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DEAR STUDENT-ATHLETE:
**A closer look at how college athletics departments are
addressing sexual misconduct**

PUBLIC POLICY AND LAW HONORS THESIS

BY NIA VOGEL

**Fall 2017-Spring 2018
Trinity College, Hartford, CT**

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Second Reader: Timothy Dunn, Esq.**

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To those affected by sexual misconduct: this is for you. Always remember that you are never alone.

THE PRE-GAME ROUTINE: An Introduction

The year is 2017. The setting is America. A man gets home from work and turns on his TV. The news is on, as it always is at 6 o'clock, and there is a report on about the star quarterback of a big-time college football team that sexually assaulted a freshman woman at the college. The man watching the news is not surprised. The team is one win short of securing their position in the upcoming bowl game. The woman just wants attention and money, and the quarterback is invincible.

Sexual assault is an epidemic that is afflicting college campuses throughout the country. Exact statistics regarding the prevalence of sexual assault are hard to gather because many incidents go unreported.¹ In most cases of underreporting, the victim remains silent out of fear of being alienated by her peers, or ignored by college faculty.² However, it is estimated that one out of every five women in America are victims of attempted or completed sexual assault during her time in college.³

In order to address incidents of sexual assault on college campuses, schools are required to comply with the federal statute Title IX. Title IX of the Education Amendments was enacted in 1972. The original purpose of Title IX was to eliminate discrimination on the basis of sex in education.⁴ Since 1972, Title IX has evolved to encompass more aspects of discrimination in education. The evolution of Title IX can be attributed to various regulations, interpretations and lawsuits filed by those who felt discriminated against in an educational setting, or a school's

¹ "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague201104.pdf>

² "Dear Colleague" Letter

³ "Dear Colleague" Letter

⁴ "Dear Colleague" Letter

activities.⁵ Two of the most important evolutions of the statute include Title IX's application to sexual harassment in or around an educational setting and equality in athletics.⁶

One of the most controversial interpretations of Title IX includes the redefinition of sex discrimination to include sexual harassment. However, if the harassment is severe or consistent enough, it can, in fact, limit the victim's access to equal education.⁷ A victim may experience mental or psychological harm that prevents them from focusing in the classroom, or enjoying other extracurricular activities or opportunities a school may have to offer.⁸

The group of students at the greatest risk of being responsible for sexual assault against a peer is male student athletes.⁹ Statistics reveal that although male college athletes represent less than 4% of colleges' student body, that group commits about 20% of reported sexual assaults.¹⁰ It seems, though, that time after time, college athletes walk away from their cases with less serious consequences than seem appropriate. Many athletes that face serious accusations during their investigation process often receive a slap on the wrist and a chance to finish their season.¹¹

The evidence supporting the high rates of male student athlete assault are staggering. Because of the data, colleges and universities should be reasonably aware of the potential liability associated with a recruited male athlete sexually assaulting another student.¹² Compliance with

⁵ Anderson, Paul M, and Barbara Osborne. "A Historical Review of Title IX Litigation." *Marquette Law Scholarly Commons* 18, no. 1 (2008): 127.

⁶ Anderson *et. al.*, 127

⁷ US Department of Education, Office for Civil Rights. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. Washington, DC. January 2001.

⁸ *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*.

⁹ Lindo, Jason M, et al. "College Party Culture and Sexual Assault." *National Bureau of Economic Research*, 2015.

¹⁰ The Hunting Ground. "The Truth About Statistics of Sexual Assault in College." The Hunting Ground Film, January 31 2017. <http://thehuntinggroundfilm.com/2017/01/the-truth-about-statistics-of-sexual-assault-in-college/>.

¹¹ Brown, Sarah. "Big-Time Sports Programs Tighten Rules on Athletes with Sexual Assault Records." *Chronicle of Higher Education* 63, no. 43 (August 18, 2017): 91.

¹² "Spies, Jenni E. "Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by Its Student Athletes." *Marquette Sports Law Review* 16, no. 2 (2006): 429–60.

Title IX is codified in federal law. Athletic departments are in the perfect position to focus their attention on the disproportionately large population of perpetrators. With a policy geared towards athletes that is strictly enforced, colleges and universities have greater potential to avoid the legal costs, the time, and the harm to their reputation due to a Title IX investigation.

Colleges and athletic departments alike have begun to notice the saliency of the issue. Consequently, efforts to reduce campus sexual assault and increase support for victims has begun to take place on many college campuses. For example, many schools now post their sexual assault policy conveniently on their websites so students can easily access the information and learn their rights. Additionally, the National Collegiate Athletics Association (NCAA) now requires all member schools to facilitate sexual assault prevention training specifically for their student athletes.¹³

Even though some progress has been made, an entire culture shift is likely necessary to significantly reduce the incidents of sexual assault. Conversations about the issue are still relatively new and still misunderstood. A step towards a culture shift as an end goal should be the creation of one uniform, umbrella policy that the NCAA can enforce as a bare minimum for all member schools' athletic departments.¹⁴

Research Question and Scope of Topic:

This thesis seeks to explore the evidence that college and universities' athletic departments are developing sexual misconduct policies and programs geared towards their student-athletes. If there is existing evidence that such programs and policies are being implemented, this thesis will

¹³ "Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution." Text, August 8, 2014. <http://www.ncaa.org/governance/committees/executive-committee-statement-sexual-violence-prevention-and-complaint-resolution>.

¹⁴ "Dear Colleague" Letter; Gutshall, Brandon. "A New Uniform: NCAA Policy and Student-Athlete Misconduct." *UMKC Law Review* 76, no. 3 (2008 2007): 727–50.

further uncover which methods, if any, are being used to evaluate the relative success of the policies and programs, and whether or not the evaluation methods are accurate.

Although the majority of college campuses are affected by student on student sexual assault, this thesis will only analyze the sexual assault policies from the eight Ivy League schools and the eleven NESCAC schools. The two athletic conferences under investigation were chosen to note a difference, if any, in policies for Division I schools and Division III schools. Additionally, the two schools are philosophically similar as their athletic departments take an academics-first approach to the student-athlete relationship with balancing athletics and academics. Because of the unique situation of the two conferences, there is a possibility that the policy proposals cannot be perfectly extrapolated to every athletic conference.

Based on a comparison of current policies and programs, a list of best practices for colleges' athletic departments to adopt will be created. The list of best practices will advise the Ivy League schools and the NESCAC schools, as well as the NCAA about which currently implemented policies are best serving their schools.

CHAPTER 1: THE RULEBOOK

A Brief Overview of Title IX

Introduction:

Title IX is a civil rights law that prohibits discrimination on the basis of sex in any education program or activity that receives federal funding.¹⁵ Since 1972, Title IX has served as the most important policy window for increasing educational opportunities for minority groups in education. As public opinion about different contentious issues evolved, such as women in education and sexual harassment in the educational setting, Title IX evolved to support that public opinion. Over the course of the past forty years, policy makers, political activists, and students have used Title IX as the foundation for achieving their policy goals.

Title IX, as it stands today, has had a monumental impact on the American educational system. Title IX helped to increase the population of women in educational programs, in graduate programs and in athletics.¹⁶ Additionally, Title IX made strides towards raising awareness about sexual misconduct in education, offering support for survivors, and trying to reduce the incidents of sexual misconduct on school campuses altogether. However, with each update to the law, regardless of whether the update is legislative or judicial, new political complications arose with those updates.

Title IX: 1972-2001

Although this thesis focuses on the interpretation of Title IX that includes sexual harassment, it is important to know that limiting sexual harassment in education was not the

¹⁵ Gonzalez, Heather B., and Jody Feder. "Sexual Violence at Institutions of Higher Education." *Congressional Research Service*, April 15, 2016, 1.

¹⁶ Rose, Deondra. "Regulating Opportunity: Title IX and the Birth of Gender-Conscious Higher Education Policy." *Journal of Policy History* 27, no. 1 (January 16, 2015): 157.

original purpose of the law. In the mid-twentieth century, women experienced a pattern of discrimination in primary and secondary schools.¹⁷ For example, publicly funded universities frequently denied women admission to undergraduate programs, women were expected to meet higher admissions standards for post-secondary schools than their male peers, and women who were equally as qualified as men were offered smaller financial aid packages.¹⁸ Though the bias towards men existed, not enough attention was given to the matter to spark progressive change.

In response to the obvious inequalities, feminists led fierce campaigns in order to draw congressional attention to their cause.¹⁹ Finally, in 1972, President Richard Nixon signed Title IX into law.²⁰ Originally, Title IX mirrored Title VII, which prevented discrimination based on race, color, religion and national origin.²¹ Title IX, however, was introduced as a part of the 1972 Education Act Amendments in order to prevent sex discrimination in any education program or activity receiving federal financial assistance.²² Adding legislation for discrimination based on sex separate from legislation based on other forms of discrimination was the first step for guaranteeing the opportunity to perpetuate the eventual evolution of Title IX.

In 1972, the language of Title was as follows:

- (a) **Prohibition against discrimination; exceptions.** No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
- (1) Classes of education institutions subject to prohibition
 - (2) Educational institutions commencing planned change in admissions
 - (3) Educational institutions of religious organizations with religious tenets
 - (4) Educational institutions training individuals for military services or merchant marine

¹⁷ Congressional Research Service. *Title IX and Sex Discrimination in Education: An Overview*. By Gary L. Galemore. RS20710. Washington, DC: The Library of Congress, 2003.

¹⁸ Galemore, *Title IX and Sex Discrimination in Education: An Overview*

¹⁹ Lieberwitz, Risa L. "The History, Uses and Abuses of Title IX." *EBSCOhost* 102, no. 4 (August 2016): 69.

²⁰ Lieberwitz, 69

²¹ Lieberwitz, 70

²² Lave, Tamara Rice. "A Critical Look at How Top Colleges Are Adjudicating Sexual Assault." *University of Miami School of Law Review* 71, no. 2 (2017): 390.

- (5) Public educational institutions with traditional and continuing admissions policy
- (6) Social fraternities or sororities; voluntary youth service organizations
- (7) Boy or Girl conferences
- (8) Father-son or mother-daughter activities at educational institutions
- (9) Institutions of higher education scholarship awards in “beauty” pageants

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) Educational institution defined.

For the purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college or department.²³

At first, various applications of Title IX were attributed to its vague language, which led to different interpretations in court. For example, at its inception, Title IX covered typical forms of sex discrimination, that resulted in disadvantaging women. By 1981, the Office for Civil Rights (OCR) of the Department of Education (ED), the agency that oversees Title IX compliance, issued a memorandum that explicitly defined sex discrimination to include sexual harassment.²⁴ Further, sexual harassment was specifically defined as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of the recipient [of federal funding], that denies, limits, provides different, or conditions the provision of aid, benefits services, or treatment

²³ US Department of Education, Office for Civil Rights. *Title IX, Education Amendments of 1972*. Washington, DC. Revised April 2015.

²⁴ Henrick, Stephen. “A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses.” *Northern Kentucky Law Review* 40, no. 1 (April 18, 2013): 50.

protected under Title IX.”²⁵ Under this memorandum, any school employee that sexually harassed a student would be in non-compliance.

In its first narrow interpretation, the Supreme Court held that Title IX did not apply to an educational institution as a whole, but instead specifically applied to those programs or activities that directly received federal funding.²⁶ Therefore, the employee mentioned above would threaten the loss of funding for his class, sports team, etc. Over time, however, the need for greater enforcement prompted a new interpretation of the application of the law. In 1987, Congress passed the Civil Rights Restoration Act in order to clarify the broad application of Title IX.²⁷ With the passage of the Act, Title IX encompassed all of the operations of a primary school, secondary school, college or university that received federal funding.²⁸ Given that most of schools receive at least some federal funding, the Act left very few schools with the opportunity for non-compliance without the threat of losing that funding. Additionally, a single employee found guilty of sexual harassment would make his whole institution vulnerable for losing federal funding.

One year later, the federal government saw the need to expand Title IX to include not only employee-on-student conduct, but also student-on-student conduct as well. In order to help support a safe environment for all students, the federal government released additional guidance entitled “Sexual Harassment: It’s Not Academic,” which incorporated student-on-student conduct.²⁹ Though the government tried to alleviate some of the inconsistencies with the new interpretations of Title IX, such as the blurred line between employee-on-student conduct and student-on-student conduct, additional clarity was needed to further enforce proper methods of compliance.

