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## An Intersection of Gender, Race, and Sports: Guidelines for Universities Determining Whether Athletes Accused of Title IX Violations Should be Removed from Their Teams

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# An Intersection of Gender, Race, and Sports: Guidelines for Universities Determining Whether Athletes Accused of Title IX Violations Should be Removed from Their Teams

David A. Grenardo\*

*Sexual assault on college campuses remains an epidemic. As universities attempt to handle Title IX complaints regarding sexual misconduct, they must protect the academic environment and integrity of their schools. Since athletes are three times more likely to be accused of sexual assault than non-athletes, and schools have historically mishandled complaints against athletes, the proposed guidelines in this Article provide an equitable approach for determining when an athlete should be removed from his team based on accusations of a Title IX violation. The guidelines are based on the newly implemented Title IX regulations and take into account the interests and biases of the schools, athletes, and victims, limit the discretion of the schools in deciding when to*

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*remove an athlete from his team, and send an unequivocal message to the rest of the university and student body that providing a safe academic environment for all students is more important than the school's athletic profits and success.*

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INTRODUCTION

Only ten days after Lizzy Seeberg alleged she was raped by a University of Notre Dame football player, she took her own life.<sup>1</sup> Suicide and suicidal thoughts comprise only a couple of the potential effects experienced by survivors of sexual assault.<sup>2</sup> Survivors also face increased risks of suffering from post-traumatic stress disorder (PTSD), anxiety, substance abuse, and depression.<sup>3</sup> The story of Lizzy Seeberg, who studied at Saint Mary’s College located just north of South Bend, Indiana, represents an all-too-common one regarding sexual assault on college campuses.<sup>4</sup> The latest extensive survey done on sexual assault

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1. THE HUNTING GROUND (Chain Camera Pictures 2015) (including remarks of the deceased victim’s father recalling the day he learned that his daughter had committed suicide); Melinda Henneberger, *Why I Won’t be Cheering for Old Notre Dame*, WASH. POST (Dec. 4, 2012), [https://www.washingtonpost.com/blogs/she-the-people/wp/2012/12/04/why-i-wont-be-cheering-for-old-notre-dame/?noredirect=on&utm\\_term=.a15eb3896778](https://www.washingtonpost.com/blogs/she-the-people/wp/2012/12/04/why-i-wont-be-cheering-for-old-notre-dame/?noredirect=on&utm_term=.a15eb3896778) [<https://perma.cc/5QP6-73A2>].

2. *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK (last visited Mar. 18, 2019) (citing DG KILPATRICK ET AL., NAT’L VICTIM CTR. & MED. UNIV. OF S.C., *RAPE IN AMERICA: A REPORT TO THE NATION* (1992)), <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/P3K8-YUNH>] (stating “33% of women who are raped contemplate suicide” and “13% of women who are raped attempt suicide”).

3. Diana Yates, *Increased Risk of Suicide, Mental Health Conditions Linked to Sexual Assault Victimization*, UNIV. OF ILL. AT URBANA-CHAMPAIGN (Aug. 8, 2017, 4:00 PM) (citing Emily R. Dworkin et al., *Sexual Assault Victimization and Psychopathology: A Review and Meta-analysis*, 56 *CLINICAL PSYCHOL. REV.* 65 (2017)), <https://news.illinois.edu/view/6367/541218> [<https://perma.cc/KLG6-B9JH>] (analyzing the links between sexual assault, mental health, and suicide); *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK (last visited Mar. 18, 2019), <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/P3K8-YUNH>]; Carolyn Coker Ross, *Eating Disorders, Trauma, and PTSD*, NAT’L EATING DISORDERS ASS’N BLOG (last visited Mar. 18, 2019) (citing Timothy D. Brewerton, *Eating Disorders, Trauma, and Comorbidity: Focus on PTSD*, 15 *THE J. OF TREATMENT & PREVENTION* 285, 293 (2007) (finding that victims of sexual trauma were more likely to suffer from PTSD and eating disorders)), <https://www.nationaleatingdisorders.org/blog/eating-disorders-trauma-ptsd-recovery> [<https://perma.cc/35HZ-L9CB>] (finding trauma stemming from sexual assault and sexual harassment to be associated with eating disorders).

