POSITION STATEMENT

Need for National Collegiate Athletic Governance Organization Rules Related to Athlete Sexual Misconduct and Other Physical Violence

Executive Summary

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


2 The Drake Group is a national organization of faculty and others whose mission is to defend academic integrity in higher education from the corrosive aspects of commercialized college sports. For further information see: http://thedrakegroup.org
Eight detailed recommendations are offered to address the need for national collegiate athletic governance organizations to take strong steps to address this issue:

1. Title IX compliance should be a condition of membership of any national athletic governance organization.
2. Member institutions should be required to have athlete code of conduct rules (whether as part of the general student code of conduct or separately) specified by the national organization as a condition of athletics eligibility.
3. National athletic governance organizations should establish and enforce current athlete and recruit obligations to complete annual sexual misconduct and other violent behavior disclosure statements and, if such verified information reveals misconduct or a currently enrolled athlete engages in such conduct, declare such athlete ineligible for college sports participation and receipt of athletic scholarships. Such rules should include mandated suspension upon institutional receipt of credible complaints until the completion of Title IX specified investigation and adjudication procedures.
4. All athletic department personnel should be required to report knowledge of any sexual or other violent incident or sexual harassment committed by any athlete or suffered by any athlete victim to the athletic director, or other employee with the authority to institute corrective measures. In addition, athletic department employees should be prohibited from involvement in subsequent investigation and adjudication of such charges (other than as mandated by the investigation or court process) with strong penalties imposed for failure to do so.
5. Institutions should be required to provide athlete and staff violence education, including restorative justice practices, bystander-prevention, and a commitment to gender transformative programming.
6. The national collegiate athletic governance organization should establish an athlete ombudsperson office to provide confidential assistance to athletes seeking advice on these and other issues affecting their eligibility.
7. National collegiate athletic organizations should begin regularized collection of data on athlete sexual misconduct and other violent behavior.
8. Member institutions should be prohibited from using special “escorts” or “hostesses” for entertaining prospective athletes during campus visits.

Introduction

Intercollegiate athletics is a beneficial extracurricular activity for students that also helps build community and alumni affinity on college campuses. But these benefits are fundamentally threatened by the serious problems related to campus sexual assault and physical violence by athletes. Indeed, it would not be an understatement to say that there is a crisis regarding sexual misconduct by and of athletes. Athletic administrators, coaches, and college presidents must be held accountable when they enable talented athletes to evade discipline for committing acts of violence, create a culture of entitlement that results in athletes believing they can get away with such misconduct or, in some cases, create an unhealthy climate in which misogyny and sexism are rampant and the sexual conquest of women is celebrated.
The Drake Group examined the current issues related to collegiate sport sexual misconduct and other physical violence, concluding that (1) no uniform approach exists at any level of policy making to deal with the issue, (2) athlete sexual misconduct and other physical violence is condoned by an unacknowledged collegiate athlete subculture that neither educational sport leaders nor college presidents have adequately addressed, and (3) institutions of higher education are frozen by self-interest, hence unlikely to address such misconduct unless immersed in a media or legal crisis, in which case they act alone. Neither the NCAA nor other national collegiate athletic governance associations have confronted this issue in a comprehensive way that will deter such violent athlete behavior for the long term.

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

Furthermore, not only do institutions ignore the problem too frequently, but they also actively contribute to the problem. For example, too many institutions have knowingly enabled athlete sexual misconduct and other violence by providing pro bono legal assistance to alleged perpetrators (assistance not provided to other students, including victims), obstructing investigations or judicial proceedings, encouraging and/or paying for women to sexually engage with recruits, providing public relations assistance, intimidating or blaming victims, imposing weak penalties inconsistent with the treatment of non-athletes and/or using their influence with campus and local police departments to reduce the possibility of formal criminal charges. Institutions typically act only after transgressions have already occurred and been mishandled. Indeed, frequently, it is only in the face of extraordinary media-fueled public outrage that institutions condemn such behavior, usually by removing selected individual enablers, such as coaches or administrators and by creating policies that begin to address athlete sexual misconduct. In such cases, usually members of governing boards, advance appropriate policy responses to their respective campus crises, but do not then promote policy change by calling upon the NCAA, state legislatures or other larger groups to do more to prevent a repetition of

3 The term “violence,” as used throughout this paper, is defined in 18 U.S.C. § 16. That statutory provision states: “The term ‘crime of violence’ means— (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”
such behaviors. As a result, decades of documented athlete sexual and other violence remain substantially unaddressed.

Failure to specifically address these factors with national rules that reject and deter sexual and other acts of violence will perpetuate the current athletics subculture that condones and enables such athlete behavior. This problem is a crisis for all involved that must be boldly addressed now. If not, the generally understood benefits of athletic participation will be greatly diminished. The NCAA or other national collegiate athletic governance associations must make this a membership requirement that is enforced and institutions must make compliance a top priority.

A Continuing Disgrace

A federally funded study in 2007 that has been cited widely revealed that one in five college women (and one in 16 men) is a victim of sexual assault. A 2015 Association of American Universities survey supported that finding, revealing that 23% of female undergraduates reported experiencing sexual assault since enrolling in college. As of July, 2016, 146 private and 139 public institutions of higher education were under U.S. Office of Civil Rights investigation for inadequately handling 309 campus sexual assault complaints. These facts underestimate the campus sexual assault problem in that “more than 90% of sexual assault victims on college campuses do not report the assault”; the prevalence of false reporting is between 2% and 10%.

5 The Chronicle of Higher Education. (2016) Title IX Sexual Assault Tracker API Documentation. Retrieved as of July 27, 2016: https://mail-attachment.googleusercontent.com/attachment/u/0/?ui=2&ik=b708008cf3&view=att&th=15632e49084c11e181&attid=0.1&disp:inline&safe=1&zw&sa=s&q=UW%20Office%20of%20Civil%20Rights%20Investigation%20of%20Campus%20Sexual%20Assault%20Complaints&safe=1&sw=saddbat=ANGjdJ96FKuIGYP4fG3kLoGCy1p_DTDs5HZrFJ07bLpDdlTq9P16E2ziP9G0fwY0_K45rh39OtiDxzxAo1moLQDIpth3LqRdddy4d7i5_PCXnsHgLY8AlkdFHeQj0UR-voE3wwr0A0XUyYDFsFtPZawCSSM2N4UztNoOFEF.-QkenRZmd28Cp40SpxuyzgJjn6k9KGWroghRDdx9CQEAsQzznqVmgK59909LPmMxmkDqZD0LDvO0nt0FIQoqwiag1G2-qgO-yjeZrsST-WGpszjmMDDb7mb--pkMaYzAQc1mXuyfUIVvuf-fYsYipQVaCLbvcocC9sMLigR2xmk9okbkPvr_Io1zXZpmgppvymX_6ytGdNam6bU0407sraeyFJQo00P7fHfjUHx17KUBW04wlaeVbr3HMPenfgIZYxRs1NgX7u12Fy55s36EipsFt0_yzS4tE9yE1iliWVU2CYMt-3XY-PHewVW4G7hCtZ75SObocVSEzfdgAZ765r43hGZVYww56hijZAS1jmgT3LHIwTopEzfkwfayiISGxXOoxIMkU_ltdV6CvuxcfyqfOeiqfqtvIMfQOS5v2fTROJSrStLk_9DUfx3TK-pg2sErzszVrt95nQUnDLZ31QHcM2x60r
These data should inform the consideration of issues related to college athletes and sexual assault.