²⁵ Henrick, 56

²⁶ Lave, 385

²⁷ Lave, 385

²⁸ Lave, 385

²⁹ Henrick, 55

Two court cases served as the gateway to provide additional clarification and guidance. The first of the two court cases are *Gebser v. Lago Vista Independent School District* (1998). In *Gebser*, a high school student's secret affair with her teacher was discovered.³⁰ Her high school, Lago Vista, had no procedure for reporting sexual harassment despite Title IX's requirement.³¹ The high school student, Alida Gebser, sought damages against her school, stating that she was harassed in violation of Title IX of the Education Amendments of 1972 because the school received federal funding.³² Ultimately, the decision in *Gebser* held that a school can be liable for monetary damages under two conditions. First, the accuser must show that the school official with the ability to implement disciplinary action knew about the harassment.³³ Second, despite knowledge of the harassment, neither the school official nor the educational establishment took proper corrective measures.³⁴ The Court concluded that Lago Vista did not show indifference towards the affair between Gebser and her teacher because it did not have knowledge of the relationship.³⁵ Lago Vista was not held liable for damages.³⁶

The second case is *Davis v. Monroe County Board of Education* (1999). In *Davis*, Aurelia Davis sued the Monroe County Board of Education alleging that her daughter, LaShonda, suffered sexual harassment by another student, and the school officials were knowingly indifferent towards the harassment.³⁷ Davis also claimed that the harassment created a hostile environment for her fifth-grade daughter, precluding her from equal access to education in violation of Title IX.³⁸ The Justices in *Davis* held that a school may be liable for monetary damages if one student sexually

³⁰ *Gebser v. Lago Vista Independent School District*, Oyez.

³¹ *Gebser v. Lago Vista Independent School District*, Oyez.

³² *Gebser v. Lago Vista Independent School District*, Oyez.

³³ Henrick, 60

³⁴ Henrick, 61

³⁵ *Gebser v. Lago Vista Independent School District*, Oyez.

³⁶ *Gebser v. Lago Vista Independent School District*, Oyez.

³⁷ *Davis v. Monroe County Board of Education*, Oyez.

³⁸ *Davis v. Monroe County Board of Education*, Oyez.

harasses another student in the school's programs and the conditions of *Gebser* are met.³⁹ To reinforce the outcomes of both court cases, the OCR summarized its expectations in the 2001 Education Department OCR Guidance.

The 2001 OCR Guidance

In order to definitively outline all of the conditions of *Gebser* and *Davis* and provide revised definitions on a few policy keywords, the OCR issued the "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("Guidance") in 2001.⁴⁰ The Guidance was drafted in order to explain the decisions of *Gebser* and *Davis* in a manner that can be applied to schools' Title IX policies. The Guidance specified that a school's grievance procedures must:

- Be sent to students and employees, including where complaints may be filed;
- Be applied to complaints alleging harassment;
- Provide for an adequate, reliable, and impartial investigation of the complaints. Interviews must be conducted, including the opportunities to present witnesses and other evidence;
- Establish a prompt time frame for the complaint and investigative process; and
- Ensure that the notice of outcome of the complaint is given to the parties involved. An assurance must be made that the school will take corrective measures to eliminate current harassment and similar instances of harassment in the future.⁴¹

The extent to which schools' Title IX policies adhere to these guidelines is known as compliance. All schools that receive federal funding for its educational programs must comply with Title IX or risk losing federal funding.⁴² The Guidance also provided definitions of key terms to enhance the policy's clarity.

³⁹ Henrick, 61

⁴⁰ US Department of Education, Office for Civil Rights. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*. Washington, DC. January 2001.

⁴¹ Osborne, Barbara, and Claire Duffy. "Title IX, Sexual Harassment, and Policies at NCAA Division IA Athletics Departments." *Journal of Legal Aspects of Sport* 15, no. 1 (2005): 67.

⁴² Galemore, *Title IX and Sex Discrimination in Education: An Overview*.

The Guidance also ensured that recommendations were made in such a way as to promote adequate compliance without interfering with academic freedom or free speech.⁴³ As such, revised definitions to key words were added to the Guidance. Two of the most important definitions include:

- Sexual Harassment: “unwelcome conduct of sexual nature” that is serious enough to impact the survivor’s access to educational opportunities by creating a hostile environment. Sexual harassment includes a wide range of incidents, including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of sexual nature”.⁴⁴
- Hostile Environment: As used in the definition of sexual harassment, a hostile environment refers to sexual harassment that is “sufficiently severe, persistent, or pervasive enough to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment”.⁴⁵

The use of these definitions in the Guidance was a strong policy move. Prior to specifying these terms, schools could argue whether or not they were in compliance with Title IX based on their own definitions of sexual harassment, hostile environment, etc. However, stating the definitions in federal guidance took away the opportunity for schools to create their own definitions in order to avoid sanctions. Because of the definitions, all schools must at least adhere to the same interpretation of compliance. In sum, the 2001 Guidance was able to correct for some of the vagueness existing in Title IX and its subsequent guidance, but the 2001 Guidance still contained several ambiguities.

2011 “Dear Colleague” Letter

Purpose:

⁴³ Henrick, 51

⁴⁴ Lieberwitz, 73

⁴⁵ Lieberwitz, 73

Fast forward ten years and the federal government is no longer led by a Republican president. President Barack Obama, during his second term, sought to address the problem of sexual misconduct on college campuses head on. Partially inspired by the moral desire to protect his adolescent daughters, and partially inspired by former Vice President Joe Biden's desire to address women's civil rights, resolving this epidemic once and for all was a priority for the Obama Administration.⁴⁶ However, a group of survivors who publicized their stories about schools' mishandling of their cases truly encouraged the Obama Administration to, as Biden phrases it, "put the pedal to the metal" and begin working on policy reform.⁴⁷ Rather than beat around the bush, President Obama sought to resolve the inconsistencies in the existing 2001 Guidance and supported the release of the 2011 "Dear Colleague" Letter.

The purpose of the "Dear Colleague" Letter was to explicitly define the types of action a school is expected to take in order to comply with Title IX.⁴⁸ Once again, federal guidance was used in order to take some of the discretion away from schools in order to promote more consistent compliance. The Letter asserted that colleges and universities must alter their policies in order to move the burden of proving sexual misconduct away from the victim towards the accused.⁴⁹ The Letter also emphasized holding perpetrators more accountable. To do so, the Letter mandated that the standard of proof be reduced from the criminal court standard of "beyond a reasonable doubt" to a more lenient standard of a "preponderance of the evidence" used in civil cases.⁵⁰ In essence, this means that rather than there being about a 95% chance the accused was responsible for the

³² Eilperin, Juliet. "Biden and Obama Rewrite the Rulebook on College Sexual Assaults." *Washington Post*, July 3, 2016. https://www.washingtonpost.com/politics/biden-and-obama-rewrite-the-rulebook-on-college-sexual-assaults/2016/07/03/0773302e-3654-11e6-a254-2b336e293a3c_story.html; Lave, 389

⁴⁷ Eilperin, "Biden and Obama Rewrite the Rulebook on College Sexual Assaults."

⁴⁸ Gonzalez *et. al.*, 17

⁴⁹ Lave, 389

⁵⁰ Lieberwitz, 95

misconduct, there only needs to be about a 50% the accused was responsible for the alleged wrongdoing. While some feel that the change in standard has made strides towards victim protection, others feel as though the change in standard makes the accused seem guilty until proven innocent.

Controversy:

Although the Letter clearly with outlined its expectations, many feel as though the stark clarity over-compensated for the nuances in previous guidance. For example, reducing the standard of evidence used in colleges' investigation and adjudication processes, has proved to be one of the most controversial adaptations of Title IX. Although the Letter describes the new evidentiary standard as "clarification", many policy makers, school officials, and students see the new standard as a challenge to the due process rights of the accused. Because the standard of proof is so low, and in fact lower than the standard used in criminal proceedings, many feel as though the accused is denied both equal protection under the law, and an equitable opportunity to plead their case.⁵¹

Imposing the new standard also creates an interesting situation for schools. If the school chooses to adhere directly to the Letter's recommendations, the school would not grant the respondent assumption of innocence, thereby denying the respondent due process.⁵² On the other hand, if a school chooses not to follow the recommendations of the Letter, the school might be found in a situation of non-compliance.⁵³ The Letter did face political backlash, but the new standard remained in place for the duration of Obama's presidency.

Title IX Update: Where is it now?

⁵¹ Henrick, 60

⁵² Henrick, 61

⁵³ Henrick, 61

Enforcement:

Today, the OCR of the Department of Education oversees all Title IX violations.⁵⁴ When a complaint is brought to the Education Department, the first choice of action is mediation.⁵⁵ The Department of Education tries to work with non-compliant schools in order to remedy the instance of discrimination. In the most severe non-compliance cases, the consequence is the loss of federal financial assistance. The threat of losing the financial assistance is the ultimate driving force for compliance; however, this consequence has never been imposed on a school.⁵⁶

Although Title IX is a federally administered statute, most of the guidance proposed by the OCR is simply guidance. The federal government makes strong recommendations for schools to follow that guarantee compliance, but schools have discretion when creating their policies.⁵⁷ Because schools have discretion over how they choose to administer Title IX, Title IX policies tend to vary between schools. For example, certain schools may choose to structure their investigation as “adversarial,” mirroring a criminal court proceeding, while other schools choose an investigative model which allows for separating the complainant and respondent during the fact-finding phase.⁵⁸

Benefits:

Title IX has sparked a lot of positive change among educational institutions across the country. As a whole, the most important benefit of Title IX is the vast increase in educational opportunities for women.⁵⁹ At Title IX’s inception, men outnumbered women in under-graduate

⁵⁴ Henrick, 62

⁵⁵ Henrick, 62

⁵⁶ Wilson, Robin. “Should Colleges Be Judging Rape?.” *The Chronicle of Higher Education*, April 12, 2015. http://www.chronicle.com/interactives/assault_judging.

⁵⁷ Ellman-Golan, Emma. “Saving Title IX: Designing More Equitable and Efficient Investigation Procedures.” *Michigan Law Review* 116, no. 155 (October 2017): 168.

⁵⁸ Ellman-Golan, 181

⁵⁹ Rose, 157

programs.⁶⁰ During the 2012-2013 academic year, women equaled 57% of undergraduate students in America.⁶¹ In addition, Title IX opened the door for women to receive financial aid for college and attend graduate programs.⁶² Women's participation in sports has also dramatically increased and schools are providing more resources for women's sports programs as well.⁶³ As early as 1978, just one year after Title IX was passed, women's participation in high school sports increased to six times the rate that it had been in 1970.⁶⁴ The numbers are still continuing to grow. In the 2015-2016 academic year, 211,886 women participated in collegiate, NCAA recognized sports, marking a 25% increase than the previous decade.⁶⁵ In this regard, Title IX has essentially met its initial goal and can therefore be considered a success: women and men are given essentially equal opportunities in education and educational programs.

In regards to sexual misconduct, the evolution of Title IX has shown victims that the government, as well as educational institutions, supports victims coming forward. Additionally, the evolution of Title IX through court cases and supplementary government guidance has created policy windows for schools to refine their procedures in a manner that support the victim and provides for an efficient and emotionally respectful processes. Because of Title IX, schools must, at the very least, investigate all claims of sexual misconduct, giving the victim a chance to be heard.

Determining the extent of success for the goal of the 2001 Guidance is challenging. The biggest challenge schools face when evaluating their sexual assault grievance procedures is that

⁶⁰ Rose, 157

⁶¹ Rose, 158

⁶² Rose, 158

⁶³ Rose, 158

⁶⁴ Rothman, Lily. "How Title IX First Changed the World of Women's Sports." *TIME Magazine*, June 23, 2017. <http://time.com/4822600/title-ix-womens-sports/>.

⁶⁵ Rothman, "How Title IX First Changed the World of Women's Sports."

sexual assaults still remain largely under-reported.⁶⁶ Only about 20% of rape allegations are reported to the police, while less than 5% of other sexual misconduct violations are reported to campus safety officials.⁶⁷ Without the proper data collection, it is difficult to discover whether fewer reports of sexual assault are the result of effective policy or an adverse effect of victims feeling even more reluctant to come forward about their assault. For now, as long as schools are compliant, their policies are regarded as a “success” because they align with the policy as described. Any other measures a school takes to protect its students are applauded for going above and beyond, rather than setting a new higher standard. Non-compliant schools must remedy their policy to the point that it sufficiently meets the standards of the federal guidance.

Change in Administration:

The change of presidential administration in 2017 introduced the opportunity to alleviate some of the concerns about due process. In September 2017, Education Secretary Betsy DeVos announced that the Department of Education would formally rescind Obama-era guidance, meaning the 2011 Letter.⁶⁸ While some politicians and scholars applaud DeVos’s attempt at leveling the legal playing field for complainants and respondents, others are worried that removing the Letter will cause victims to see the move as a lack of support and have a chilling effect on reporting instances of sexual misconduct.⁶⁹ For now, schools will continue to administer Title IX as they see fit, while the government continues to find a middle ground between protecting the

⁶⁶ Ladika, Susan. “Sports and Sexual Assault.” *CQ Researcher* 27, no.16 (2017).

⁶⁷ Delamater, Chandler. “What ‘Yes Means Yes’ Means for New York Schools: The Positive Effects of New York’s Efforts to Combat Sexual Assault through Affirmative Consent” *Albany Law Review* 79, no. 2 (2016 2015): 592

⁶⁸ Tatum, Sophie. “Education Department Withdraws Obama-Era Campus Sexual Assault Guidance.” *CNN*, September 22, 2017. <http://www.cnn.com/2017/09/22/politics/betsy-devos-title-ix/index.html>.