4. *The Campus Safety and Security Data Analysis Cutting Tool*, U.S. DEP’T OF EDUC., <http://ope.ed.gov/Security/> [<https://perma.cc/L2FE-6EC3>] (last visited Mar. 18, 2019) (reporting that the number of reported criminal offenses on college and university campuses in 2017 was 38,080, with 7,491 of those being rape); UNIV. OF MICH., *RESULTS OF 2015 UNIVERSITY OF MICHIGAN CAMPUS CLIMATE SURVEY ON SEXUAL MISCONDUCT 4* (2015), <https://publicaffairs.vpcomm.umich.edu/wp-content/uploads/sites/19/2015/04/Complete-survey-results.pdf> [<https://perma.cc/M5AF-V9XU>] (stating that “22.5% of undergraduate females” reported having experienced sexual assault in some form); Kate B. Carey et al., *Incapacitated and*

in colleges occurred in 2019 and showed that 25.9% of female undergraduates were victims of sexual assault.<sup>5</sup> Moreover, athletes are three times more likely than other students to be accused of sexual assaults on college campuses.<sup>6</sup> What cannot be lost in the numbers is that each survivor is a person whose life and relationships will change forever because of another's vicious and senseless acts.<sup>7</sup>

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*Forcible Rape of College Women: Prevalence Across the First Year*, 56 J. OF ADOLESCENT HEALTH 678, 679 (2015) (reporting that 18.6% of female students surveyed at a New York university experienced either completed or attempted rape during their freshman year in college); DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 23 (2015), <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf> [<https://perma.cc/G3UV-4GHL>] (detailing data obtained from twenty-six universities, including that “[o]ne-third (33.1%) of senior females. . .report[ed] being a victim of nonconsensual sexual contact at least once” during college).

5. Report of the AAU (Association of American Universities), Campus Climate Survey on Sexual Assault and Misconduct (Rev. Jan. 17, 2020) at ix, available at <https://www.aau.edu/key-issues/campus-climate-and-safety/aaucampusclimate-survey-2019> (finding 6.8% of male undergraduates were victims of sexual assault) (last visited at Jul. 15, 2020); see Katherine V. Norton, *From Court Martial to College Campus: Incorporating the Military's Innovative Approaches to Sexual Violence into the University Setting*, 55 CAL. WESTERN L. REV. 465, 475 (2019) (estimating “20% to 25% of college women and 15% of college men are victims of forced sex during their time in college”) (quoting Nat'l Sexual Violence Resource Ctr., Sexual Assault in the United States, available at <https://www.nsvrc.org/statistics>); Nick Anderson & Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/> [<https://perma.cc/QF4G-FCXG>] (polling 1,053 women and men across five hundred colleges and universities); CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-2 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/E46J-72TZ>] (stating that 19% of women experienced sexual assault after entering college, as found in a study commissioned by the National Institute of Justice (NIJ) and funded by the United States Department of Justice (DOJ)).

6. Paula Lavigne, *Outside The Lines: College Athletes Three Times More Likely to be Named in Title IX Sexual Misconduct Complaints*, ESPN (Nov. 2, 2018), [http://www.espn.com/espn/otl/story/\\_id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints](http://www.espn.com/espn/otl/story/_id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints) [<https://perma.cc/ZA4Q-W57R>] (stating that according to data provided by thirty-two Power Five schools, college athletes represent just 1.7% of the student body but account for over 6% of Title IX complaints); see also ALYSSA KEEHAN ET AL., UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 4 (2015), [http://www.ncdsv.org/ERS\\_Confronting-Campus-Sexual-Assault\\_2015.pdf](http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf) [<https://perma.cc/53BA-PLXG>] (discussing how college athletes are accused of rape at a much higher rate than non-college athletes). Twenty percent of repeat offenders are college athletes. *Id.*

7. *Victims of Sexual Violence: Statistics, RAPE, ABUSE & INCEST NAT'L NETWORK* (last visited Mar. 18, 2019) (citing LYNN LANGTON & JENNIFER TRUMAN, SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME (2014), <https://www.bjs.gov/content/pub/pdf/sivc.pdf> [<https://perma.cc/5W9W-BUFN>]), <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/P3K8-YUNH>] (stating that “38% of victims of sexual violence experience work or school problems, which can include significant problems with a boss, coworker, or peer,” and “37% experience family/friend problems, including getting into arguments more frequently than before, not feeling able to trust their family/friends, or not feeling as close to them as before the crime.”). While women are not the only people who experience sexual assault, this article will focus on female sexual assault victims and male perpetrators. See, e.g., *Victims of Sexual Violence: Statistics, RAPE, ABUSE & INCEST NAT'L NETWORK* (last visited Mar. 18, 2019), <https://www.rainn.org/statistics/victims-sexual-violence>

Not only might the sexual assault of a young woman derail her future and prevent her from attaining the goals she is capable of, but the assault also places her in the line of fire for further harassment, particularly when a college athlete is the alleged perpetrator.<sup>8</sup> For example, Erica Kinsman received death threats and vulgar messages after asserting a fellow student at Florida State University, Jameis Winston, who was also the star quarterback for the nationally ranked football team, raped her.<sup>9</sup> Survivors of sexual assault often become the targets of vitriol from fans and fellow students as their sexual history, dating lives, and actions regarding the events in question become the focus of public scrutiny, instead of the alleged perpetrator's actions and past conduct.<sup>10</sup>

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[<https://perma.cc/P3K8-YUNH>] (stating that “[m]illions of men in the United States have been victims of rape.”).