In the spring of 2016, the President, Athletic Director, and Head Football Coach at Baylor University resigned in the wake of rapes and sexual assaults of at least six women by football players. In the summer of 2016, the University of Tennessee reached a $2.48 million settlement with eight women regarding sexual assaults by football and basketball players. Baylor and Tennessee are just two high profile examples of the many cases in which universities treated athletes accused of sexual assault or other forms of misconduct differently than non-athlete students. The literature appears to support the contention that Division I athletes in football and basketball are more likely than other athletes to be involved in violent crimes and are more likely to be favorably treated in the case of sexual conduct transgressions than athletes in other sports and non-athletes. A 2019 USA Today Network research effort revealed:

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

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

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

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

In 2011, Benedict teamed up with CBS News chief investigative correspondent Armen Keteyian to produce a Sports Illustrated investigative report in which 2,387 criminal background checks were run on players of the pre-season top 25 college football teams. They found that one in 14 players (7%) had arrest records, more than 200 players were arrested or cited by police 277 times in one season and one-fifth of all college sports-related crimes included domestic violence. Only two (Texas Christian University and the University of Oklahoma) conducted background checks and these were flawed in that only adult records were included.

ESPN’s Outside the Lines (OTL) program examined the extent to which athletes participating in football and men’s basketball from 2009 through 2014 at 10 top ranked universities were referenced in police reports from 20 campus and city police departments as being accused of crimes. The institutions and percentages of players found to be accused were

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9 Id.
11 Ibid
14 Lavigne, P. (2015) How OTL Completed Its Investigation. ESPN.com (June 15, 2015) Retrieve at: http://espn.go.com/espn/otl/story/_/id/13039153/how-lines-completed-athletes-police-investigation-10-schools OTL “selected 10 schools in various conferences and geographies, leaning toward colleges in quintessential college towns and in states that had public records laws that seemed favorable to accessing police and court records. Other considerations were the programs’ revenues, fan bases and overall rankings of the football and men’s basketball programs over the time period studied. Once the 10 colleges were selected, Outside the Lines compiled the schools’ football and men’s basketball rosters from 2009 through 2014 -- a total of six sets. From summer 2014 to October, public records requests were filed to 20 campus and city police departments in all, for incident reports containing player names that appeared on the selected rosters... With few exceptions, Outside the Lines counted each case in which an athlete was involved in a criminal incident if the player was arrested or named as a suspect in a police report or the police report narrative included information that indicated an officer witnessed the player committing a criminal act or noted evidence to the same; a witness or alleged victim described him engaged in a crime; or the athlete admitted to wrongdoing.” See full article for further methodology details and a full explanation of why percentages are underreported.
Auburn (5%), Florida (24%), Florida State (18%), Michigan State (15%), Missouri (14%), Notre Dame (2%), Oklahoma State (11%), Oregon State (18%), Texas A&M (15%), and Wisconsin (14%). These percentages were significantly higher than those of non-athlete students.

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

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

- A strong association exists between drinking and sport—“athletes drink, get drunk and drink to get drunk at a higher rate than non-athletes.” Drinking plays a prominent role in some men’s “premeditated strategy to coerce women into unwanted sex or to be violent; it may also be a convenient and socially acceptable means by which men can distance themselves from their violence.”

- Impaired reasoning or impulse control caused by head injury plays a role in many instances of sexual violence. “Sport related injuries were the third most likely type of head injury, behind car accidents and falls, most occurred before the age of 16.”

- Training athletes to be violent in sport affects behavior off the field of play. Training athletes to be physically dominant coupled with socialization that treats women

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15 Ibid.
17 Id., p. 250
disrespectfully may contribute to hostility and violence against women and may support rape attitudes.\textsuperscript{19}

- Research on male athletic teams and fraternities yields similar results; “peer support of abuse and social ties with abusive peers are predictors of violence against women...the more peer support for violence against women, the more likely a member of that group is to commit these crimes.”\textsuperscript{20}

- “Institutional support for alleged perpetrators often blames women and fails to hold athletes responsible for their actions...athletes bring more resources (financial and otherwise) into the judicial process and are better able than non-athletes to escape punishment for their crimes against women. The impediments in prosecuting athletes who perpetrate violence against women, real or imagined, may contribute to the likelihood that an athlete will commit this sort of crime.”\textsuperscript{21}

- “Star athletes, whose mediated images represent an idealized masculinity, and lesser male athletes, by association, enjoy elevated status within the masculine status hierarchy... [and] can garner considerable access to resources for demonstrating masculinity. Within some subworlds of sport, crimes against women (both the act and the recounting of it) may be a demonstration of masculinity.”\textsuperscript{22}

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

Sabo, Messner and others similarly assess the athletics subculture being supportive of sexual violence, homophobia, aggression, militarism and the denigration of women, resulting in a dysfunctional masculinity ideal dominated by strength, physical dominance, and impressive virility.\textsuperscript{23} Most authors agree that the popularity of sport in every society, its significance as a cultural institution, its dominance by men, and its effect on the perceptions of ideal masculinity, severely limit male athlete choices of acceptable behavior and thought expression, thereby supporting sexual violence. While these phenomena have been studied in depth over the last four decades, educators and sports administrators have not used this information to change sport systems in this regard. This review of the literature supports the need to do so now. Multiple approaches must be used.

\begin{footnotesize}
\begin{enumerate}
\item Crossett., p. 250-251
\item Id., p. 251
\item Id., p. 252
\item Id., p. 253
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Institutional Actions and Justifications That Enable Athlete Violence

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

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

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

“Letter-of-Intent signee Jeffrey Simmons, a highly ranked football prospect recruited by Mississippi State University (MSU), allegedly used physical force in attempting to intervene in a domestic fight between his sister and another woman and was charged with misdemeanor assault for striking a woman. Simmons, a football player, was suspended for the first game of the season, a penalty equal to that imposed if a player commits a targeting foul during a game. MSU’s athletic director made the following statements concerning the incident. ‘Based on conversations our staff has had with school, community and church leaders in Noxubee County, this incident appears to be uncharacteristic of Jeffery.’ It’s a

highly unique circumstance to administer discipline to a student for an incident that occurred prior to that individual joining our university.’ ‘We expect the structure and discipline Jeffery will be a part of in our football program to benefit him. Jeffery will be held accountable for his actions while at MSU, and there will be consequences for any future incidents.’ ‘Five seconds of a really poor choice shouldn’t preclude an individual from going to school.’”