⁶⁹ Tatum, “Education Department Withdraws Obama-Era Campus Sexual Assault Guidance.”; Cauterucci, Christina. “Finally, a New Policy We Know Trump Truly Believes in: Protections for Sexual Assaulters.” *Slate*, September 8, 2017. http://www.slate.com/blogs/xx_factor/2017/09/08/trump_and_devos_side_against_sexual_assault_victims_with_new_title_xi_rollbacks.html.

well-being of the victim and protecting the rights of the accused. This creates considerable legal ambiguity.

Conclusion

Title IX has evolved since 1972 in order to best serve the federal government's idea of how to best address sexual misconduct in education. Because schools are continuing to face the epidemic of sexual misconduct, Title IX should continue to be evaluated in order to best protect all students from sexual misconduct. In order to do so, policy makers should identify patterns in incidents of misconduct and develop a method to best address the patterns and protect students from harm. In addition, athletics departments should consider creating their own policies as they have direct oversight and a close relationship with a portion of every college's student body.

CHAPTER 2: THE OFFENSIVE LINE

Who is likely to be affected by sexual misconduct, who is likely to commit sexual misconduct and why institutions should care

“This is a game that, if you lose, you go home and beat your wife and kids.” – Charles Barkley⁷⁰

Introduction:

Even with the progress made towards strong Title IX implementation and victim support, sexual misconduct continues to plague college campuses nationwide. Constant data analysis has allowed researchers and policy makers to identify “problem populations.” The ability to predict who is likely to engage in sexual misconduct can aid in creating more targeted policies that can both protect students from harm and protect institutions from liability.

Sexual Misconduct on College Campuses:

With the earliest studies conducted in the 1980’s, the battle against campus sexual violence has lasted almost forty years.⁷¹ An early 1987 study reveals that 25% of 3,187 undergraduate women across 32 institutions were sexually victimized during their time at college.⁷² As recently as 2016, a National Institute of Justice survey reported that 25% of 15,000 undergraduate women across 9 institutions experienced sexual assault during their time at college.⁷³ Additionally, 6.1% of undergraduate men report that they, too, experience attempted or were engaged in sexual

⁷⁰ Dabbs, Ellen E. “Intentional Fouls: Athletes and Violence Against Women.” *Columbia Journal of Law and Social Problems* 31, no. 167 (1998): 170.

⁷¹ Pappas, Brian A. “Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct.” *Tulsa Law Review* 52, no. 121 (2016): 123.

⁷² The Hunting Ground. “The Truth About Statistics of Sexual Assault in College.” The Hunting Ground Film, January 31 2017. <http://thehuntinggroundfilm.com/2017/01/the-truth-about-statistics-of-sexual-assault-in-college/>.

⁷³ The Hunting Ground, “The Truth About Statistics of Sexual Assault in College.”

misconduct.⁷⁴ After four decades, serious policy reform, and culture change, sexual violence on college campuses has not gone away.

Further studies conducted to address the issue identify a “typical” perpetrator. For example, though many different undergraduate students may be a victim of sexual misconduct, sexual misconduct perpetrators tend to be repeat offenders.⁷⁵ A 2002 study surveyed 1,882 male college students and found that 4% of the men surveyed committed about 28% of the sexual assaults.⁷⁶ Another common characteristic of sexual perpetrators is the level of familiarity between the perpetrators and the victims. It is more likely for sexual misconduct to occur between peers than between strangers.⁷⁷ RAINN, the Rape, Abuse, and Incest National Network collected data from the Department of Justice and found that 7% of sexual abuses against children and teens are committed by strangers, 59% are committed by acquaintances.⁷⁸ That means, a child or teen is eight times more likely to be sexually abused by someone they know, rather than someone they do not know. The fear of change of status or abuse of power in a relationship makes it more difficult for survivors to report the misconduct, which may likely lead to the misconduct occurring again.⁷⁹

Because many perpetrators share these common characteristics, it makes the over-all population of perpetrators smaller and easier to target. Clear policies and early intervention can help identify the proper course of action, and help reduce the problem on college campuses. Another seemingly unrelated characteristic also increases the probability a person will offend. This factor is membership on an athletic team.⁸⁰ Of course, not every athlete exhibits assaultive

⁷⁴ Pappas, 121

⁷⁵ Pappas, 123

⁷⁶ Pappas, 124

⁷⁷ Pappas, 124

⁷⁸ RAINN. “Perpetrators of Sexual Violence: Statistics.” RAINN. 2018. <https://www.rainn.org/statistics/perpetrators-sexual-violence>.

⁷⁹ Pappas, 125

⁸⁰ Nixon II, Howard L. “Gender, Sport, and Aggressive Behavior Outside Sport.” *Journal of Sport & Social Issues* 21, no. 4 (November 1997): 379.

behavior, but student athletes are over-represented in reported sexual assaults. This relationship leads to difficult procedural issues when sexual misconduct cases are adjudicated. Not only may students find themselves in a situation where they may feel as though they did not undergo an adequate investigative or adjudicative process, but also, schools may find themselves dealing with consequences of students challenging the outcomes of their cases.

The Over-Represented Population: Male Student Athletes:

As sexual misconduct has gained saliency, more survivors have felt encouraged to report. Survivors are beginning to feel that reporting the crime will be answered with sanctions against the perpetrator. However, despite the progress, the issue has not entirely gone away. In fact, it is still the case that certain populations are more “at risk” to commit sexual misconduct than others. The most at-risk population is college-age, male student athletes.

Females:

Very little literature exists regarding the relationship between female participation in sports and sexual aggression, but that does not mean the relationship does not exist. What researchers have found, however, is that females are less likely to engage in violence in general. In fact, females are three-times less likely than males to engage in any violent conduct outside of their sport.⁸¹ A particular study consisting of survey data conducted by Howard Nixon II, finds that “a belief in the value of toughness in sport is related to physically aggressive acts in everyday life for male athletes, but not for female athletes.”⁸² This is one reason that female athletes may not engage in sexual violence as often as male athletes. Due to the lack of evidence supporting female athletic

⁸¹ Nixon II, 388

⁸² Nixon II, 379

engagement and sexual aggression, this thesis will focus on the evidence and theories surrounding male participation in sport and sexual aggression.

Evidence:

Many studies have addressed this question.⁸³ These studies reveal that male student athletes are involved in an overly large proportion of sexual assault complaints.⁸⁴ One study based on campus police reports reveals that male student athletes at a large public institution represent 3.8% of the total male population, but represent 5.5% of the reported sexual assaults.⁸⁵ A different study surveyed campus judicial affairs records. This study reveals that male student athletes represent 3.3% of this institution's total male population, but male student athletes represent 19% of the perpetrators reported to the institution's judicial review board.⁸⁶ This relationship is statistically significant.

While the previous studies look at male student-athletes as a whole, some scholars recommend focusing specifically on male athletes involved in contact sports. These scholars report that the likelihood of aggressive sexual behavior increases in athletes a large university finds that male football and basketball players comprised 30% of the student athlete population, but are responsible for 67% of the reported sexual assaults.⁸⁷ This statistic is even greater than the likelihood that fraternity members commit sexual violence. Men in Greek Life organizations are said to be three times for likely to commit sexual violence than their non-Greek peers.⁸⁸ However,

⁸³ Although the many studies analyzed data from several colleges and universities, none of the studies revealed the names of the institutions under observation.

⁸⁴ Van Driesen, Lauren. "The Campus Sexual Assault Elimination Act: Is It Enough to Combat Sexual Assault on Campus?" *Rutgers University Law Review* 68, no. 5 (2016): 1841.

⁸⁵ Crosset, Todd W., Jeffrey R. Benedict, and Mark A McDonald. "Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices." *Journal of Sport & Social Issues* 19, no. 2 (May 1995): 126.

⁸⁶ Crosset, 128

⁸⁷ Crosset, 132

⁸⁸ North, Anna. "Is College Sexual Assault a Fraternity Problem?" *The New York Times*, January 29, 2015. <https://op-talk.blogs.nytimes.com/2015/01/29/is-college-sexual-assault-a-fraternity-problem/>.

this does not account for men that have membership in Greek Life and on athletic teams.⁸⁹ Most common, however, members of football, lacrosse, hockey, and basketball teams are most likely to be accused of gang rape.⁹⁰

It is important to note that these statistics involve the number of reported incidents, not the number of student-athletes found guilty. However, the frequency is so high, it is unlikely that student-athletes are frequently accused based on pure coincidence, especially considering certain studies hold statistical significance.

Theories explaining student-athlete sexual aggression:

Four theories attempt to explain why male student-athletes are more likely to engage in sexual violence than other populations.

- **Alcohol Abuse:** The most common explanation for any person involved in sexual misconduct, survivor or perpetrator, is alcohol consumption.⁹¹ Especially in regards to college sports, a culture has developed that associate “game days” with binge drinking.⁹² Excessive alcohol consumption can increase both aggressive tendencies and sexual tendencies.⁹³ The combination of the two can lead to the desire to complete a sexual act regardless of consent or other context. One researcher studied the tailgate culture at the University of Colorado, Boulder. She found that every Saturday football game was preceded by a tailgate where students drank heavily.⁹⁴ During football season, and tailgate season, alcohol related violence rose.⁹⁵ She set out to explore the relationship further and noticed the role that advertising agencies play into this phenomenon. Due to the sexualized role of women in beer commercials, and the “good time” expectations of “party schools”, “cultural expectations of violence following alcohol consumption, and later the expectations that such violence will be sexual in nature” developed as a consequence.⁹⁶
- **Misplaced Aggression:** Generally speaking, sports create a physical environment where athletes are expected to behave in a physically aggressive manner.⁹⁷ In this regard, sports have the tendency to forgive and encourage certain sorts of violence.⁹⁸ Some scholars find

⁸⁹ North, “Is College Sexual Assault a Fraternity Problem?”

⁹⁰ Nixon II, 379

⁹¹ Crosset, 133

⁹² Scales, Ann. “Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes.” *Michigan Journal of Gender & Law* 15, no. 205 (2009): 205–90.

⁹³ Nixon II, 21

⁹⁴ Scales, 246

⁹⁵ Scales, 249

⁹⁶ Scales, 255

⁹⁷ Nixon II, 379

⁹⁸ Scales, 257

that athletes have trouble “turning off” this behavior when they interact with other people in social settings.⁹⁹ In addition, the pursuit of victory is at the core of any athletic contest, and part of that pursuit of victory is remaining tough and aggressive throughout the contest. The constant encouragement of violence and dominance on the field can potentially lead to blurred lines off the field. Psychologically speaking, a student-athlete engaging in sexual misconduct may not realize that this sort of aggression is inappropriate. It is possible that this is the driving force behind men that abuse women.¹⁰⁰

- **Hyper-Masculinity:** Not only do sports have the potential to lead to misplaced aggressive tendencies, sports may also create a sense of hyper-masculinity in male athletes. Several aspects of sports culture contribute to the hyper-masculinity theory. First and foremost, sports, especially contact sports, reinforce stereotypical gender norms.¹⁰¹ In this sense, masculinity, and sexism, even if subconsciously, are promoted.¹⁰² Much of male team bonding exists through the creation of this “macho” atmosphere, sometimes known as “locker room talk”.¹⁰³ Teammates glorify each other’s strengths and victories, boosting the male ego.¹⁰⁴ This inflated sense of self may be asserted outside of sport in the form of dominance over women. Sexism is also reinforced over the gender segregation in athletics.¹⁰⁵ Men and women usually practice and compete separately, so masculinity has the opportunity to flourish. When women are introduced into the male-sports world, they are often cheerleaders, not teammates or opponents, and play a highly sexualized role.¹⁰⁶ The exaggerated gender roles, coupled with the presence of violence in most games, may legitimize aggression towards women for some athletes.¹⁰⁷
- **Celebrity Theory:** The last piece of the puzzle is the celebrity theory. The cultural celebrity status awarded to male athletes creates a large bias to those trying to evade consequences.¹⁰⁸ Taking into consideration the multitude of reasons why a person may commit sexual violence, the celebrity theory explains why a student athlete may think they can get away with it, even if they know it is wrong. In her study, Ellen Dabbs finds a pattern of student-athletes routinely receiving preferential treatment from disciplinary authorities.¹⁰⁹ The authorities may be fans and will willingly aid in a team’s success.¹¹⁰ Additionally, professional sports leagues and any legal systems involved also treat athletes more leniently for violence against women.¹¹¹ This builds up a feeling of invincibility from authority in athletes.¹¹² Consequently, a student-athlete may exercise less self-control in their social interactions, including their interactions with women, than other men.¹¹³ In

⁹⁹ Dabbs, 170

¹⁰⁰ Dabbs, 170

¹⁰¹ Nixon II, 380

¹⁰² Nixon II, 380

¹⁰³ Nixon II, 380

¹⁰⁴ Scales, 257

³⁶ Crosset, 127

¹⁰⁶ Scales, 246

¹⁰⁷ Scales, 255

¹⁰⁸ Dabbs, 170

¹⁰⁹ Dabbs, 170

¹¹⁰ Dabbs, 170

¹¹¹ Dabbs, 170

¹¹² Dabbs, 170

¹¹³ Dabbs, 170

other words, because an athlete may feel as though they are above the law, they will break it, and the behavior becomes normative.

