment activities.

d. Institutions that violate sections "a" or "b" or "c" of this recommendation shall serve a one-year suspension of membership (no distribution of national collegiate athletic governance organization or member conference revenues or eligibility for post-season play) for the initial offense, a two-year suspension for a second offense, and permanent revocation of membership for a third offense. Additional sanctions (such as "show cause" orders, vacating wins or championships earned with athletes who should have been declared ineligible) should be commensurate with the circumstances to which they apply.

Recommendation 8. The Use of Special "Escorts" for Visiting Prospective College Athletes Must Be Prohibited.

The use of nonstudent or other special "escorts" or "hostesses" for entertaining prospective athletes during campus visits should be prohibited because this practice is subject to abuse, namely, sexualizing the on-campus visits of athletics recruits. Only currently enrolled team members or Admissions Office trained students who regularly conduct campus tours and orientation sessions for high school students should introduce prospective athletes to the campus.

Rationale

- *The use of attractive female hostesses to entertain visiting high school or junior college recruits should cease. Abuses have been well documented.⁹⁶ The University of Tennessee disbanded its "Orange Pride" hostess program after an NCAA finding of "failure to monitor." Other institutions have similar groups consisting of predominantly attractive females, with the activities of such groups having been similarly questioned at the University of Colorado at Boulder, University of Oregon, and Vanderbilt University, among others.⁹⁷ This issue is not only the sexualization of recruit entertainment but also endangers the safety of the women involved in such practices.*

⁹⁶ Dominick, J. (2011, July 20) Inside College Football's Hostess Programs. *FITSNEWS.com*. Retrieve at: <http://www.fitsnews.com/2011/07/20/inside-college-footsballs-hostess-programs/>

⁹⁷ Mulhere, K. (2015, January 27) Hostesses? In 2015? *InsideHigherEd.com*. Retrieved from <https://www.insidehighered.com/news/2015/01/27/concerns-continue-about-role-hostesses-football-recruiting>

- *ESPN revealed a four-year stripper scandal at the University of Louisville involving paying escorts to entertain and have sex with recruits, including in a campus dormitory where athletes were housed.⁹⁸ The same practices occurred at the University of Colorado.⁹⁹*
- *The NCAA has prohibited the use of non-students or those not trained by the institution to provide campus tours as “hosts” who may be paid for entertaining visiting prospects—see Division I NCAA Manual for instance:*

13.6.7.5 Student Host. The student host must be either a current student-athlete or a student designated in a manner consistent with the institution’s policy for providing campus visits or tours to prospective students in general. The institution may provide the following to a student host entertaining a prospective student-athlete: (a) A maximum of \$40 for each day (24-hour period) of the visit (maximum of \$80 for two 24-hour periods) to cover all actual costs of entertaining the student host(s) and the prospective student-athlete (and the prospective student-athlete’s parents, legal guardians or spouse), excluding the cost of meals and admission to campus athletics events. It is permissible to provide the student host with an additional \$20 per day for each additional prospective student-athlete the host entertains;

But the following NCAA rule, which allows groups of attractive students to participate in entertaining recruits on visits as long as they are not “official hosts,” still exists:

13.6.7.6 Student Support Group Assisting in Recruiting. An institution may not provide a free meal or entertainment to a member of an institutional student support group that assists in the recruitment of a prospective student-athlete during an official visit unless the student is designated as the one student host for that prospective student-athlete. Any additional arrangement between the institution and members of such a support group (e.g., compensation, providing a uniform) is left to the discretion of the institution.

Recommendation 9. Transparency and Public Access to Research Data Must Be Required.

National collegiate governance organizations should begin regularized collection of data on athlete sexual and other violent behavior. The data should include questions about the athletics subculture as part of regularized college athlete research initiatives (such as the once-every-five-years NCAA GOALS surveys). All national collegiate athletic organizations

⁹⁸ Goodman, J. (2015, October 3) Louisville Investigating Claims of Escort Use in Recruiting. *ESPN.com*. Retrieved from http://www.espn.com/mens-college-basketball/story/_/id/13794771/louisville-cardinals-investigating-book-claims-escort-was-paid-sex-recruits. See also Ridpath, D. (2015, October 5) Recruiting Allegations at Louisville Could Get Ugly. *Forbes*. Retrieved from <http://www.forbes.com/sites/bdavidridpath/2015/10/05/recruiting-allegations-at-louisville-could-get-ugly/#4fe36305415c>

⁹⁹ Associated Press. (2004, March 4) Chronology of Colorado Scandal Events. *ESPN.com*. Retrieved from: <http://www.espn.com/college-football/news/story?id=1739512>

should also adopt a policy that makes collected individual-level data publicly available to researchers. Research studies should include random samples of athletes and nonathletes within the same survey. In particular, future surveys should also explicitly oversample college athletes from multiple sports to assess the unique differences across different types of student-athletes, when compared to the general student body.

Rationale

- *The NCAA regularly collects data on Finances, Academics, Student-Athlete Well-Being, Participation Demographics, and Personnel (visit the following link; <http://www.ncaa.org/about/resources/research>). Although the NCAA is committed to collecting data on student-athletes at both the institutional and individual levels, the organization has been much slower to share data with researchers who lack direct ties to the NCAA (i.e., making individual-level data publicly available for researchers to freely use). Despite the effort by the NCAA and the Inter-University Consortium for Political and Social Research (ICPSR) to share data with the public (visit the following link; https://www.icpsr.umich.edu/web/ICPSR/search/studies?start=0&ARCHIVE=ICPSR&PUBLISHED_STATUS=PUBLISHED&sort=score%20desc%2CTITLE_SORT%20asc&rows=50&q=NCAA), no current individual-level data are publicly available for researchers to download.*
- *More troubling is that NCAA individual-level surveys of student-athletes regarding issues like substance use or academic experiences do not have adequate control groups to provide meaningful comparisons (i.e., a sample of students who do not participate in athletics). A greater effort is necessary to collect random samples of athletes and nonathletes within the same survey to address major public-health issues like substance use, sexual violence, and mental health. These surveys must explicitly oversample athletes from multiple sports to assess the unique differences across different types of student-athletes (e.g., football versus track) when compared to the general student body.*

Recommendation 10: The National Athletic Governing Organization Must Specify and Enforce Penalties Against the Educational Institutions and Athletes That Fail to Abide by Any of the Requirements Above.