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

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

Other examples were reported by Inside Higher Education in July of 2015:

“Earlier this year, a female University of Oregon student sued the university, alleging that it recruited the basketball player accused of assaulting her, even though it knew he had previously been accused of a separate sexual assault at Providence College. Oregon suspended the player, as well as two others involved in the assault, but the suit also states that the university scrubbed the players’ transcripts of any references to sexual misconduct, making it easier for them to transfer to play elsewhere.

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

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

26 Crossett, p. 252.
Recent events at Baylor particularly highlight the wrongdoing by institutions. Numerous complaints regarding sexual misconduct and instances of violent behavior by Baylor University football players were filed and ignored by coaches, athletic administrators and university officials. Eventually, arrests were made and following convictions, there were numerous resignations of University officials.\(^{28}\)

Division I institutions commonly arrange legal assistance for accused athletes, and the rules of the NCAA and other national collegiate athletic governance organizations do not prohibit the practice. The University of Tennessee, as part of a $2.48 million athlete-sexual-assault settlement, admitted that “it did prepare a list of six local lawyers for athletes to call. The lawyers, all Tennessee graduates, included two former members of the university’s athletic board, a football color commentator for its television network and a prominent booster. Other students at Tennessee accused of crimes -- and those who file complaints that they have been the victims of assaults or other crimes -- did not receive the list.”\(^{29}\) “For decades, a lawyer in Baton Rouge provided pro bono legal services to more than 100 Louisiana State University athletes until the university asked him to start charging athletes in 2011. Throughout the 1980s, an Orlando attorney and Florida State University booster represented athletes for free... FSU officials and Tallahassee police worked together to help prepare a defense for Jameis Winston, the university’s star quarterback at the time, after he was accused of sexually assaulting a female student.”\(^{30}\)

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

While Title IX requires education environments to be safe and students protected from hostile environments that impede the education process, institutions have an enormous amount of flexibility on how to ensure such, which makes it more likely that athletes are provided with special treatment. During the past few years, hundreds of lawsuits brought by both survivors and accused students, many by or against athletes. These have been filed in state and federal courts with varying causes of action, from Title IX violations, to negligence, deliberate indifference and breach of contract.\(^{31}\)

A 2014 survey of 440 institutions commissioned by the office of U.S. Senator Claire McCaskill found that many schools use investigatory and adjudication processes that fail to

\(^{28}\) Susan Ladika, (2017). Sports and sexual assault. *CQ Researcher, 27*:16, 361-384. Retrieve at: http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2017042800 The judicial system too has contributed to the crisis that occurs on college campuses involving athletes. For example, at Stanford, Brock Turner, a Stanford University swimmer, was convicted for sexually assaulting an unconscious woman, but served only half of a six-month sentence.


\(^{30}\) Ibid.

\(^{31}\) See, e.g., Weckhorst v. KSU, Case No. 2016-cv-02255, dismissed with prejudice Nov. 26, 2019
comply with best practices. For example, experts maintain that students should not participate in adjudication panels in campus sexual assault cases due to privacy concerns for victims or conflicts of interest because they may know peers who are victims or perpetrators. But 27% of institutions in the national sample, 43% among large public institutions and 30% among large private institutions, allow such student participation. Incredibly, many institutions polled in the McCaskill survey reported setting up different investigation and adjudication procedures for their athletes. “More than 20% of institutions in the national sample give the athletic department oversight of sexual violence cases involving student athletes. Approximately 20% of the nation’s largest public institutions and 15% of the largest private institutions allow their athletic departments to oversee cases involving student athletes.”

The report concluded:

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

“Athletic department officials inserted themselves into investigations many times. Some tried to control when and where police talked with athletes; others insisted on being present during player interviews, alerted defense attorneys, conducted their own investigations before contacting police, or even, in one case, handled potential crime-scene evidence. Some police officials were torn about proper


33 Ibid, p. 11.

34 Ibid.

procedure -- unsure when to seek a coach's or athletic director's assistance when investigating crimes.”

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

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

All of these institutional practices increase the risk of the institution being held liable under Title IX for failing to prevent hostile educational environments created by athlete sexual misconduct.

Responding to the apparent sexual assault crisis on college campuses, Congress is currently considering a bipartisan bill, the Campus Safety and Accountability Act (S.590). Included among the provisions is a sport-specific requirement to use a uniform process for campus disciplinary proceedings that would no longer allow athletic departments or other subgroups to handle complaints of sexual misconduct for members of that subgroup alone.

The NCAA’s Response to the Sexual Violence Issue

The NCAA’s response to the sexual violence issue has been minimal, primarily requiring education of athletes, adopting unenforceable resolutions and only recently, adopting a limited policy requiring athlete disclosure. In August of 2014, the NCAA Executive Committee adopted a resolution that urged athletic programs to “assure that student-athletes are neither advantaged nor disadvantaged by special treatment”. The resolution stated that member institutions’ athletics departments must:

• “Comply with campus authorities and ensure that all athletics staff, coaches, administrators and student-athletes maintain a hostility-free environment for all student-athletes regardless of gender or sexual orientation; know and follow campus protocol for reporting incidents of sexual violence; report immediately

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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; and
• Cooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence, ensuring that investigations involving student-athletes and athletics department staff are managed in the same manner as all investigations of students and staff on campus.”  

The resolution does not have the force of NCAA rules, which carry penalties for non-compliance. Neither does the resolution address athletic department practices such as arranging for athletes to receive early legal advice or representation in the event of allegations of criminal conduct or interfering with external criminal investigations or adjudication. Last, the resolution ignores violent behavior other than sexual violence.

In September 2014, the NCAA issued an education publication titled Addressing Sexual Assault and Interpersonal Violence: Athletics’ Role in Support of Healthy and Safe Campuses. The stated purposes of the publication are to assist member institutions “in developing their own approaches to preventing or reducing the incidents of sexual assault and other acts of interpersonal violence on their campuses” and to “provide information on responding appropriately to acts of violence and other matters relevant to complying with federal law”. Notably the publication does not acknowledge the high rates of athlete involvement in sexual violence that appear to exist in Division I football and basketball, appearing to deny or mitigate its existence among aggregated data:

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

Neither does the publication mention specific concerns about recruiting athletes with criminal records, specific ways in which athletic departments have acted inappropriately in investigating and adjudicating sexual offenses, or other issues discussed in this paper. No NCAA rule requires mandatory distribution of such important educational material. Moreover, even if such a rule

38 Ibid.
40 Ibid, p. 5.
41 Ibid, p. 11.
existed, it would not end athlete violence because although education is an important intervention, it is not sufficient to solve the problem.

On August 5, 2016, the NCAA Board of Governors announced that it was asking the leaders of all three competitive divisions to “consider legislation to deal with athletes accused of sexual violence” and suggested that its August, 2014 resolution “could serve as the basis for new rules that would address topics such as compliance with campus authorities as well as state and federal laws, proper reporting protocols and more education within the athletic department about prevention and intervention.”