Although all four theories help explain why an athlete may engage in sexual violence, the celebrity theory begins to explain why an institution may favor an accused student athlete rather than the victim of the misconduct. Student-athletes, especially at big Division I universities, are cash cows for the school. Institutions have a financial incentive to keep the athlete on the field in order to maintain revenue from alumni donations and boosters, and safeguard against bad publicity. The observed bias towards student athletes, and the preferential treatment they usually receive is the one of the main contributors of noncompliance with Title IX. Proof of disciplinary leniency and the rationale of the phenomenon are discussed in more detail below.

Disciplinary Leniency Towards Student Athletes:

Even more troubling than the over-representation of male student-athletes as perpetrators is the frequency with which they tend to get away with the misconduct. In general, male perpetrators in Title IX cases tend to be favored.¹¹⁴ It is common for cases to be thrown away or to have comparatively lenient punishments for serious offenses.¹¹⁵

The best way to describe the kind of bias student-athletes receive can be best represented using an example. On December 7, 2012 Erica Kinsman filed a complaint with the Tallahassee Police Department accusing Florida State University's star freshman quarterback of rape.¹¹⁶ The Tallahassee police department did not contact Winston until thirteen days after Kinsman filed the

¹¹⁴ Van Driesen, 1863

¹¹⁵ Van Driesen, 1864

¹¹⁶ Wolken, Dan. "State doesn't expect Jameis Winston to speak with investigators." *USA Today*, November 15 2013. <https://www.usatoday.com/story/sports/ncaaf/2013/11/15/jameis-winston-florida-state-sexual-assault-investigation/3578745/>.

report.¹¹⁷ Kinsman developed bruises and had semen on her underwear.¹¹⁸ The police did not collect a DNA sample from Winston until the prosecutor had taken over the case months later.¹¹⁹ The investigator assigned to the case was Officer Scott Angulo, who did private security work for the Seminole Boosters, the main benefactor of Florida State Athletics.¹²⁰

On December 5, 2013, prosecutor Willie Meggs announced the completion of the investigation and the decision that no charges would be brought against Winston due to “major issues” with Kinsman’s testimony.¹²¹ On December 21, 2014, the Florida State University’s honor council cleared Winston of violating the sexual misconduct portion of FSU’s student code of conduct.¹²² In 2016, Kinsman sued FSU for being in violation of Title IX while handling her original complaint against Winston.¹²³ Kinsman’s suit settled for \$950,000, but FSU did not admit liability.¹²⁴ The DNA collected from Winston matched the DNA found on Kinsman’s underwear.¹²⁵

Though this case is extreme, it represents the kind of favoritism that may occur in sexual misconduct cases involving student-athletes. In this case, each avenue of authority did not believe a very credible female’s story. The police were lax in properly investigating Winston, likely

¹¹⁷ Bogdanich, Walt. “A Star Player Accused, and a Flawed Rape Investigation.” *The New York Times*, April 16, 2014. <https://longform.org/posts/a-star-player-accused-and-a-flawed-rape-investigation>.

¹¹⁸ Bogdanich, “A Star Player Accused, and a Flawed Rape Investigation.”

¹¹⁹ Bogdanich, “A Star Player Accused, and a Flawed Rape Investigation.”

¹²⁰ Bogdanich, “A Star Player Accused, and a Flawed Rape Investigation.”

¹²¹ Schlabach, Mark. “FSU’s Jameis Winston not charged.” *ESPN*, December 6, 2013. http://www.espn.com/college-football/story/_/id/10082441/jameis-winston-not-charged-sexual-assault-investigation.

¹²² Axon, Rachel. “Florida State’s Jameis Winston cleared in code of conduct hearing.” *USA Today*, December 21, 2014. <https://www.usatoday.com/story/sports/ncaaf/2014/12/21/jameis-winston-florida-state-code-of-conduct-sexual-assault-allegation/20735355/>.

¹²³ Tracy, Marc. “Florida State Settles Suit Over Jameis Winston Rape Inquiry.” *New York Times*, January 25, 2016. <https://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html>.

¹²⁴ Tracy, Marc. “Florida State Settles Suit Over Jameis Winston Rape Inquiry.”

¹²⁵ Hinnen, Jerry. “Report: Jameis Winston DNA matches accuser’s sample in test.” *CBS Sports*, November 21, 2013. <https://www.cbssports.com/college-football/news/report-jameis-winston-dna-matches-accusers-sample-in-test/>.

because it was peak football season. The person charged with investigating the claim, Officer Angelo, had a large financial incentive to see Winston escape blame.

The reasons these phenomena occur in cases involving athletes are simple. Especially in Division I programs, college athletes provide significant revenue to the institutions.¹²⁶ A scandal involving a student athlete could lead to a decrease in revenue due to decline in game attendance or even student enrollment following bad media coverage.¹²⁷ Athletic departments, and the institutions as a whole, therefore have a strong incentive to keep the players on the field and the controversy out of the news.

Rather than try to cover up any wrong doings, institutions should work on creating proactive solutions to help sexual misconduct from happening. Leaving aside the overall harm to the victim, the consequences a college may incur due to a poorly handled sexual misconduct case can largely outweigh the benefits of keeping the incident hidden.

Interest of the Institution:

Federal, state, and school-wide policies are not enough to fully address the problem, in large part because of the existing bias towards student athletes and conflict of interest investigating a student athlete may present. The policies cannot be effective if they are not strongly enforced. However, because student-athletes often contribute significantly to the problem, athletic departments are uniquely poised to catalyze a positive culture change on college campuses. Even if athletic departments are not interested in investing time to help reduce sexual misconduct on campuses, if athletic departments do not address the issue, they may face several

¹²⁶ Van Driesen, 1865

¹²⁷ Van Driesen, 1865

harmful consequences. Furthermore, since all educational institutions must comply with federal law, athletics departments must be part of the solution.

Legal Consequences:

All educational institutions have a legal obligation to comply with Title IX or risk losing federal funding.¹²⁸ One requirement of Title IX is that the investigation and adjudication processes be prompt, fair, and equitable.¹²⁹ If a large portion of Title IX complaints involve student athlete perpetrators, athletic departments are risking non-compliance for the institution as a whole.

As mentioned above, while all educational institutions are duty bound to comply with Title IX, athletic departments have separate legal responsibilities to protect their student athletes. Currently, the legal obligations of coaches towards their athletes are defined in statutory law.¹³⁰ More specifically, the duties can be defined by state athletic associations, departments of education, other government agencies, past court cases and requirements for obtaining a coaching certificate.¹³¹ One of these obligations is “preventing sexual harassment by other athletes and coaching staff, as well as discrimination.”¹³² The NCAA routinely reinforces this obligation and the importance of it.¹³³ For example, each member institution is required to have an office for compliance in the athletics department and mandatory education lectures for student athletes and coaches are required each academic year.¹³⁴ Although athletes are the primary concern of the NCAA, when the athletes themselves are the perpetrators, this legal obligation extends to the rest

¹²⁸ Congressional Research Service. *Title IX and Sex Discrimination in Education: An Overview*. By Gary L Galemore. RS20710. Washington, DC: The Library of Congress, 2003.

¹²⁹ *Title IX and Sex Discrimination in Education: An Overview*, 3

¹³⁰ Mirsafian, Hamidreza. “Legal Duties and Legal Liabilities of Coaches toward Athletes.” *Physical Culture and Sport Studies and Research* 69 (2016): 5–14.

¹³¹ Mirsafian, 7

¹³² Mirsafian, 8

¹³³ The NCAA Executive Committee. *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses*. By Wilson, Deborah, Connie Kirkland, and Brandi Hephner. Web, 2014.

¹³⁴ *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses*.

of the student body. If coaches and athletic departments do not properly act on this duty by knowingly failing to address the harassing behavior coming from athletes, the institution's entire student body is at risk. The legal obligations exist at both the institutional level and at the level of the athletic department and should be enforced in order to best avoid a Title IX complaint.

Financial Consequences:

As discussed in the previous chapter, in the *Gebser v. Lago Vista Independent School* dissent, Justice Stevens stated, "we pay educational institutions to end sex discrimination in education."¹³⁵ In the most extreme case of non-compliance, an institution will lose its federal funding.¹³⁶ As this is the most severe punishment, lesser offenses also manifest in smaller financial consequences. The financial consequences result from several parts of the process. For example, any time an institution hires an outside investigator the institution must cover the cost.¹³⁷ Additionally, if a survivor wishes to hire an attorney to help navigate the process, certain institutions will cover this cost.¹³⁸ Costs also arise if an institution decides to settle a case.

Further costs may incur from the outcome of the case. The decision of *Gebser*, in conjunction with the decisions in *Davis v. Monroe County Board of Education* (described in the previous chapter), defines the standard that creates a "private right of action for monetary damages for individuals who have been sexually harassed by either a teacher or another student."¹³⁹ Depending on the severity of the charges brought against an institution or a perpetrator, a survivor

¹³⁵ Scales, 226

¹³⁶ *Title IX and Sex Discrimination in Education: An Overview*, 3

¹³⁷ EAB. "NYT: Title IX Costs Colleges Millions Each Year." EAB Daily Briefing. April 1, 2016. <https://www.eab.com/daily-briefing/2016/04/01/nyt-title-ix-costs-colleges-millions-each-year>.

¹³⁸ "NYT: Title IX Costs Colleges Millions Each Year."

¹³⁹ Spies, Jenni E. "Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by Its Student Athletes." *Marquette Sports Law Review* 16, no. 2 (2006): 439.

may receive damages that outweigh the revenue an athlete may produce for the school. An institution is better off resolving the manner to save itself the financial burden.

Other Shortcomings in Current Policies:

Analyzing current policies, addressing their shortcomings and highlighting their strengths can greatly benefit institutions in the long run. First, being proactive rather than reactive is very important for the safety of a student body.¹⁴⁰ Institutions should always aim to protect their students; institutions should not wait for an incident to re-evaluate their policies. This will not only help maintain trust between the students and the institution, but it will also save the institution its reputation and financial liabilities. Strong policies are also important if the student sue the institution for violating Title IX. The institution needs to be able to prove that the steps they took were in compliance with state and federal law.

Both institutions and athletic departments can also gain from athletic departments having their own separate policies and procedures that are consistent with those of the institution as a whole. The athletic departments are closer to the problem and can help address the problem more quickly. The athletic departments can also act as a cushion between an offending student and the potential harm a sexual misconduct scandal or noncompliance can do to the institution on a whole. Athletic departments can turn to the NCAA for the advice it needs to proceed, and they can also look to the institution's policy where the NCAA does not set formal standards.¹⁴¹

¹⁴⁰ Scales, 235

¹⁴¹ Scales, 237

Conclusion:

The battle against sexual misconduct on college campuses is in its fourth decade and will continue as long as sexual misconduct is occurring. In light of the Trump Administration's decision to relax Title IX enforcement, it is increasingly important that institutions create clear policy and enforce its implementation. The policies should target the problem populations and work towards addressing this group. In order to better evaluate the current state of athletic department policies, the next chapter will review the athletic department policies for the NESCAC Colleges and Ivy League Universities. These evaluations will help provide a framework for improving current policies. Additionally, the evaluation method can be used as a new standard for evaluating compliance for colleges and universities.

CHAPTER 3: GAME DAY

A look at what the Ivy League Universities and NESCAC Colleges are currently implementing

Introduction:

The previous chapter established athletic departments' concern for either developing sexual misconduct policies of their own, or at least addressing their support for the schools' sexual misconduct policy. This chapter will analyze and evaluate what the Ivy League institutions and what the New England Small College Athletic Conference (NESCAC) institutions implemented.

Methodology:

Creating a Baseline:

The purpose of a baseline in any study is to create an information base that is used to assess the strengths and weaknesses of the subjects under observation.¹⁴² In this case, it will be the policies for the NESCAC and Ivy League athletic departments.

In order to better understand compliance expectations of colleges and universities, I will first review the NCAA's Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution ("Statement") and the NCAA Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture ("Toolkit"). The Statement and the Toolkit both outline the NCAA's commitment to the issue and discuss why they believe addressing the problem from a departmental level is important. The Statement and the Toolkit also provide a framework for the NCAA's expectations of Title IX compliance and policies and procedures that the NCAA believes will be most effective in addressing and reducing sexual misconduct on college campuses. As the

¹⁴² UN Women. "Baseline Studies." Virtual Knowledge Centre to End Violence Against Women and Girls. 2012. <http://www.endvawnow.org/en/articles/959-baseline-studies.html>.

NCAA is the official governing body for all collegiate athletics, and all member institutions must comply with NCAA rules and regulations, the NCAA framework is an appropriate baseline to evaluate the efficacy of the schools' policies.

Selection of Schools:

NCAA sports operate under three levels of play: Division I, Division II, and Division III.¹⁴³ Among the many different factors that separate the divisions into three different categories, available finances is one of them.¹⁴⁴ Division I receives the most financial assistance from the college, while Division III receives the least.¹⁴⁵ It is reasonable to assume that Division I institutions have more financial availability and resources to implement certain policies and hire additional personnel. Therefore, I will compare what is implemented at the Division I level and at the Division III level to gain a better understanding of what kinds of policy exists at the different levels of play.