8. AM. ASS'N OF UNIV. PROFESSORS, *CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES* 367 (2012) (citing Connie J. Kirkland, *Academic Impact of Sexual Assault* (George Mason Univ., 1994)), [https://www.aaup.org/file/Sexual\\_Assault\\_Policies.pdf](https://www.aaup.org/file/Sexual_Assault_Policies.pdf) [<https://perma.cc/86XX-UNVF>]

“College students who have survived sexual assault rarely perform at their prior academic levels, are sometimes unable to carry a normal course load, and frequently miss classes. These changes stem sometimes from social withdrawal, sometimes from a desire to avoid the perpetrator. Assaulted students regularly drop courses altogether, leave school, or transfer. Along with decline in academic performance and social withdrawal, long-term outcomes may include increased risk of depression, substance abuse, self-harm, eating disorders, post-traumatic stress, personality disorders, and suicide.”;

*see generally* Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 *TRAUMA VIOLENCE ABUSE* 191 (2014) (identifying the relationship between sexual harassment and psychological distress, academic disengagement, and academic performance). Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 *TRAUMA VIOLENCE ABUSE* 191 (2014) (“[W]omen who reported being sexually harassed by persons in positions of power at their universities also reported decreased school attendance, decreased quality and quantity of work, and dropping out.” (citing E. van Roosmalen & S.A. McDaniel, *Sexual Harassment in Academia: A Hazard to Women's Health*, 28 *WOMEN & HEALTH* 33 (1998)); *see, e.g.*, *THE HUNTING GROUND* (Chain Camera Pictures 2015) (containing an interview with Kinsman in which she confessed the sexual assault led her to withdrawal from the university).

9. *THE HUNTING GROUND* (Chain Camera Pictures 2015) (noting that fans and students of the university also called Kinsman an “opportunist” who had fabricated the story for popularity).

10. *See* U.S. DEP'T OF JUSTICE, *RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013* 9 (2014) (reporting that 80% of rapes or sexual assault against college women go unreported to police, with “1 in 5” victims stating “fear of reprisal” as a reason why they did not report); Lavigne, *supra* note 7. “Dan Schorr, a Title IX consultant who aided Michigan State with Title IX investigations, stated that ‘although students overall are becoming more comfortable coming forward. . . the process is still daunting. [W]omen can face hostility from the school and community.’” *Id.* *See* Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 *AM. J. COMMUNITY PSYCHOL.* 263, 270 (2006) [[https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1705531/pdf/10464\\_2006\\_Article\\_9069.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1705531/pdf/10464_2006_Article_9069.pdf)] (“Unlike crimes such as burglary and assault, rape survivors must prove not only that the crime did in fact occur, but that they had no role in its occurrence.”); Phillip Ericksen, *Garland's Email Shows Baylor Culture of Victim-Blaming, Title IX Lawsuit Plaintiffs Say* (Sept. 1, 2017) (citing Exhibit A at 2, *Doe 1 et al. v. Baylor Univ.*, No. 6:16-cv-00173-RP (W.D. Tex., Mar. 7, 2017) (evidencing a 2016 email from Baylor's interim President to a senior administrator where he states that Baylor sexual assault victims “seem willingly to make themselves victims”)), [[https://www.wacotrib.com/news/courts\\_and\\_trials/garland-s-email-shows-baylor-culture-of-victim-blaming-title/article\\_46b76fb4-043e-508b-8eaf-f8ecd6abaf3.html](https://www.wacotrib.com/news/courts_and_trials/garland-s-email-shows-baylor-culture-of-victim-blaming-title/article_46b76fb4-043e-508b-8eaf-f8ecd6abaf3.html)] [<https://perma.cc/Y5PW-FZ85>]; *THE HUNTING GROUND* (Chain Camera Pictures 2015) (involving

When a student makes a sexual assault complaint against another student, Title IX requires the university to “adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints.”<sup>11</sup> The university must conduct an investigation and resolve the sexual assault complaint internally, regardless of whether a criminal case is pursued by law enforcement, the district or state attorney, or the victim.<sup>12</sup> Colleges, as discussed *infra*, have egregiously mishandled Title IX complaints, including many cases involving athletes as the alleged perpetrators.<sup>13</sup> If a university mishandles a Title IX complaint involving alleged student-on-student sexual misconduct, then the victim or accused can sue the school,<sup>14</sup> but courts give great deference and latitude to schools in how they handle Title IX claims.<sup>15</sup> This article proposes guidelines to address one particular aspect of a Title IX complaint: when and how to remove an athlete from his team after he is accused of violating Title IX based on sexual misconduct.<sup>16</sup>

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numerous accounts of administrators and university police blaming the sexual assault on the victim).