In 2016, an NCAA Board of Governors Commission to Combat Campus Sexual Violence was appointed to pursue such rules. However, the Commission was disbanded without advancing such legislation. In October of 2016, under pressure from Congress, an NCAA multidisciplinary task force produced a Sexual Violence Prevent toolkit; a second edition was produced in August of 2019. And in August of 2017, the NCAA Board of Governors adopted a sexual violence policy that required the school president or chancellor, athletics director and Title IX coordinator each member institution campus to attest annually that coaches, athletics administrators and student-athletes were educated in sexual violence prevention.

On May 1 of 2020, the Board of Governors adopted its 2017 sexual violence policy to add the following disclosure requirements:

- All prospective, continuing and transfer athletes must complete an annual disclosure form revealing any prior sexual, interpersonal or other act of violence that resulted in an investigation, a Title IX disciplinary proceeding or criminal conviction;
- Member institutions must confirm such athletes’ disclosures;
- When an athlete attempts to enroll in another institution, the member institution must share such disclosure and confirmation information;
- If an institution chooses to recruit or accept a transfer athlete, that institution must have a policy in place to require staff members to query the former institution for the purpose of obtaining such information;
- Athletes’ failing to fully and accurately disclose may result in penalties including loss of eligibility to participate; and

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• Institutions failing to attest to their compliance with the sexual violence policy mandates will be prohibited from hosting any NCAA championship competitions in the next academic year.46

Significantly, while an athlete who does not truthfully disclose prior misconduct may lose eligibility to compete, there is no loss of eligibility as a penalty for committing sexual assault.

Historically, the NCAA has not been inclined to act in a rule-making and enforcement capacity on the tough issues (i.e., concussion and medical policies, academic integrity, etc.), choosing instead to defer to individual institutional responsibility. Rulemaking and enforcement are the primary mechanisms of governance. Requiring sexual violence education of athletes and mandating athlete disclosure of past misconduct are only first steps. Fingerprint criminal background checks are also advisable. However, the missing element is an effective deterrent, namely the athlete understanding that committing sexual or other forms of violence will result in permanent loss of eligibility to participate in college athletics at any NCAA institution.

Conference Responses to the Athlete Sexual Violence Issue

In 2015 the Southeastern Athletic Conference (SEC) became the first conference to ban the recruiting of transfer athletes previously disciplined for misconduct. The SEC adopted a rule that prohibited member institutions from recruiting any athlete dismissed from an institution for sexual assault, domestic violence, or other forms of sexual violence.47 This rule was revised in 2016 to expand the definition of serious misconduct to include "dating violence or stalking, or conduct of a nature that creates serious concerns about the safety of others" and to require members to "conduct appropriate inquiry into a transfer student-athlete's background prior to providing athletically related aid or allowing him/her to practice or compete."48 Apparently, both recruiting needs and moral considerations precipitated the SEC actions. The University of Georgia, an SEC member, had dismissed a football player from its team after his arrest on a domestic violence charge. The University of Alabama, another SEC member, recruited him after a year spent in junior college. Georgia proposed the rule change. If moral considerations had been the root cause of the rule, it likely would have applied to all athletes – prospective and currently enrolled, not just transfers.

In February of 2016, prompted by the athlete rape scandal at Baylor University, the Big 12 conference passed a similar rule affecting prospective freshmen or transfer student athletes but not enrolled student-athletes. The rule declares freshmen and transfers who previously committed serious misconduct (defined as “sexual assault, domestic violence, and other similar

crimes involving moral turpitude”) as ineligible for financial aid, practice or competition. In serious misconduct by enrolled student-athletes is subject to unspecified “applicable institutional procedures.”

In March of 2016, the Pac-12 “approved a policy prohibiting a transfer from receiving athletic aid or participating in athletics if the transfer student-athlete is unable to re-enroll at a previous institution due to student misconduct...issues such as assault, harassment, academic fraud, and other violations of campus behavior conduct policies.” Formal criminal background checks are not required but Pac-12 members are required to ask transfers to disclose whether they are eligible to reenroll at their previous institutions.

To date, it appears that only the Big 12 prohibits recruiting freshmen with criminal records or who have otherwise engaged in serious misconduct. No conferences have rules regarding the eligibility of currently enrolled athletes who have been convicted of or disciplined for sexual violence.

Institutional Athlete Sexual Violence Policies

Faced with significant OCR pressure and based on an OCR “Dear Colleague” letter in 2014 that provided significant guidance to institutions on how to comply with Title IX sexual harassment provisions, institutions of higher education adopted policies governing all students, faculty and staff that prohibit sexual harassment and state how such occurrences are to be reported, investigated and adjudicated. The OCR guidance also included prohibitions against retaliation and obligations to report criminal conduct to police. The Obama’s OCR guidance, which was withdrawn in 2018 by the Trump administration, resulted in a lack of uniformity by institutions. The Trump administration then enacted new Title IX regulations in May of 2020, after an extensive notice and comment period, that carry the force of law (are not just guidelines), and are intended to impose more uniformity in the investigation and adjudication of sexual misconduct on college campuses. For numerous reasons, these new rules are aimed mostly at protecting the rights of accused students (including athletes). They narrow the definition of sexual harassment and limit the location of acts that fall within Title IX’s jurisdiction, severely limit the scope of persons who are mandatory reporters (coaches and athletic personnel no longer need give notice to the school once they become aware of misconduct), provide for

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50 Ibid.


52 Ibid.

cross-examination of parties and witnesses making it less likely that survivors will come forward and encourage schools to use a higher standard of evidentiary proof resulting in it being more difficult to hold schools legally responsible for addressing sexual misconduct. While lawsuits have been brought to enjoin the new rules, in the meantime, they contribute too to the crisis involving athletes and are further reason why the NCAA and institutions must enact their own rules relating specifically to athletes. Our recommendations focus on this need.

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

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

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

“1. Each public college and university shall have a written policy governing the conduct of student athletes. At a minimum, those policies shall include:

a. A disclosure statement completed and signed by the student athlete prior to participation in any intercollegiate athletic endeavor, which shall include a description of (1) all prior criminal convictions, (2) all prior juvenile dispositions wherein the student was found to have committed an act that would constitute a misdemeanor or felony if committed by an adult, and (3) all pending criminal

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charges, including juvenile proceedings alleging any act which would constitute a misdemeanor or felony if committed by an adult.

b. This statement will be kept in the office of the athletic director. Failure to accurately disclose all incidents may result in immediate suspension from the team.

2. Institutions shall not knowingly recruit any person as a player for an intercollegiate athletic team who has been convicted of a felony or, in the case of a juvenile, who has been found to have committed an act which would constitute a felony if committed by an adult. Exemptions to this restriction shall be granted only by the President of the college or university upon recommendation of the athletic director and faculty athletics representative. Such decisions shall be reported in writing to the Executive Director of the State Board of Education at the time the exception is granted.