The eight Ivy League universities will represent Division I institutions and the eleven NESCAC institutions will represent Division III institutions. These schools are compared due to their similar mission statements, geographic location, and student and faculty demographic¹⁴⁶. Because these institutions are very similar to each other, yet different from institutions in other athletic conferences.

The Data:

¹⁴³ NCAA. "Our Three Divisions." NCAA. 2018. <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions>.

¹⁴⁴ NCAA, "Our Three Divisions."

¹⁴⁵ NCAA, "Our Three Divisions."

¹⁴⁶ New England Small College Athletic Conference. "NESCAC." NESCAC. 2018.

<http://www.nescac.com/about/about>.; The Ivy League. "A History of Tradition - Ivy League." Ivy League Sports. 2018. <http://www.ivyleaguesports.com/sports/2017/7/28/history-timeline-index.aspx>.

I chose to analyze the efficacy of the sexual misconduct policies posted on the institutions' websites. I narrowed my data in this manner to reflect what a curious student, a student in need, or a prospective student will be able to find through an online search. Both Title IX and the NCAA Guidelines do recommend all sexual misconduct information be posted on the institutions' websites. Based on the Title IX requirements mentioned in Chapter 1, and the NCAA's expectations outlined below, I created six criteria to search for on each institution's website or within each institutions' policy: (1) whether the athletic department has a separate Title IX Coordinator; (2) whether the athletic department has its own Student-Athlete Code of Conduct; whether the athletic department makes a statement on Title IX; (3) whether the Student Athlete Code of Conduct is different than the Student Code of Conduct; (4) whether the institution makes a statement on recruiting and sexual misconduct; and (5) whether the institution supports the NCAA's Ethical Conduct. The institutions' websites and policies will be compared in order to determine which policies are superior and which fall short. General shortcomings and further recommendations will be addressed in the following chapter.

NCAA Commitment to Addressing Sexual Misconduct:

Understanding the NCAA's commitment to addressing sexual misconduct on member institutions' campuses, and the NCAA Executive Committee's expectations for the member institutions will help inform how the data is broken down. Below is a summary of the Executive Committee Statement and further explanation of a few key features.

Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution:

On August 6, 2014, the NCAA Executive Committee released an official statement regarding their interest in preventing sexual violence and developing better complaint resolution

processes in order to align their expectations with member institutions' practices.¹⁴⁷ The statement was in response to the rising saliency of the issue across college campuses¹⁴⁸. In the preamble to the statement, the Executive Committee states:

“The executive committee charges the NCAA with identifying core issues that affect the Association as a whole and with overseeing Association-wide issues and ensuring that each division operates consistent with the basic purposes, fundamental policies, and general principles of the Association.”¹⁴⁹

Here, the Committee is addressing the pervasiveness of the issue plaguing college campuses and college athletic programs. The preamble continues by explaining the NCAA's role in providing a safe and healthy environment for its student-athletes, along with its legal obligation to comply with all parts of Title IX.¹⁵⁰ In sum, addressing sexual misconduct on college campuses is not only a legal concern for the NCAA, but also a moral concern.¹⁵¹

Following the preamble, the Executive Committee resolves to “recognize the importance of addressing the abhorrent societal issue of sexual violence, especially when it occurs on our campuses.”¹⁵² In addition, the resolution emphasizes that student-athletes must not be advantaged, or disadvantaged, by special treatment from the athletic department, which may sometimes be the case.¹⁵³ The statement ends with several criteria that the Executive Committee expects all member institutions to meet as indicated below:

- “Comply with campus authorities and ensure that all athletics staff, coaches, administrators and student-athletes maintain a hostile-free environment for all student-athletes regardless

¹⁴⁷ The NCAA Executive Committee. *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*. By Deborah Wilson, Connie Kirkland, and Brandi Hephner. 2014.

¹⁴⁸ *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*

¹⁴⁹ *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*

¹⁵⁰ *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*

¹⁵¹ *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*

¹⁵² *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*

¹⁵³ *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*

of gender or sexual orientation; know and follow campus protocol 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;
- Assure 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 other students and staff on campus;”
- The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator, are readily available within the department of athletics, and are provided to student-athletes; and
- All student-athletes, coaches and staff have been educated on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.”¹⁵⁴

Together, if these criteria are effectively implemented, the criteria promote compliance with Title IX sexual misconduct procedures, help all members of the athletic department understand the risks and consequences of sexual misconduct, and encourage prevention, reporting and intervention. These factors aid in reducing sexual misconduct by proactively giving members of the institutions a better understanding of the issue.

Substantively, the third criterion listed is one of the most significant criteria in addressing the problem. At a bare minimum, every member institution must comply with state and federal policies in order to maintain their federal funding.¹⁵⁵ By restating this fact, the policy will encompass any practices or regulations that the NCAA policy failed to mention. This statement, in combination with the other listed criteria, prove that the NCAA believes member institutions should not only comply with Title IX because of its legal obligations, but member institutions should strive towards creating the safest environment for its students.

¹⁵⁴ *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses*

¹⁵⁵ *Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses*

The table below presents information that each NESCAC and Ivy League institution provides on its website regarding sexual misconduct. The information is broken down into the previously mentioned criteria in order to better evaluate whether it meets the NCAA's expectation. Additionally, the table allows for better comparison of policies across institutions and across competitive divisions.

Data:

Ivy League

<u>Brown University</u>	
Separate Coordinator?	Associate AD Compliance; Assistant AD Compliance; Senior Associate Director of Athletics - Student- Athlete Services; Student-Athlete Services Coordinator
Separate Code of Conduct?	Yes (Student Athlete Handbook)
Statement on Title IX?	Yes - Title IX, Sexual Harassment
Student Athlete Code of Conduct Different than Code of Conduct?	Directs students to their Sexual Harassment and Assault Resources & Education (SHARE) Office. The statement gives a brief outline of the role of the resources available through the SHARE Office, and describes the kind of student that may want to utilize this resource. Also lists Key Contacts for Assistance, and encourages students to report.
Statement on Recruiting ?	Inappropriate activities include: Use of escort services, exotic dancers, or any other similar services
Supports NCAA' s Ethical Conduct?	Yes
Source:	http://static.psbin.com/3/n/svkafonwboutuw/2017-18_Student-Athlete_Handbook.pdf
<u>Columbia University</u>	
Separate Coordinator?	Associate Athletics Director for Compliance; Assistant Director of Compliance
Separate Code of Conduct?	Yes (Student Athlete Affirmation of Conduct)
Statement on Title IX?	Yes - Sexual Misconduct
Student Athlete Code of Conduct Different than Code of Conduct?	"In order to participate as a member of the Columbia University intercollegiate athletics program, student-athletes are required to affirm, in writing, that they have read and agree to abide by the following statement" One term includes: "Refrain from participating in activities that may bring dishonor to, and negatively reflect upon myself, my teammates and Columbia University. These activities include, but are not limited to: academic dishonesty, gambling and sports wagering, sexual misconduct, team initiation, hazing, sexual harassment, discrimination, illegal drug

	use (recreational and/or performance enhancing), illegal alcohol use (underage drinking), and violation of local, state, federal and international laws."
Statement on Recruiting ?	No
Supports NCAA's Ethical Conduct?	Yes
Source:	http://www.gocolumbialions.com/ViewArticle.dbml?&DB_OEM_ID=9600&ATCLID=3623606 .
<u>Cornell University</u>	
Separate Coordinator?	Associate Director for Compliance and Student Services; Assistant Director for Compliance; Compliance Assistant; Deputy Director of Athletics for <i>Intercollegiate Athletics/Senior Woman Administrator, Athletics Title IX Coordinator</i> . Cornell also offers a separate office for Student- Athlete Support Services
Separate Code of Conduct?	Yes (Student Athlete Handbook) (Note* 2017-2018 is not available online, this information is from 2016- 2017)
Statement on Title IX?	Yes - Discrimination, sexual harassment
Student Athlete Code of Conduct Different than Code of Conduct?	"These athletic conduct guidelines are in addition to, and do not replace Cornell's Campus Code of Conduct." Engaging in sexual harassment is the first item on the "don't" list. Disciplinary infractions by student athletes may result in: Verbal reprimand, Verbal or written warning, Suspension from practice or games, Dismissal from the team, and/or Suspension from all athletic privileges (may occur within 24 hours of notification of arrest). Student-athletes who are found responsible for violations of the Campus Code of Conduct are subject to disciplinary action through the Office of the Judicial Administrator of the university. Sanctions may include community service, restitution, fines, counseling referrals, disciplinary probation, and suspension or dismissal from the university. Procedures for campus judicial proceedings are outlined in the Campus Code of Conduct.
Statement on Recruiting ?	Prohibited activities: use of escorts or exotic dancers, use of "gentleman's clubs" or "adult entertainment facilities. Failure to comply with Cornell policies will result in disciplinary action. Sanctions may include cessation of the recruiting process. Cornell provides its athletics personnel and students with periodic education and awareness programs that emphasize their commitment to and concern for the welfare of students visiting campus and recruitment policies.
Supports NCAA's Ethical Conduct?	Yes - A student- athlete is not eligible if he/she has shown dishonesty in evading or violating NCAA regulations

Source:	http://cornellbigred.com/sports/2007/7/11/ComplianceMain.aspx .
<u>Dartmouth College</u>	
Separate Coordinator?	Assistant Athletic Director for Compliance; Currently no assistant
Separate Code of Conduct?	Yes (Student Athlete Handbook and Planner)
Statement on Title IX?	No
Student Athlete Code of Conduct Different than Code of Conduct?	N/A
Statement on Recruiting ?	Recruits are expected to abide by state and federal laws and College policies while on their overnight visit. Any violation of the rules in this policy may impact that individual' s NCAA eligibility and possibly the Admissions Office' s decision on their application to Dartmouth. Repeat offenses by specific individuals and/or sports will result in progressively greater sanctions. The Compliance Office will keep a written record of violations and sanctions. These sanctions do not apply to any violations of NCAA or Ivy League rules. Those violations will be dealt with separately.
Supports NCAA' s Ethical Conduct?	Yes
Source:	http://image.cdnlInwnl.xosnetwork.com/attachments1/files/11600/628373.pdf?DB_OEM_ID=11600 .
<u>Harvard University</u>	
Separate Coordinator?	The athletics website has a separate page for student-athlete resources. The page directs students to Office of Sexual Assault Prevention and Response, Sexual Harassment/Assault Response and Education, and Office of Gender Based Dispute Resolution. Assistant Director of Athletics (for Compliance); Assistant Director of Compliance; Associate Director of Athletics - Compliance
Separate Code of Conduct?	Yes (Student Athlete Handbook)
Statement on Title IX?	No
Student Athlete	N/A

Code of Conduct Different than Code of Conduct?	
Statement on Recruiting ?	Recruits are expected to abide by Harvard University Policies as well as NCAA rules. Student- athlete hosts are prohibited from using sexual relations to encourage a recruit to commit to Harvard.
Supports NCAA' s Ethical Conduct?	Yes - Has a guide to better understand NCAA rules
Source:	http://www.gocrimson.com/information/compliance/index .

University of Pennsylvania

Separate Coordinator?	Assistant AD Compliance; Assistant Director of Compliance
Separate Code of Conduct?	Yes (Student Athlete Handbook)
Statement on Title IX?	Yes - Nondiscrimination, Equity in Athletics Disclosure Act
Student Athlete Code of Conduct Different than Code of Conduct?	The Student Athlete Handbook notes the importance to adherence of the "Pennbook" (University Policies and Procedures). Infractions of NCAA rules are to be reported, in writing, to the Compliance Coordinator. Alleged NCAA infractions are to be investigated by the Compliance Coordinator. If a violation is found to have occurred, it shall be forwarded to the NCAA Office of Enforcement and Office of Student-Athlete Reinstatement, if appropriate. Failure to comply with Penn policies or NCAA rules and regulations may result in disciplinary action by that sport' s head coach, the Director of Athletics, Office of Student- Conduct or the NCAA.
Statement on Recruiting ?	Recruits are prohibited from visiting adult book and video stores while on their overnight visit. Recruits in violation of the overall policy, NCAA rules and regulations, or state and federal law will be sanctioned.
Supports NCAA' s Ethical Conduct?	Yes - Statement on compliance in Student Athlete Handbook
Source:	https://www.pennathletics.com/sports/2016/6/24/_131485207616826912.aspx .