11. Dear Colleague Letter from U.S. Dept. of Educ., Office of Civil Rights (Sept. 22, 2017) (citing 34 C.F.R. § 106.8(b)); 2001 Guidance at (V)(D); *see also* 34 C.F.R. § 668.46(k)(2)(i) (providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must “[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result”).

12. *See, e.g.*, Emma B. Bolla, *The Assault on Campus Assault: The Conflicts Between Local Law Enforcement, FERPA, and Title IX*, 60 B.C. L. Rev. 1379, 1385 (2019) (providing that a Title IX investigation does not create a criminal proceeding and “local law enforcement may or may not bring criminal charges” if it learns of a Title IX sexual assault claim).

13. *See, e.g.*, BAYLOR UNIVERSITY BOARD OF REGENTS FINDINGS OF FACT <https://www.baylor.edu/thefacts/doc.php/266596.pdf> (conducting “an independent and external review of Baylor University’s institutional response to Title IX and related compliance issues through the lens of specific cases.”); Court Order, *Doe 1 et al. v. Baylor Univ.*, No. 6:16-cv-00173-RP (W.D. Tex., Mar. 7, 2017); Sue Ambrose & David Tarrant, *The Silence of Ken Starr: Baylor’s President Focused on Football, Fumbled on Sex Assaults*, DALLAS MORNING NEWS (May 5, 2016), [http://interactives.dallasnews.com/2016/the-silence-of-ken-starr/#\\_ga=2.17432057.1991307063.1553407624-1362776751.1511387873](http://interactives.dallasnews.com/2016/the-silence-of-ken-starr/#_ga=2.17432057.1991307063.1553407624-1362776751.1511387873) [<https://perma.cc/5HB7-FJKE>]

14. *Davis v. Monroe Bd. of Educ.*, 526 U.S. 629, 651 (1999) (holding that students can sue the university for its handling of Title IX claims).

15. *Id.* at 649 (stating that schools must “respond to known [sexual] harassment in a manner that is not clearly unreasonable.”).

16. Legal commentators have argued that once there is an allegation or complaint against the athlete, then the athlete should immediately be suspended. *See* Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX’s Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 581 (2016) (stating that “[a]ppropriate interim steps when a student-athlete is involved in a report of sexual violence must include an immediate suspension of playing privileges”); Katherine Mangan, *Colleges Walk a Fine Line When Athletes are Accused of Sexual Assault*, THE CHRON. OF HIGHER EDUC. (Oct. 9, 2014), <https://www.chronicle.com/article/Colleges-Walk-a-Fine-Line-When/149291> [<https://perma.cc/X4LD-J6AF>] (“While there’s always a risk that a quick, public response could sully the reputation of a student who turns out to be falsely accused, failing to take action would be worse....”).

Professor Jayma Meyer, as a part of her extensive set of proposed rule changes for the NCAA to enact and enforce to address universities’ mishandling of sexual violence complaints, briefly addressed suspending a player accused of sexual violence arguing that an independent panel comprised of “lawyers or law enforcement experts not connected in any way to the school” would

To create a just and equitable policy, the interests and biases of the victim, accused, and university must be considered. The victim wants justice for the harm she suffered and will continue to suffer throughout her life due to the actions of the perpetrator. Notably, in the criminal context, women who report such claims rarely fabricate assaults. False reporting involves a “reported crime to a law enforcement agency that an investigation factually proves never occurred.”<sup>17</sup> Multiple studies indicate that the percentage of false reporting typically ranges between 2% to 8%,<sup>18</sup> and those numbers are “frequently inflated, in part because of...a weak understanding of sexual assault.”<sup>19</sup> In other words, over 90% of women reporting sexual assaults are telling the truth, and that percentage is likely even higher because the vast majority of sexual assaults go unreported to the police.<sup>20</sup> Reporting a Title IX sexual assault violation is not the absolute equivalent of reporting a crime to the police because making a false Title IX report to a university administrator is not a crime, whereas falsely reporting to a law enforcement agency is. However, both reporting processes involve a woman coming forward to report a horrendous incident, which will likely result in the victim facing unnecessary scrutiny when she may already feel embarrassed and ashamed.<sup>21</sup>