3. A student athlete convicted of a felony after enrollment, including a plea of nolo contendere on a felony charge, shall be removed from the team and shall not be allowed to participate again in intercollegiate athletics at any Idaho public college or university. Further, an institution may cancel any athletic financial aid received by a student who is convicted of a felony while the student is receiving athletic financial aid subject to NCAA regulations and the institution’s applicable student judicial procedure. Nothing herein shall be construed to limit an institution from exercising disciplinary actions or from implementing student athletic policies or rules that go beyond the minimum requirements stated herein.¹⁵⁵

Institutional governing boards react similarly. Following the infamous Sandusky affair at Pennsylvania State University, the NCAA mandated and the University’s Board of Trustees adopted a student-athlete code of conduct and acknowledged its oversight responsibility over the integrity of the athletic department.¹⁵⁶ Similarly, the Board of Trustees of Michigan State University adopted the following policy following a 1993 incident in which an athlete was not suspended from the football team after pleading guilty to assault, battery and entering a premises without permission:

“Any student-athlete who, while a member of an MSU intercollegiate athletic team, is convicted of a felony¹ will be suspended from the MSU intercollegiate athletic team of which he or she is a member and thereby precluded from participation in games and all other benefits related to team membership.² The student-athlete may request an exception to this rule. The President, upon

recommendation of the coach and after consultation with the Director of Intercollegiate Athletics may grant such an exception.”

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

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

• If reasonable and credible evidence exists that a student-athlete may have engaged in Category II misconduct, the Director of Athletics or his/her designee may temporarily suspend a student-athlete from practice, competition, or all athletics activities and services until a formal review is conducted.

• Charge of Felony: If charged with a felony, a student-athlete will be automatically suspended from athletics participation by the Director of Athletics pending the Athletics Department’s investigation. After the internal review, appropriate disciplinary action will be taken, which may include suspension from competition and suspension or continued suspension from the team.

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• Conviction of Felony: If convicted of a felony, a student-athlete will be immediately removed from his or her athletic team.

• Note: Penalties will be greater if any of the following are involved in the violation:
  1. Failure to disclose the alleged violation to the Head Coach, an Athletics administrator or the FAR as soon as possible
  2. Alcohol and/or drugs or a history of a violation(s) of the Athletic Department’s Substance Program
  3. Repeated misconduct including academic dishonesty
  4. Multiple violations within a single act of misconduct
  5. Repeated association with acts of misconduct in which guilt may be implied

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

The problems with policies such as the above are multiple: (1) most committee members are athletic department staff, so the committee has an inherent conflict of interest, (2) best practices dictate that students not be involved in the adjudication of sexual-assault claims, (3) the list of possible penalties lacks a strong deterrent, and (4) the athlete is not treated like other students.

In the spring of 2017, Indiana University athletic department adopted the “Indiana Rule,” a policy disqualifying any prospective student-athlete or transfer with a record of sexual abuse. On September 17, 2019, the University of Texas at San Antonio announced adoption of the Tracy Rule, which it claimed was the most comprehensive Serious Misconduct Rule in the NCAA:

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

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Unfortunately, few athletic departments have followed suit.

**Conclusions and Recommendations**

This review of the current issues related to college athlete sexual and other violence demonstrates that, other than the OCR rules that have general applicability to institutions, no uniform approach exists at any level of policy making to address issues unique to college athletics. Significantly, no concerted and coordinated effort by the NCAA and other national-collegiate-athletic-governance organizations, conferences, or member institutions confront athlete violence in a way that will meaningfully deter such violence. The lack of a nationally uniform policy, coupled with the pressure at the institutional level to win at any cost, results in huge disparities across institutions in the way athlete misconduct is treated. Thus, athletes do not hear a clear message indicating that violent behavior is unacceptable. In other words, no consistent deterrent for such behavior is available. Worse yet, institutions often enable misconduct by supporting athletes who engage in such behavior or by continuing to recruit them, enroll them, and allow them to participate in athletics. And, the efforts by institutions that do try to deal directly with such behavior are often nullified by the ease with which accused athletes can freely and quickly transfer to another institution with no penalties.

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

We recognize that many of these recommendations are complex because (a) precision is necessary to afford fair process to accused students, (b) a racial bias in the law enforcement system must be acknowledged, and (c) the rules must target sexual violence and other physically violent behavior that harms others on or off campus. Precision is also required to clarify behavioral expectations, eliminate self-interested institutional responses to athlete violence, and make athletes aware that special treatment will not be forthcoming.
Of critical importance, given the failures of the May 2020 revision of Title IX regulations, there is a need for national collegiate athletic governance organizations and higher education institutions to plug these gaps immediately. Specifically, we recommend that athletics governance organizations require member institutions to enact broader provisions, either under their codes of conduct or as separate codes of conduct, specifically related to athletic departments. Under such provisions, athletes would be immediately suspended from athletic participation if credibly accused of sexual misconduct on or off campus. Coaches and other athletic-department personnel would be required to report to the institution’s Title IX coordinator and the office responsible for enforcing its code of conduct any knowledge of sexual misconduct by or against athletes. Finally, if an athlete were accused of such misconduct, athletic-department involvement in the matter would cease immediately.

Last, The Drake Group notes that the recommendations advanced below apply to both male and female athletes because both are affected by the dysfunctional athletics subculture and engage in sexual misconduct. Competitive sport teaches physical dominance and aggression. Lack of respect for women may not play the same role for female athletes as it does for male athletes, but all other elements of the subculture blueprint are present, including anecdotal evidence of top-level female athletes being involved in domestic and other violence.61

Recommendation 1. Title IX Compliance as a Condition of Membership

National collegiate athletics governance organizations should establish, as a condition of membership, that institutions demonstrate, through a once-in-every-four-years conference or independent third party assessment, compliance with the athletics and sexual harassment provisions of Title IX of the Education Amendments of 1972. With respect to athletics’ equities, if inequities are identified, remedies must be identified and completed within 12 months following submission of the assessment. With regard to Title IX’s sexual harassment regulations and guidelines applicable to all students, the assessment should examine the investigation and adjudicative process of any athlete alleged to have committed an act prohibited by Title IX. This assessment should determine whether the athlete has been treated like any non-athlete student except for national-collegiate-athletic-governance-organization eligibility rules designed to deter such conduct by withdrawing athletics participation privileges and governing organization or institutional code of conduct rules mandating more stringent standards which would be allowed by Title IX regulations.

Rationale

• An NCAA principle currently exists addressing this issue:
  “2.3.1 Compliance with Federal and State Legislation. It is the responsibility of each member institution to comply with federal and state laws regarding gender equity. However, no enforceable NCAA regulation exists that implements the principle. Previously, NCAA Division I imposed a once every ten years peer-certification requirement that included a Title IX athletics participation assessment but no assessment of compliance with the law’s sexual harassment provisions. This certification program was eliminated in 2011.

• NCAA and other national collegiate athletic governance organization members should comply with state and federal laws as a condition of membership and should have rules that require such compliance.

• When institutions fail to give female athletes equal treatment and equal opportunities to participate, which is still true almost 50 years after the passage of Title IX, they inadvertently support an athletics subculture that devalues women.