Princeton University

Separate Coordinator?	Senior Associate Director of Athletics/Senior Woman Administrator
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Separate Code of Conduct?	Yes (Student Athlete Handbook)
Statement on Title IX?	Yes - Diversity & Inclusion
Student Athlete Code of Conduct Different than Code of Conduct?	The Student Athlete Handbook briefly defines what constitutes sexual misconduct and gender discrimination, and Princeton's intolerance towards it. The statement mentions the possibility of expulsion. It also encourages students to report, mentions available resources, mentions the Title IX Coordinator, Title IX itself, and the VAWA Act.
Statement on Recruiting ?	Prohibited forms of entertainment include: use of escorts or exotic dancers, trips to gentleman's clubs or adult entertainment facilities. "Other impermissible acts would involve any illegal activity including sexual harassment, sexual assault"
Supports NCAA' s Ethical Conduct?	Yes
Source:	https://s3.amazonaws.com/sidearm.sites/princeton.sidearmsports.com/documents/2017/8/31/2017_18_SA_Handbook.pdf

Yale University

Separate Coordinator?	Assistant Athletic Director, Compliance/SWA; Assistant Director of Compliance; Sr. Associate Athletic Director/Compliance
Separate Code of Conduct?	Yes (Student Athlete Handbook)
Statement on Title IX?	Yes - Informational flyer on sexual misconduct at the end of the Student Athlete Handbook.
Student Athlete Code of Conduct Different than Code of Conduct?	Yale Rules and Regulations are one of the four sets of principles that govern Yale athletics. Student athletes in violation of the athlete Code of Ethics will be subject to disciplinary action by the Department of Athletics (sexual misconduct is not one of the listed prohibited acts). The informational flyer is otherwise no different than the one distributed to the rest of the student body.
Statement on Recruiting ?	Prohibited forms of entertainment include: use of escorts or exotic dancers, trips to gentleman's clubs or adult entertainment facilities.
Supports NCAA' s Ethical Conduct?	Yes - Statement on compliance page. NCAA rules and regulations are one of the four sets of principles that govern Yale athletics.
Source:	http://static.psbins.com/f/1/8p9h7votn6yei0/yale_student-athlete_handbook.pdf .

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NESCAC

<u>Amherst College</u>	
Separate Coordinator?	Assistant Compliance Officer; Senior Woman Administrator
Separate Code of Conduct?	Yes
Statement on Title IX?	Yes (Title IX)
Student Athlete Code of Conduct Different than Code of Conduct?	Students must follow Amherst Student Code of Conduct. Violations of the Student Code of Conduct can result in consequences affecting athletic participation "such as dismissal from the team or temporary or permanent loss of the privilege of representing Amherst College in intercollegiate varsity athletics."
Statement on Recruiting?	Recruits are expected to follow the Amherst Student Code of Conduct while on their overnight visit.
Supports NCAA's Ethical Conduct?	Yes.
Source:	http://static.psbins.com/k/b/rstofgcspzuxek/Amherst_CollegeSA_Handbook_-_1st_Draft.pdf .
<u>Bates College</u>	
Separate Coordinator?	Senior Woman Administrator
Separate Code of Conduct?	No - Refers to Student Code of Ethics
Statement on Title IX?	Yes (Sexual Misconduct)
Student Athlete Code of Conduct Different than Code of Conduct?	Student must follow the Bates Sexual Misconduct Policy. Violation of this policy may result in consequences affect athletic participation including, but not limited to: "Official Letter of Reprimand, Community Service, Required, Counseling or Educational Programming, Loss of Playing or Practice Opportunities, Permanent Removal from the Athletic Program."
Statement on Recruiting?	No

Supports NCAA's Ethical Conduct?	Yes
Source:	http://athletics.bates.edu/code-of-ethics .
<u>Bowdoin College</u>	
Separate Coordinator?	Senior Woman Administrator; NCAA Compliance Coordinator
Separate Code of Conduct?	Yes
Statement on Title IX?	Yes (Sexual Misconduct)
Student Athlete Code of Conduct Different than Code of Conduct?	Summary of the Sexual Misconduct Policy. While reporting is encouraged, sanctions are not stated.
Statement on Recruiting?	No
Supports NCAA's Ethical Conduct?	Yes.
Source:	http://static.psb.in.com/n/n/rptfz3whqn9ker/Bowdoin_Student_Athlete_Handbook_-_2017-18.pdf .
<u>Colby College</u>	
Separate Coordinator?	Assistant Athletic Director/Compliance; Assistant Athletic Director/SWA
Separate Code of Conduct?	No
Statement on Title IX?	No
Student Athlete Code of Conduct Different than Code of Conduct?	N/A
Statement on Recruiting?	No

Supports NCAA's Ethical Conduct?	N/A
Source:	http://gocolbymules.com/information/directory/index .
<u>Connecticut College</u>	
Separate Coordinator?	--
Separate Code of Conduct?	Yes
Statement on Title IX?	No
Student Athlete Code of Conduct Different than Code of Conduct?	N/A
Statement on Recruiting?	No
Supports NCAA's Ethical Conduct?	Yes
Source:	http://www.camelathletics.com/athletics/Student_Athlete_Code_of_Conduct .
<u>Hamilton College</u>	
Separate Coordinator?	Associate Director of Athletics/Senior Woman Administrator
Separate Code of Conduct?	No
Statement on Title IX?	No
Student Athlete Code of Conduct Different than Code of Conduct?	N/A
Statement on Recruiting?	No

Supports NCAA's Ethical Conduct?	N/A
Source:	http://athletics.hamilton.edu/information/directory/index .
<u>Middlebury College</u>	
Separate Coordinator?	Assistant AD/Senior Woman Administrator; Assistant Athletic Director/Director of Compliance
Separate Code of Conduct?	Yes (Student-Athlete Resource Guide)
Statement on Title IX?	Yes (Nondiscrimination, Anti-harassment, "Sexual Misconduct, Domestic and Dating Violence and Misconduct, and Stalking")
Student Athlete Code of Conduct Different than Code of Conduct?	Summarizes and points to Sexual Misconduct Policy in the Student Code of Conduct. Lists some possible sanctions for faculty members ("discipline for employees such as written reprimands, salary freezes (faculty) or termination of employment" and students ("discipline for students such as probationary status, a letter of official discipline, suspension, or expulsion from any or all programs in which the student is enrolled or participating").
Statement on Recruiting?	Recruits are expected to adhere to the Middlebury Handbook while on their overnight visit.
Supports NCAA's Ethical Conduct?	Yes
Source:	http://static.psb.in.com/m/b/omnc5chvuhizg9/StudentAthleteResourceGuide2017.pdf .
<u>Tufts University</u>	
Separate Coordinator?	Senior Associate Athletic Director / SWA; Compliance Director
Separate Code of Conduct?	Tufts has a compliance page with links to Tufts' Sexual Misconduct Policy and Tufts Commitment to Preventing and Addressing Sexual Misconduct
Statement on Title IX?	Yes - "Tufts University Athletics is committed to compliance with the August 8, 2017 NCAA Board of Governors Policy on Campus Sexual Violence"
Student Athlete Code of Conduct Different than Code of Conduct?	N/A

Statement on Recruiting?	No
Supports NCAA's Ethical Conduct?	Yes
Source:	http://www.gotuftsjumbos.com/information/compliance/index .

Trinity College

Separate Coordinator?	Associate Athletic Director for Compliance & Student-Athlete Welfare/SWA
Separate Code of Conduct?	No
Statement on Title IX?	No
Student Athlete Code of Conduct Different than Code of Conduct?	N/A
Statement on Recruiting?	No
Supports NCAA's Ethical Conduct?	N/A
Source:	http://www.bantamsports.com/information/directory/index

Wesleyan University

Separate Coordinator?	Associate Athletic Director/Senior Women's Administrator
Separate Code of Conduct?	Yes (Student-Athlete Handbook)
Statement on Title IX?	No
Student Athlete Code of Conduct Different than Code of Conduct?	N/A

Statement on Recruiting?	Recruits are expected to adhere to the Wesleyan Student Handbook while on their overnight visit.
Supports NCAA's Ethical Conduct?	Yes
Source:	http://static.psb.in.com/1/o/z25l6rdx3k6tu1/Handbook entire 2017-18 for online.pdf .
<u>Williams College</u>	
Separate Coordinator?	Disciplinary Hearing Committee: 2 members of the athletic department senior staff (1 additional as a stand in if needed), Faculty Athletic Representative, Athletic Director)
Separate Code of Conduct?	Yes (Student-Athlete Handbook)
Statement on Title IX?	Yes - Sexual misconduct, assault, rape
Student Athlete Code of Conduct Different than Code of Conduct?	Students must follow Williams' Student Code of Conduct. However, violations of the Student Code of Conduct can result in consequences affecting athletic participation ("Warning, probation, suspension from practice, suspension from games, loss of captaincy, removal from a team, cancelling of games or the season").
Statement on Recruiting?	Recruits are expected to adhere to the Williams Student Code of Conduct while on their overnight visit.
Supports NCAA's Ethical Conduct?	Yes
Source:	https://athletics.williams.edu/varsity-sports/student-athlete-handbook/ .

Analysis:

Ivy League:

Coordinators: Cornell University is the only institution in the Ivy League whose athletic department has its own Title IX Coordinator. The majority of the Ivy League institutions have at least one Athletic Director for Compliance with at least one assistant. In addition to Athletic Directors designated to compliance, Brown University, Cornell University, and Harvard University have an Athletic Director of Student Services. These Directors are charged with directing students in need to the proper offices and resources.

Codes of Conduct: Every Ivy League institution has a Student-Athlete Code of Conduct separate from its general Student Code of Conduct. The posted Cornell University Student-Athlete Code of Conduct, however, is the 2016-2017 Code.

Statement on Title IX: Out of the eight Ivy League institutions, three institutions' (Brown University, Dartmouth College, and Harvard University) Student-Athlete Codes of Conduct do not address sexual misconduct. The Student-Athlete Codes of Conduct for Columbia University, Cornell University, University of Pennsylvania, Princeton University, and Yale University each state that student-athletes found guilty of sexual misconduct will undergo disciplinary action. Although Brown's Student-Athlete Code of Conduct does not explain disciplinary action for perpetrators, it does offer information for survivors and students wishing to report. Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University and Yale University also have compliance webpages connected to their athletic department websites outlining the institutions' commitment to compliance with NCAA rules and regulations.

Statement on Recruiting: Columbia University is the only institution that does not make any statement regarding expected conduct or prohibited activities for recruits on their overnight visits.

For the remaining institutions, the information regarding recruiting conduct varies. Brown University, Cornell University, Dartmouth College, Harvard University, the University of Pennsylvania, Princeton University and Yale University each list either prohibited activities, or state the obligation to adhere to the institution's conduct policies, or both. Cornell University, Dartmouth College, and the University of Pennsylvania each list sanctions for student-athlete hosts and recruits in violation of the institutions' recruiting policy. No institution states that it will look into a recruit's history of sexual misconduct.

NESCAC:

Coordinators: Out of all eleven NESCAC institutions, none of the institutions have a separate Title IX Coordinator for their athletic departments. Each institution does have a Title IX Coordinator for the school. Six institutions (Amherst College, Bowdoin College, Colby College, Middlebury College, Tufts University, and Trinity College), however, have an Assistant Athletic Director whose primary responsibility is overseeing NCAA compliance. In order to comply with NCAA rules and regulations, athletic departments must be free of sex discrimination, including sexual misconduct, and must address any existing sex discrimination.¹⁵⁶ Assigning compliance to one staff member will ensure that any existing non-compliance issues are efficiently addressed. An Assistant Athletic Director of Compliance can increase the efficiency of the position. However, while these two members help ensure compliance, they do not investigate or adjudicate sexual misconduct complaints themselves. To help maintain compliance, this position can be a good resource for directing students in need to the proper offices and information.

Codes of Conduct: Five institutions (Amherst College, Bowdoin College, Connecticut College, Middlebury College, Wesleyan University and Williams College) have a Student-Athlete Code of

¹⁵⁶ *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses.*

Conduct separate from its Student Code of Conduct posted on their athletic department websites. Bates College's website refers student-athletes to the Bates College Code of Ethics. Three institutions (Colby College, Hamilton University, and Trinity College) do not share a Code of Conduct with which they expect their students to adhere to on their websites. Amherst College, Bates College, Middlebury College, and Williams College each list possible sanctions for student-athletes found guilty of sexual misconduct.

Statement on Title IX: Of the eleven websites, five institutions (Colby College, Connecticut College, Hamilton University, Trinity College, and Wesleyan University) have no statement regarding Title IX, Sexual Misconduct or its institution's Student Code of Conduct. Five institutions (Bates College, Bowdoin College, Middlebury College, Tufts University and Williams College) address their commitment to addressing the many existing forms of sexual misconduct. Amherst College makes a statement in support of Title IX as a whole. Tufts University has an entire webpage dedicated to explaining compliance. This webpage has information regarding Tufts' Sexual Misconduct Policy and Tufts Commitment to Preventing and Addressing Sexual Misconduct.

Statement on Recruiting: Four institutions (Amherst College, Middlebury College, Wesleyan University, and Williams College) state that recruits on an official overnight visit must abide by the respective institution's Code of Conduct. The remaining seven institutions make no statement on their recruits' history or behavior while on campus. No institution states that it will look into a recruit's history of sexual misconduct.

Challenges to Evaluating Data:

Evaluating any Title IX or sexual misconduct policy is uniquely challenging due to the data collection process. Statistics regarding sexual misconduct are only gathered based on voluntary reports of the crime. Whereas other data about a college's student body, such as student participation in athletics or class year can be easily obtained through observation or rosters, incidents of sexual misconduct can easily be covered up if it occurs behind closed doors with no other witnesses, or because sexual misconducts matters are under-reported. Therefore, although studies show college-age male student-athletes are the most commonly reported perpetrator, it may actually be that a different group commits acts of sexual misconduct more frequently, but survivors fail to report members of this group. Likewise, institutions with high rates of reported sexual misconduct may not reflect a dangerous campus, but a campus where students feel comfortable enough to report. Due to the complexity of data collection, it is hard to measure the effectiveness of specific policies that address sexual assaults on college campuses. Still, it is important for colleges to address the problem and create and disseminate the policies that will best protect and support their students.

Rather than rely on traditional measurement methods, schools should evaluate their policies based on ease of access, steps taken towards compliance, and amount of support available to students and faculty. In the case of athletic departments, colleges should refer first to Title IX guidance, and then NCAA guidelines to further strengthen its policies. This way, institutions can take additional steps in order to best educate and protect its students and faculty. The NCAA expectations for sexual misconduct policies will be addressed in the next chapter.

Conclusions:

Successes:

Overall, the Ivy League universities' athletic departments do a better job publicizing their commitment of addressing sexual misconduct. The majority of the schools have a compliance page on their website, clearly expressing their commitment to Title IX. Additionally, the majority of the schools also have a separate Student Athlete Code of Conduct that specifically addresses Sexual Misconduct. Of the schools that do have a separate Code of Conduct, they address both available resources for the student-athletes and state the consequences geared towards athletic participation if they are found to be in violation of the Code of Conduct. Each Ivy League university also states its commitment to the NCAA's Ethical Conduct, which clearly supports addressing sexual misconduct in the athletic department, which represents a strong commitment to the policy.

The NESCAC colleges' athletic departments, on the other hand, exhibit less overall publicized support for Title IX. However, for the schools that do have information regarding addressing sexual misconduct, their efforts mimic those of the Ivy League universities. For example, Amherst College, Bates College, Bowdoin College, Middlebury College, and Williams College each have a Student-Athlete Code of Conduct posted on their website. Each of these policies also contain information about the resources available to student-athletes in need and list the possible consequences that a violation of the Code of Conduct may have on athletic participation. Tufts University, like the Ivy League universities, even has its own compliance page stating and explaining Tufts' commitment to Title IX. It is possible that Tufts compliance policy is similar to that of the Ivy League schools' because its student size and corresponding resources are likely similar to those of the Ivy League. Although the institutions that do not post sexual misconduct policies on their webpages may be in compliance with Title IX, they are in violation of the NCAA's policy.

Separate webpages for compliance, and separate Student-Athlete Codes of Conduct can be an integral part of Title IX processes. Regardless of whether the institution has its own sexual misconduct policy, creating an additionally code of conduct, consentient with the college's overall policies, to the student athletes reinforces the kind of behavior expected. Athletic participation is not a right, but a privilege, and students should be in good standing with the institution in order to maintain their participation. However, if a student does transgress and the incident does influence their membership on an athletic team, that information should be disseminated through the athletic department. It is likely that the students will turn to the athletic department first if they feel as though they have been wrongly stripped of their participation. Even if the student does not do this, the institution will have to coordinate with the athletic department in order to properly assess the situation. Stating the expected behavior and potential consequences at the outset is a proactive means of discouraging sexual violence. Creating these codes of conduct and posting them on the athletic department website is a relatively low-cost endeavor. Considering at least some schools in both divisions have these policies and webpages, institutions with similar resources should be equally as capable at implementing them as well.

Shortcomings:

The most important difference between the Ivy League universities and the NESCAC colleges is the statement on recruiting. Seven out of the eleven NESCAC colleges have no statement on recruiting or recruits' behavior while on their overnight visit. For the four colleges that do (Amherst College, Middlebury College, Wesleyan University and Williams College), they state that recruits must abide by the college's Code of Conduct while on their overnight visit. The policies do not go further and address the possible implications of the recruiting process for the recruits found in violation of the college's sexual misconduct policy. Again, a clear statement of

possible sanctions is necessary to inform students of policies and to protect an institution if a guilty party tries to challenge the institution's decision.

In contrast, most of the Ivy League universities go into more depth regarding its recruits expected behavior. In addition to affirming that recruits must abide by the institution's code of conduct, the Ivy League's policies also list very specific prohibited activities for recruits. The listed activities include several situations where recruits and student hosts may find themselves in very compromising situations. Most of the schools also explain the possible sanctions for a recruit or student host if they are in violation of the recruiting policy. Hopefully, this is enough to stop recruits from engaging in this behavior and stop the institutions from pursuing a potentially dangerous recruit.

It is somewhat surprising that neither the Ivy League nor the NESCAC institutions address a recruit's prior history with sexual misconduct. Certain athletic conferences, such as the SEC, the Big 12, and the PAC 12, do not pursue athletes with a reported history of sexual misconduct.¹⁵⁷ This is especially important considering most perpetrators are repeat offenders. This is also no different than an institution denying entrance to a student who reports prior crime-related history on their Common Application. The depth of this kind of background check may trigger some privacy implications. More consequences of this policy will be discussed in the following chapter.

Other than lenient regulations for recruits, some Ivy League universities and NESCAC colleges do not state specific sanctions for student-athletes (or students, if the athletic department lacks information on sexual misconduct) in violation of the institution's sexual misconduct policy. These policies tend to state that the school will implement "disciplinary action." The danger of a

¹⁵⁷ Brown, Sarah. "Big-Time Sports Programs Tighten Rules on Athletes with Sexual Assault Records." *Chronicle of Higher Education* 63, no. 43 (August 18, 2017): 91.

general statement is that it leaves a lot of discretion to the school's disciplinary body. A school may arbitrarily assign different sanctions to two different students who committed similar offenses, just because they can. A situation such as this leads to unequal application of the policy between cases. This is also a major concern for advocates for the rights of the accused.¹⁵⁸ If challenged in court, this would lead to a due process violation.

It is not surprising that, overall, Ivy League universities' athletic departments are doing more to address sexual misconduct than the NESCAC colleges. The Ivy League universities are Division I and have more available resources, such as availability to financial resources and legal staff, . However, institutions in both divisions should develop better, more comprehensive policies. While no has issued a "perfect policy," strong policy elements exist between the schools. An analysis of current policies demonstrates that institutions have developed actual guidelines that inform actual practices. Institutions have the opportunity to learn from one another and strengthen their efforts to address sexual misconduct. The next chapter will explain possible policy recommendations that either institution could feasibly implement.

¹⁵⁸ Joyce, Kathryn. "The Takedown of Title IX." *The New York Times*, December 5, 2017. <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html>.

CHAPTER 4: PLAY BY PLAY

Policy recommendations based on current policies and research

Introduction:

Each college and university is different in structure and resources and has its own needs. Consequently, not all policies are created equal. Below are a set of policy recommendations. The recommendations are either suggested by the NCAA or exist at other institutions. The policies chosen are the most feasible for any institution or governing body to implement.

Recommendations:

Enforcement:

Policy reform will not take place unless the reform is met with strong enforcement. Currently, strong enforcement is lacking, at least for the Ivy League universities and NESCAC colleges. This is evident in the information the institutions have online. According to the NCAA, athletic departments must have the college or university's nondiscrimination policy addressing sexual harassment and sexual violence posted on their websites.¹⁵⁹ The websites must also have the name and contact information for the campus Title IX Coordinator.¹⁶⁰ The institutions themselves may not have received any notice that they lack this information because if the institution has this information available to the public, the institution is in compliance with Title IX. However, the athletic department is not in compliance with NCAA policy. Clearly, nothing has been done to remedy this situation. It is imperative that the NCAA routinely communicates with membership institutions in order to coordinate information and guarantee compliance.

¹⁵⁹ NCAA. "Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture." NCAA. 2016. <http://www.ncaa.org/sport-science-institute/sexual-violence-prevention-tool-kit>.

¹⁶⁰ "Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture."

One researcher proposed the creation of one uniform policy administered and overseen by the NCAA.¹⁶¹ The NCAA review board could work with member institutions in order to annually update the uniform policy.¹⁶²

This proposal has some potential. It is important, then, that the institutions' policies and the NCAA's policies are consistent. Any further recommendations made by the NCAA would have to be within the scope of what athletics departments have the capability of implemented. Another option the NCAA can take is to put its Sexual Violence Prevention Toolkit to better use. The checklists proposed by the NCAA are a set of recommendations that strive to help coordinate the athletic department resources for addressing sexual misconduct with the institution's resources in order to promote proper compliance and overall safety.¹⁶³ The items on the checklist that best coordinate resources are as follows:

- “The college or university’s nondiscrimination policy addresses sexual harassment and sexual violence and is posted and disseminated through the athletics department and on its website;
- The name and contact information for the campus Title IX Coordinator is posted and disseminated throughout the athletics department;
- Written policies are shared with athletics staff and student athletes and include the following terms: methods to report a sexual violence complaint; descriptions of complainant and respondent; strategies to create safe environments; instructions for campus visit and recruiting prospective athletes;
- “Responsible employees” and “campus security authorities” within the athletics department are identified, in consultation with the Title IX Coordinator and legal counsel, and their identity is shared with staff and students;
- A designated athletics staff member oversees the department strategies, in conjunction with the Title IX Coordinator and other campus administrators, to develop, manage, implement, and evaluate sexual assault prevention efforts for athletics staff, coaches and student athletes;
- Student athletes receive leadership training and actively support sexual assault prevention efforts within the athletics department and across campus;

¹⁶¹ Gutshall, Brandon. “A New Uniform: NCAA Policy and Student-Athlete Misconduct.” *UMKC Law Review* 76, no. 3 (2008 2007): 769.

¹⁶² Gutshall, 769

¹⁶³ “Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture.”

- All athletics administrators, coaches, and other paid or unpaid staff in athletics are provided sufficient resources and training to prevent and appropriately respond to sexual violence; and
- All athletics staff cooperate with college or university investigations into allegations of sexual violence, do not interfere with those efforts and ensure investigations involving student athletes and athletics department staff are managed in accordance with federal regulations and campus policies.”¹⁶⁴

Each of these items helps coordinate resources between the athletics department and the institution without creating an imposition on the institution’s policies. Additionally, they do not create a significant burden on the athletics department: policies do not need to be significantly altered and none of the policies excluding the educational programs will incur a cost.

Gutshall also recommends the NCAA review board work with institutions to annually update the policies.¹⁶⁵ Under this recommendation, policies would not be updated, but rather the checklist would be altered in order to address any additional needs. Another governing body that falls under the NCAA’s jurisdiction is the Student Athletic Advisory Council (SAAC). Each institution has its own chapter of SAAC and it is composed of one student from each athletic team.¹⁶⁶ Each athletic division also has its own National SAAC which is composed of two SAAC Representatives from each institution.¹⁶⁷ The mission of the National SAAC is “to enhance the total student-athlete experience by promoting opportunity, protecting student-athlete welfare, and fostering a positive student-athlete image.”¹⁶⁸ Each year, legislation is proposed to each National SAAC and voted on by the members present at the NCAA convention.¹⁶⁹ This may also be an

¹⁶⁴ “Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture.”

¹⁶⁵ Gutshall, 769

¹⁶⁶ NCAA. “NCAA Student-Athlete Advisory Committees (SAACs).” NCAA. February 4, 2014. <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs>.

¹⁶⁷ “NCAA Student-Athlete Advisory Committees (SAACs).”

¹⁶⁸ “NCAA Student-Athlete Advisory Committees (SAACs).”

¹⁶⁹ “NCAA Student-Athlete Advisory Committees (SAACs).”

appropriate avenue to evaluate and reassess NCAA guidelines for campus sexual misconduct responsibilities.

The review board should also either dedicate time or create a committee to ensure institutions are following the items on the checklist. Having a checklist is ineffective if its guidelines are not implemented. If a school is found to not be in adherence to these guidelines, they should either be given a grace period to mitigate the issue, or be given a sanction if the issue is not properly corrected.

Athletics Department Policies in Addition to College Policies:

Student-Athlete Code of Conduct: In accordance with the NCAA Executive Board statement, all institutions should create a separate Code of Conduct for their student athletes. Participation in collegiate athletics is an addendum to an average college experience. If an institution expects certain behavior from their athletes, they should state it. Additionally, if the institution has consequences that affect athletic participation, the athletic department should make all student athletes aware. Creating the separate Code of Conduct may take time, but it does not impose a substantial burden on the institution or athletics department, financial or otherwise.

If an athletics department does not wish to create its own Code of Conduct, it should at least state its commitment to the Student Code of Conduct for the institution. Most Codes of Conduct state disciplinary action for students found in violation of the Code. If the disciplinary action involves consequences in regards to a student's athletic participation, a student should be able to find that information through their athletic department.