• Twenty percent of the nation’s largest public institutions and fifteen percent of the largest private institutions allow their athletic departments to oversee Title IX sexual harassment cases involving student athletes, a conflict of interest that contributes to athletes being treated differently than non-athletes. Such practices would not pass muster if compliance with Title IX was a membership requirement of the NCAA and other national-collegiate-athletic-governance organizations.

• The NCAA currently requires independent assessment of the rules compliance systems of members on a regularized basis. The assessment requirement recommended here is no different.

• May 2020 revised Title IX regulations permit more stringent institutional Code of Conduct requirements and collegiate athletics governance organizations may require their members to adopt and enforce such standards.

Recommendation 2. Inclusion of NCAA Athlete Code of Conduct Requirements as a Sub-Part of or in addition to the Member Institution’s Student Code of Conduct

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

Rationale

• New Title IX regulations issued on May 6, 2020, specify that:
  Section 106.45(b)(3)(i) (“The recipient must investigate the allegations in a formal complaint. If the conduct alleged by the complainant would not constitute sexual

62 2015-16 NCAA Division I Manual, p. 3
harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Recommendation 3. Every National Collegiate Athletic Association Should Establish an Athlete Code of Conduct that Addresses Sexual and Other Forms of Violence and Sexual Harassment

Each national collegiate athletic association should establish and enforce an athlete code of conduct that contains the following elements related to sexual assault and other forms of violence:

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

(1) any prior sexual, interpersonal or other act of violence that resulted in a criminal complaint, investigation, settlement, finding of responsibility, plea or conviction;

(2) all prior juvenile dispositions wherein the student was found to have committed an act of sexual or physical violence that would constitute a felony if committed by an adult;

(3) all pending criminal charges, including juvenile proceedings, alleging any act of sexual or physical violence that would constitute a felony if committed by an adult, and

(4) any sexual misconduct or physical violence in high school or at a previous institution of higher education that resulted in a past or pending Title IX or student code of conduct investigation or disciplinary proceeding and the outcome of such proceeding, if complete.

The statement shall also require the athlete to give permission to share such disclosure with the national collegiate athletic governing organization and other institutions of higher education to which the athlete subsequently transfers, subject to FERPA and other confidentiality laws. Athletes’ failing to fully and accurately disclose are subject to penalties including loss of eligibility to participate. Institutions failing to administer

\[64\] Note, that as discussed above, the NCAA adopted a disclosure requirement in May 2020, but The Drake Group believes it is toothless. While it requires certain disclosures, it requires no suspension or ban on athletes who have committed sexual misconduct or other meaningful policies or sanctions.
and verify disclosure statements and, in the event of athlete transfer, share such statements with the institution to which the athlete transfers, shall be suspended from membership for at least one year.

b. **Review of Disclosure Statements/Determination of Eligibility.** All disclosure statements containing responses to a (1), (2), (3) or (4) above should be submitted to a national collegiate athletic governance association Eligibility Center following institutional verification of such information. Based upon a review of such statements, the Eligibility Center shall disqualify prospects or current athletes from eligibility for intercollegiate athletics in the following manner:

(1) Institutions should be prohibited from recruiting any individual to participate or permitting any current athlete to participate in intercollegiate athletics (e.g., practice, compete or receive athletics financial aid) who has been:

   a. convicted of any sexual misconduct, sexually violent (e.g., nonconsensual, coerced or forced sex or sexual advances, etc.) or other physically violent act (e.g., battery, assault, domestic violence, etc.) or has pled nolo contendere to such an act or agreed to reduced charges;

   b. in the case of a juvenile, found to have committed such an act;

   c. suspended, expelled or otherwise disciplined by any educational institution for such an act.

(2) Athletes who have declared ineligible under this provision should have an avenue of appeal to an independent panel comprised of both youth-development and law-enforcement experts not employed by any member institution. **Independent** means an individual who has not held a paid or unpaid position within the college or university and its systems, nor has provided support to the university as a booster, alumnus, consultant, or person of influence.

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65 U.S. Department of Education. (2016) Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals. (May 9, 2016) Retrieve at: http://www.ed.gov/beyondthebox The Drake Group acknowledges the wisdom of the May 9, 2016 Secretary of Education letter and guide provided to college and university leaders, cautioning them about “the chilling effect of inquiring early in the application process whether prospective students have ever been arrested. The guide also encourages alternatives to inquiring about criminal histories during college admissions and provides recommendations to support a holistic review of applicants.” The Drake Group is not suggesting that college admission be denied to convicted juvenile felons. Rather, we argue for a careful system specific to intercollegiate athletics that explores deterrents to non-sport violence. We believe that the system proposed is justified because it (a) restricts the submission of disclosure statements to an objective and expert entity outside the institution, (b) opposes the release of such disclosures to member institutions’ admissions offices, (c) incorporates an appeal process that is directly responsive to the Secretary of Education’s call for a holistic review, (d) is limited to past violent behavior, as opposed to all crimes, and (e) only considers such behavior in relation to the privilege of participating in athletics, the specific subculture to be affected.
The Eligibility Center should maintain such disclosure statements as confidential documents. Doing so would also enable the organization to produce valuable research on athlete violence.

Rationale

- Creating a clear and strong deterrent to sexual violence is important because the previous educational institutions that aspiring young athletes attended may have practiced the same kind of special treatment and enablement that has failed to address athlete sexual violence in college.
- Waiving normal admissions standards or admitting talented athletes who are academically underprepared, even when the institution knows they have previously committed felonies or serious misconduct, suggests that violent behavior is acceptable and does not result in negative consequences. And allowing a known felon or student who has previously endangered the safety of classmates places the institution at risk for knowingly fostering an unsafe campus environment.
- Clear, unambiguous and uniform requirements applicable to all member institutions of the NCAA or other national-collegiate-athletic-governance organizations will deter admissions decisions based solely on the potential contributions of a prospective student to winning college sports teams even when that student’s attendance puts the safety of the general student body at risk.
- The proposed avenue of appeal is especially important to high school students, recognizing that the conduct of a juvenile is more prone to error than that of an adult and may be subject to a racial bias in the law enforcement system. Both factors warrant the possibility of an appeal. An appeals process conducted by independent experts removes institutional conflicts of interest and, in the case of sexual or other violence, may include a psychological evaluation as a condition for consideration.

c. Sexual Misconduct Allegations Against Currently Enrolled College Athletes. The following conduct rules should apply to currently enrolled athletes alleged to have committed sexual (e.g. nonconsensual, coerced or forced sex or sexual advances, etc.) or other physically violent conduct (e.g., battery, assault, domestic violence, etc.) in on-campus or off-campus settings or sexual harassment, including online sexual harassment.\(^{66}\)