Sanctions: In order to avoid due process challenges, institutions and athletics departments alike should specify as many sanctions as possible in regards to violations of the code of conduct. Stating "any disciplinary action deemed fit" leaves discretion entirely up to the institution. This could lead

to unequal sanctions for similar violations across different students without the need for proper justification. Creating a set of sanctions according to similar violations will ensure equal treatment across different cases.

Recruiting: These last two policies are likely the most controversial as they require the most amount of structural and procedural change. Two possible changes to recruiting policies should be made. First and foremost, in accordance with the NCAA Toolkit, all information regarding recruit overnights and student-host policies should be posted throughout the athletics department and on its website.¹⁷⁰ The policies should include all expected behavior, all prohibited activities, and all possible consequences. A sample student-host and prospective student overnight agreement contract is attached at the end of this thesis.

Second, NCAA member schools should consider following the example of the Big 12 conference. The Big 12 has a rule that applies to all first year and transfer students.¹⁷¹ It requires institutions to “exercise diligence” when recruiting students who may have engaged in serious misconduct in the past.¹⁷² The Big 12 defines “serious misconduct” as “sexual assault, domestic violence, and other similar crimes.”¹⁷³ If the prospective student has definitively engaged in this action in the past, they will not have eligibility to compete in the Big 12 conference.¹⁷⁴

Indiana University has a similar rule, but adds a second part to better account for the guilty party’s due process rights. While Indiana University also prohibits athletes with a history of misconduct from participating in the university’s athletic program, Indiana University adds an

¹⁷⁰ “Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture.”

¹⁷¹ Brown, Sarah. “Big-Time Sports Programs Tighten Rules on Athletes with Sexual Assault Records.” *Chronicle of Higher Education* 63, no. 43 (August 18, 2017): 91.

¹⁷² Brown, 91

¹⁷³ Brown, 91

¹⁷⁴ Brown, 91

appeals process to have this decision overturned.¹⁷⁵ The appeals process investigates whether there was a wrongdoing in the process that the prospective student guilty of misconduct.¹⁷⁶ The appeals process is heard by faculty members outside of the athletic department to avoid potential conflict of interest.¹⁷⁷ If the appeals panel finds a procedural error, the prospective student will continue through the recruiting process.¹⁷⁸

The latter approach to recruiting first year and transfer students is interesting. Considering most perpetrators are repeat offenders, ending the recruiting process for prospective students with a history of sexual misconduct is smart. This screening process is similar to questions regarding any previous disciplinary consequences that appear on the Common Application. Rather than the initial decision ending the recruiting process sticking, the athlete will still have the chance to appeal the decision. This gives someone with an unsavory history the opportunity to prove that they no longer engage in that conduct and will not do it again.

Outsourcing an Investigator: A major underlying concern arises whenever institutions internally investigate sexual misconduct allegations against a student athlete. Many people may worry that a not-guilty verdict may arise from the financial interest of the institution to protect their athlete.¹⁷⁹ On the other hand, others may worry that a guilty verdict may arise from unfair scrutiny, and the need to “make an example” out of an athlete.¹⁸⁰ Scholars suggest that one way to avoid this conflict altogether is to out-source the fact-finding investigators.

¹⁷⁵ Osterman, Zach. “New IU Policy Bans Athletes with History of Sexual or Domestic Violence.” *IndyStar*. April 19, 2017. <https://www.indystar.com/story/sports/college/indiana/2017/04/19/indiana-hoosiers-sexual-violence-athlete-ban-fred-glass/100660758/>

¹⁷⁶ Osterman, “New IU Policy Bans Athletes with History of Sexual or Domestic Violence.”

¹⁷⁷ Osterman, “New IU Policy Bans Athletes with History of Sexual or Domestic Violence.”

¹⁷⁸ Osterman, “New IU Policy Bans Athletes with History of Sexual or Domestic Violence.”

¹⁷⁹ Van Driesen, #

¹⁸⁰ Van Driesen, #

If institutions choose to hire investigators from outside of the college or university, there is a better chance the investigator has no interest in the outcome of the investigation, thus eliminating bias.¹⁸¹ An outsourced investigator may also have special training in Title IX and will be dedicated to the fact-finding process, without other professional distractions that university investigators may have.¹⁸² Someone whose sole job is the investigation may also deliver a prompt response, then advise the Title IX Coordinator on potential next steps.¹⁸³

Implementing this recommendation would cause the largest financial expense upfront. If institutions do not already out-source their investigator, it is an additional cost they will incur for each Title IX investigation carried out. However, this initial cost may save the institution large expenses later in the process, if either party sues for due process violations.

Feasibility:

While the Obama Administration developed a strong policy agenda aimed at addressing campus sexual misconduct, the Trump Administration is taking Title IX policy reform down a different path. Although many victims' rights advocates praised the 2011 "Dear Colleague Letter," many due process supporters are praising Betsy DeVos's efforts thus far. In 2016, DeVos declared the Obama policies a "failed system of kangaroo courts and weaponized civil rights."¹⁸⁴ Under DeVos's leadership, the OCR rolled back the Obama era guidance. Under the new interim guidance, schools may choose between the former "preponderance of the evidence" standard, or a

¹⁸¹ Ellman-Golan, Emma. "Saving Title IX: Designing More Equitable and Efficient Investigation Procedures." *Michigan Law Review* 116, no. 155 (October 2017): 179.

¹⁸² Ellman-Golan, 179

¹⁸³ Ellman-Golan, 179

¹⁸⁴ Joyce, "The Takedown of Title IX."

higher “clear and convincing standard.”¹⁸⁵ Because this new standard diverges from both state laws and college policies, Title IX adjudication may no longer be a federal issue, but a state issue.

The deviation from the Obama Administration’s policies is seen as a major step away from victim protection and a major step towards protection of the accused. While proponents of the Obama Era enforcement understand the current policies as “nothing short of a catastrophe” Earl Ehrhart, a Republican State Representative that drafts model bills for conservative legislators, claims “We’re back to pre-2011. In many ways, we’ve succeeded.”¹⁸⁶ So, although it is important for policy makers and school officials to promote due process during adjudication, it is also remains important to guarantee safety on college campuses. The federal government’s policy, which is less focused on victim protection, places the NCAA in a position where it can take leadership in enforcing strong Title IX policies.

The NCAA is a national body with adequate resources to enforce proper Title IX compliance across college campuses. The NCAA sexual misconduct guidelines follow the “Dear Colleague” guidance more-so than it mirrors the current guidance. As long as the NCAA maintains its commitment to addressing sexual misconduct, it should begin to crack down on enforcement of its own policies. Currently, it is clear to see that not every NESCAC or Ivy league school is in perfect compliance. It follows that there may be dozens of other schools that also have relatively weak enforcement. The NCAA may not know the shortcomings of these schools due to weak enforcement. A nation-wide review of the current state of college campuses may be necessary to spark stronger enforcement.

¹⁸⁵ Joyce, “The Takedown of Title IX.”

¹⁸⁶ Joyce, “The Takedown of Title IX.”

In regards to policy change, creating a student-athlete code of conduct, posting an existing code of conduct to the athletic department's webpage, or addressing the athletic department's commitment to addressing sexual misconduct is the least costly change. The only resource needed to implement this change is time. Going forward, it could also save institutions the cost and bad publicity from students challenging to unfavorable decisions in cases.

Changing the recruiting policy, on the other hand, is more complicated. Granting easy access to overnight rules is as simple as posting a student ethics statement on the athletic department website. However, creating an overarching recruiting policy such as Indiana University's may take serious consideration. Essentially, institutions would have to conduct criminal background checks on their students. Currently, 66% of colleges and universities conduct background checks as part of their admissions process.¹⁸⁷ The rationale behind conducting background checks on prospective students is promoting campus safety.¹⁸⁸ However, certain problems are related to the background checks. Students with existing criminal records, even with minor offenses, experience more trouble accessing financial aid, federal tax credits, and the opportunity to gain an education and potentially better their situation.¹⁸⁹ Although a policy such as Indiana's provides the opportunity to overturn a decision on a student with a criminal record, their access to education may still be affected. The statistics prove that this policy can be implemented, and is implemented in over half of the colleges and universities across the country. However, schools need to consider the potential risks and rewards before committing to this policy change.

¹⁸⁷ Baptiste, Nathalie. "Criminal Background Checks Screen College Applicants," *Prospect*. December 2015. <http://prospect.org/article/criminal-background-checks-screen-college-applicants>.

¹⁸⁸ Baptiste, "Criminal Background Checks Screen College Applicants."

¹⁸⁹ Baptiste, "Criminal Background Checks Screen College Applicants."

At first, outsourcing an investigator seemed the least likely policy to be implemented. An institution would need adequate resources to hire an investigator than assign a school official to the job. But, the DeVos's OCR supports hiring an outside, neutral fact finder.¹⁹⁰ She sees this as a victory for due process because of the “neutrality” involved. The fact finder, in theory, would have no bias towards the accused or the victim. A school official, on the other hand, may have an interest in finding any accused guilty because of the possible negative publicity associated with keeping the accused at the school. If schools could get federal funding for outsourcing their investigative process, or work in consortium with one another to share the outside fact finders, this recommendation could be feasible.

Conclusion:

Despite the diversity of schools across the country, each school can take simple measures to ensure compliance. Institutions should ensure compliance with Title IX in order to avoid legal and financial penalties. However, especially under the Trump Administration, institutions should ensure compliance with the NCAA's policies to promote a safer college campus. The policy reform will be futile unless the NCAA begins to strongly enforce the policies it has created.

¹⁹⁰ Joyce, “The Takedown of Title IX.”

APPENDIX 1: SAMPLE STUDENT HOST INSTRUCTIONS

STUDENT HOST INSTRUCTIONS

Source
NCAA.

1:



UNIVERSITY OF NORTH TEXAS
Student Host Instructions
Signature Page



Student Host Name: _____ Sport: _____

Prospect Name: _____ Visit Date: _____

These guidelines have been established to ensure that each prospective student-athlete's visit to our campus is a quality one. Your compliance with these guidelines is absolutely necessary and greatly appreciated. Incidents contrary to these guidelines may result in a decision by the University to decline to admit or grant financial aid to a prospective student-athlete and also may result in penalties to student-athletes up to and including dismissal from the team.

I certify that I have read and understand these rules, guidelines, and instructions and hereby acknowledge the receipt of \$ _____ per day for the purpose of hosting the above named prospect(s).

Student-Host Signature

Date: _____

I certify that I have read and understand these rules and guidelines. I acknowledge the receipt of \$ _____ for the purpose of travel to the university. Travel took place from _____ to _____ = _____ miles x x .50 cents.

Prospective Student-Athlete Signature

Date: _____

I certify that I have reviewed the rules and guidelines with the student-host and the prospective student-athlete.

Coach's Signature

Date: _____

SOURCE: University of North Texas Athletics Department

"Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture."

APPENDIX 2: CAMPUS VISITS AND RECRUITING POLICIES

CAMPUS VISITS AND RECRUITING POLICIES

UNIVERSITY OF FINDLAY Recruiting and Official Visit Policy

In order to guide the staff, coaches, student hosts, and visiting prospective student-athletes, the University of Findlay has established this policy to clearly state its expectations for recruiting visits to provide a meaningful framework for a prospective student-athlete to make an informed decision about his/her attendance at the University of Findlay and participation in the athletics program.

This policy has been established to institute a procedure for staff and students to report concerns about recruiting practices, to state the university's intention to deal with any inappropriate recruiting activities swiftly, and to establish education and training in relevant areas to assist staff and student adherence to these high standards. By this policy the University of Findlay seeks to prevent recruiting abuses.

NCAA Athletic Recruiting Rules

Campus Visits by prospective student-athletes

- Each prospective student-athlete shall be limited to one official visit to any institution.
- No excessive entertainment of prospective students is allowed either on or off campus.

Coaches Responsibilities

Screening of Recruits

- Head coaches are responsible for evaluating a recruit's character and citizenship, and for recruiting individuals who will share the university's commitment to the highest standards of behavior and character.
- Head coaches are expected to communicate to recruits their expectations in terms of behavior and character prior to the official visit.
- Coaches are responsible for being cognizant of any incidents in a prospective student-athlete's background that may violate the University of Findlay Code of Conduct.
- Head coaches are expected to recruit student-athletes whose actions and behaviors will reflect the athletic department's core values.

Activities during Official and Unofficial Visits

- Coaches are responsible for asking the host what free time or social activities are planned for the recruit, and to ask after the visit what activities occurred.
- Coaches are responsible for informing the host that the provision of alcohol to anyone under the age of 21 is prohibited by Ohio state laws and will not be tolerated.
- Coaches are responsible for the selection of hosts who will follow the coaches' direction and avoid inappropriate activities.
- The prospective student-athlete must be safely returned to his/her place of lodging after entertainment activities within a reasonable hour or by the curfew of 1 a.m.
- The head or assistant coach must be informed of the entertainment activities that occurred during the visit.
- Head coaches are responsible for instructing their assistant coaches and student hosts concerning appropriate and inappropriate activities. While good judgment is expected of student-athletes and all possible activities cannot be listed, the following are some examples of inappropriate and appropriate activities:

SOURCE: University of Findlay Athletics Department

Source 2: NCAA. "Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture."

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