\(^{66}\) While Title IX no longer applies to off-campus incidents or online harassment unless the school has exercised substantial control over both the harasser(s) and the context in which the harassment occurs, or it occurs in a building owned or controlled by an officially recognized student group, such as a sorority or a fraternity. This change is problematic because experience demonstrates that sexual misconduct by athletes occurs most frequently in off-campus housing, notably housing occupied by a group of athletes. And recent years have witnessed several high-profile incidents of online harassment of female athletes by male athletes in the same sport. Thus, for the purpose of penalties related to athletics eligibility, off-campus misconduct allegations should be prohibited by the national collegiate athletics governing organization Athlete Code of Conduct even if it is not considered by the
(1) athletes should be treated like all other students accused of such misconduct with regard to institutional investigative and adjudicative processes except that NCAA and other national-collegiate-athletic-governance-organization rules governing athletics eligibility in the case of alleged or found misconduct shall apply;

(2) while allegations are pending, the accused athlete should be suspended from participation in athletics practice and competition, but should remain eligible for athletics financial aid and academic services until the completion of the campus adjudication and/or criminal processes applicable to all students;

(3) the school should have a preliminary hearing process conducted by an independent body to determine the plausibility of allegations (which we favor for all students), that process must apply equally to athletes and non-athletes;

(4) In the case of a victim going straight to law enforcement with no report to the institution:
   (a) suspension of athletic eligibility should occur when the institution learns of the allegation. If an arrest or indictment follows, suspension should continue until the case is resolved.
   (c) if the allegation or arrest violates the institution’s conduct rules applicable to all students, the provisions of (c)(1)-(2)) (above) should apply;

(5) If the accused student-athlete is found responsible for sexual (e.g. nonconsensual, coerced or forced sex or sexual advances, etc.) or other physically violent misconduct (e.g., battery, assault, domestic violence, etc.) pursuant to a campus Title IX or student disciplinary proceedings, liable in a civil proceeding, or is convicted or pleas nolo contendere to a felony charge, the athlete should be permanently ineligible to practice, compete, and receive athletics’ financial aid at any member institution of the NCAA or of any other national-collegiate-athletic-governance organization. This penalty should be in addition to any penalty imposed by the institution in which the athlete is enrolled at the time of the misconduct. If the athlete is found responsible for a non-violent sexual or other offense (e.g., sexual harassment, online sexual harassment, etc.), the athlete shall be suspended from athletic participation and eligibility for financial aid or athletic department activities and services for at least one year and shall lose that year of eligibility.

(6) Athletes who have been declared permanently ineligible or suspended under this provision should have an avenue of appeal to an independent panel comprised of

institution with regard to Title IX violations that might involve other penalties such as suspension from the institution.
both youth-development and law-enforcement experts not employed by any member institution.\textsuperscript{67}

**Rationale**

- **Athletics participation is a privilege, not a right.** Thus, suspension from and prohibition of student participation in athletics do not demand the due process required when constitutional rights are threatened. Suspension of athletic eligibility pending the outcome of an investigation or an adjudicative process is reasonable because of the need for the strongest possible response to the risks of sexual and other violence posed by the athletics subculture. No Constitutional right to play must be protected.

- **Creating a clear and strong deterrent to sexual and other violence is more important than allowing an accused athlete to continue playing.** Concerns about false allegations resulting in unfairness to the accused should not supersede protecting the larger campus community. Research indicates the prevalence of false allegations is between two and ten percent and that more than ninety percent of sexual assaults are not reported.\textsuperscript{68} Thus, overwhelming evidence supports the need to prioritize protecting others from a potentially hostile environment, rather than protecting the accused individual.

- **These provisions are necessarily complex.** Precision is necessary to afford a fair process to accused students and to emphasize that the target of the rule is sexual violence and other physically violent behavior causing harm to others on or off campus. Both sexual and physical violence are unacceptable characteristics of the existing athletics subculture. Precision is also required to clarify behavioral expectations, eliminate the institutional determination of athletics eligibility, and send a clear message to athletes that special treatment will not be forthcoming.

- **Suspension prior to the completion of investigation and adjudication does not prejudice the “rights” of athletes which remain protected (i.e., due process).** Besides, the suspended athlete retains athletics financial aid, which supports continuation as a student until a determination of responsibility.

\textsuperscript{67} U.S. Department of Education. (2016) Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals. (May 9, 2016) Retrieve at: http://www.ed.gov/beyondthebox The Drake Group acknowledges the wisdom of the May 9, 2016 Secretary of Education letter and guide provided to college and university leaders, cautioning them about “the chilling effect of inquiring early in the application process whether prospective students have ever been arrested. The guide also encourages alternatives to inquiring about criminal histories during college admissions and provides recommendations to support a holistic review of applicants.” The Drake Group is not suggesting that college admission be denied to convicted juvenile felons. Rather, we argue for a careful system specific to intercollegiate athletics that explores deterrents to non-sport violence. We believe that the system proposed is justified because it (a) restricts the submission of disclosure statements to an objective and expert entity outside the institution, (b) opposes the release of such disclosures to member institutions’ admissions offices, (c) incorporates an appeal process that is directly responsive to the Secretary of Education’s call for a holistic review, (d) is limited to past violent behavior, as opposed to all crimes, and (e) only considers such behavior in relation to the privilege of participating in athletics, the specific subculture to be affected.

• Allowing the continued participation of accused would place the institution at risk for knowingly enabling a hostile or dangerous campus environment to exist. Preventing the accused from interacting with large number of students and the general public reduces this risk.

• Such clear, unambiguous, and uniform requirements, applicable to all members of the NCAA and other national-collegiate-athletic-governance organizations will deter institutions from supporting alleged athlete perpetrators, blaming the victim, failing to hold athletes responsible for their actions, and impeding the investigation or adjudication of such misconduct.

• Required returning-athlete disclosure statements of recent allegations or findings of sexual or other violent acts will reveal disqualifying violent behaviors, whenever or wherever they have occurred. The submission of disclosure updates to a central repository will ensure that data applicable to athletes’ entire college careers are available for research.

Recommendation 4. Responsibilities of Athletic Department Staff

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

a. Coaches and athletic department staff members are critical actors in recognizing athlete sexual misconduct. While the May 2020 revised Title IX regulation eliminated coaches, trainers, and other athletic-department personnel as “mandatory reporters,” national collegiate athletics governance organizations should require, as a condition of membership, that all athletics staff members report knowledge of any sexual or other violent incident or sexual harassment committed by any athlete or suffered by any athlete victim to the athletic director or other employee with the authority to “institute corrective measures.” For student-athletes, coaches and trainers in particular, but also other athletics supervisor and athlete wellness professionals, most often know the athletes best and often serve as de facto parents, counselors, and mentors for four years. These employees closely observe the mental, physical, and emotional well-being of athletes and changes in team culture. They may be the first individuals to become aware of athlete distress - the pain of the victim and the team’s knowledge of athlete perpetrator misconduct.

b. Athletic department employees should be prohibited from involvement (except for their reporting obligations) in any campus or external investigation and adjudication processes, including arranging for attorneys to assist athletes, unless the institution provides all students with the same legal assistance. Athletic department staff should also be prohibited from communicating with victims, campus or local law enforcement, district attorney’s offices and potential or listed witnesses (unless subpoenaed or as part of a formal process);
c. Prior to recruiting any high school or transfer athlete, confirm with the national collegiate governing organization Eligibility Center or other entity responsible for being the central depository of athlete sexual misconduct disclosure forms and the athlete’s previous institution to verify that the athlete has not previously been declared ineligible under Code of Conduct rules. Obtain the most recent copy of the athlete’s disclosure form for review of a transfer prospect. Ensure that all high school prospects complete a disclosure statement prior to the initiation of recruitment activities.

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

Recommendation 5. Require Athlete and Staff Violence Education

All national collegiate athletic governance organizations should convene the nation’s top athlete gender violence educators to develop a comprehensive curriculum and establish a national program to deliver gender violence programming to member institutions. They should examine programs that have already demonstrated success with fraternities and the military, two groups facing similar dysfunctional subcultures. Key to success is a commitment to the delivery of “gender transformative” programming. Such programming includes restorative justice practices and bystander-prevention education. It requires understanding important racial subtexts and confronting cultural beliefs about manhood, not only how they affect male athletes, but also how female athletes trained with similar expectations of physical dominance over others may fall into the same behavioral traps.

Athlete interactive programming must address the underlying gender, sexual, and social norms that underlie the dysfunctional athletics subculture. Sufficient time allocations and small group settings are required for such transformative work with athletes. No one-hour quick fix solution or educational short-cut exists in this area. Institutions must make annual multiple day time commitments for such programming.

Education of athletic-program leaders, especially coaches and athletic administrators, is imperative. These groups must be held accountable for creating an athletic program and team climate that rejects the dysfunctional athletics subculture. Again, the time commitment for such transformational programming must be sufficient. For example, athletic administrators and coaches, team captains and co-captains, and athletes’-advisory-council-members should have a minimum of one full day of training annually.
Leadership programming to be framed with athletics as a major partner in a coordinated campus response to sexual-assault and relationship-abuse issues.

The NCAA or other national-collegiate-governance-organizations should fully fund program development and delivery. In the case of the NCAA, the FBS conferences that are the sole beneficiaries of significant College Football Playoff revenues (the NCAA does not own the College Football Playoff) should fund the cost of delivery. National-collegiate-athletic-governance organizations that lack the financial resources enjoyed by the NCAA should seek grant support to develop and deliver this training.

Rationale

- To shift the underlying social norms that support the described athletics subculture will require the enforcement of rules and policies that create deterrents to violent conduct. That shift will also require violence-prevention education that examines gender and sexual norms and how these norms sometimes intersect with race or ethnicity.

- A growing, if not established, consensus among those working in gender-violence prevention and other health-related behaviors teaches that for programs to be effective, they must be "gender transformative." In other words, men, and young men in particular, must discuss and think through, often in same-sex group settings, how cultural beliefs about manhood affect behavior. This is serious work that cannot be accomplished by participating in an online educational program or by putting 300 to 600 student-athletes in a room to hear a one-hour speech or theatrical performance about consent or "healthy relationships."

- Coaches spend an extraordinary number of hours training athletes to be aggressive and physically dominant and have done little to shift player attitudes and bragging about sexual conquest. We must spend the time needed to address violence in non-sport settings and to confront the “group think” surrounding lack of respect for women.

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

Recommendation 6. Establish a National Collegiate Athletic Governance Organization

Athlete Ombudsman Office

National collegiate athletic governance organizations respectively should establish independent athlete ombudsman offices (modeled after the USOC athlete ombudsman operation).69 Those offices will provide confidential assistance to athletes seeking advice on responding to team situations, questions and answers about national athletic governance organization rules and other issues of concern to athletes. The office should

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69 See [http://www.teamusa.org/Athlete-Resources/Athlete-Ombudsman](http://www.teamusa.org/Athlete-Resources/Athlete-Ombudsman) for a description of the USOC Ombudsman program.
have access to a wide variety of expert resources specializing in various health, legal, and
other issues. Consideration should be given to making available a 1-800 number, live online
counseling and/or resources that athletes may access at any time. The office should
maintain data about such contacts to use for research purposes. Member institutions
should be required to annually distribute contact instructions and information on the
services of the Ombudsman Office to every athlete. Although the national collegiate
athletic governance organization should pay the salaries of employees staffing the office
and its operating expenses, the selection and annual evaluation of its staff and services
should be delegated to a special committee of distinguished former athletes who have
completed their eligibility and who are not employed by any member institution.

Rationale

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

• Making the health and well-being of athletes primary should be the mission of a
collegiate-athletics-governance-organization. After all, athletes generate significant
revenues for the organizations and their member institutions.

• Many institutions provide their students with access to professional counselors. Still,
assembling a staff and others who are expert in issues specific to the college athlete
experience is necessary. An ombudsman service may be as simple as letting athletes know
that campus student health centers provide confidential counseling.


National-collegiate-athletic-governance organizations should begin regularized collection
of data on athlete sexual and other violent behavior. The data should include questions
about the athletics subculture as part of regularized college athlete research initiatives
(such as the once-every-five-years NCAA GOALS surveys). All national collegiate athletic
organizations should also adopt a policy that makes collected individual-level data publicly
available to researchers. Research studies should include random samples of athletes and
non-athletes within the same survey. In particular, future surveys should also explicitly
oversample college athletes from multiple sports to assess the unique differences across
different types of student-athletes, when compared to the general student body.

Rationale

• The NCAA regularly collects data on Finances, Academics, Student-Athlete Well-Being,
Participation Demographics, and Personnel (visit the following link;
Although the NCAA is committed to collecting data on student-athletes at both the institutional and individual levels, the organization has been much slower to share data with researchers who lack direct ties to the NCAA (i.e., making individual-level data publicly available for researchers to freely use). Despite the effort by the NCAA and the Inter-University Consortium for Political and Social Research (ICPSR) effort to share data with the public (visit the following link; http://www.icpsr.umich.edu/icpsrweb/NCAA/), no current individual-level data are publically available for researchers to download.

- More troubling is that NCAA individual-level surveys of student-athletes regarding issues like substance use or academic experiences do not have adequate control groups to provide meaningful comparisons (i.e., a sample of students who do not participate in athletics). A greater effort is necessary to collect random samples of athletes and non-athletes within the same survey to address major public-health issues like substance use, sexual violence, and mental health. These surveys must explicitly oversample athletes from multiple sports to assess the unique differences across different types of student-athletes (e.g., football versus track) when compared to the general student body.

**Recommendation 8.** Prohibit the use of special “escorts” for visiting prospective college athletes.

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

**Rationale**

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

- ESPN revealed a four year stripper scandal at the University of Louisville involving of paying escorts to entertain and have sex with recruits, including in a campus dormitory

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where athletes were housed.\textsuperscript{72} The same practices occurred at the University of Colorado.\textsuperscript{73}

- The NCAA has prohibited the use of non-students or those not trained by the institution to provide campus tours as “hosts” who may be paid for entertaining visiting prospects – see Division I NCAA Manual for instance:

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

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

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