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“temporarily suspend from all team activities athletes who are plausibly accused of sexual assault.” Jayma M. Meyer, *It’s on the NCAA: A Playbook For Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 411 (2017). Professor Meyer posited that plausibly accused involves “reasonable suspicion that the accusations are credible,” and evidence such as bruising or other trauma would be relevant in making that determination. *Id.* at 411-12. The proposed guidelines in this Article align with Professor Meyer’s suggested approach and provide a more nuanced and detailed approach than she provided. The proposed guidelines attempt to protect the academic environment of the university while being fair and empathetic to both the victim and accused.

17. *False Reporting*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, <https://www.nsvrc.org/publications/false-reporting-overview> [https://perma.cc/562B-EDQ8] (last visited Mar. 12, 2019).

18. LIZ KELLY ET AL., NAT’L ARCHIVES, A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES (2005), <https://webarchive.nationalarchives.gov.uk/20110218141141/http://rds.homeoffice.gov.uk/rds/pdf/s05/hors293.pdf> [http://perma.cc/6AUK-ZCLH] (citing a false reporting rate of 3%); Sharon Grace et al., NAT’L CRIMINAL JUSTICE REFERENCE SERV., *Rape: From Recording to Conviction* (1992), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=142244> [http://perma.cc/9ZQF-8LGG] (discussing an 8% false-reporting statistic); Dr. Melanie Heenan & Dr. Suellen Murray, NAT’L CRIMINAL JUSTICE REFERENCE SERV., *Study of Reported Rapes in Victoria 2000-2003* (July 2006), <https://www.ncjrs.gov/app/abstractdb/AbstractDBDetails.aspx?id=243182> [http://perma.cc/5VK2-KJXW] (discussing a 2% false reporting rate).

19. *False Reporting*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, <https://www.nsvrc.org/publications/false-reporting-overview> [https://perma.cc/562B-EDQ8] (last visited Mar. 12, 2019).

20. *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> [https://perma.cc/4NL3-UVN6] (last visited Aug. 8, 2019) (showing that roughly three out of four sexual assaults go unreported). *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Aug. 8, 2019) (stating that only 20% of female student victims of sexual violence report the assault to law enforcement).

21. *Rivera v. Wyoming*, 840 P.2d 933, 938 (Wyo. 1992) (stating that victims of a sexual assault commonly do not report the incident because of feelings of shame and embarrassment).



As for the college athlete, he wants to avoid the reputational harm that accompanies a false accusation, which could derail his promising professional career and life. One of the most high-profile cases of alleged sexual assault by college athletes involved three members of the Duke University lacrosse team who were falsely accused of raping a student of a neighboring school in a criminal case.<sup>22</sup> Although they were eventually exonerated, those Duke Lacrosse players received scorn and hate mail from those who took the alleged victim's side.<sup>23</sup>

Black college athletes face a higher likelihood of being falsely accused of sexual assault.<sup>24</sup> In a study by the National Registry of Exonerations, “[j]udging from exonerations, a [B]lack prisoner serving time for sexual assault is three-and-a-half times more likely to be innocent than a [W]hite sexual assault convict.”<sup>25</sup> Not only are Black men more likely to be falsely accused or wrongfully convicted of criminal offenses that they did not commit, but they also face a higher rate of Title IX complaints that may never have occurred.<sup>26</sup> Furthermore, a White woman may accuse an innocent Black man of sexual assault because of “morning after-remorse” for engaging in interracial sexual intercourse.<sup>27</sup>

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22. See generally Amended Findings of Fact, Conclusions of Law, and Order of Discipline at 15, *N.C. State Bar v. Nifong*, No. 06–DHC–35 (Disc. Hr’g Comm’n N.C. State Bar, July 31, 2007) (concluding that the basis of the allegations made by the alleged victim was materially false).

23. See *id.* (disbarring the former District Attorney for, among other things, seeking and obtaining indictments against the athletes even after learning DNA evidence exonerated them).

24. See, e.g., NATIONAL REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES iii (Samuel R. Gross et al. eds, 2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=other> [<https://perma.cc/S7PQ-F8CZ>]. In 2014, Black males constituted only 2.5 % of the undergraduate student bodies at institutions in the Power Five Conferences—Atlantic Coast Conference (“ACC”), Big Ten Conference, Big 12 Conference, Pac 12 Conference, and the Southeastern Conference (“SEC”)—while constituting 56.3% and 60.8% of football and men’s basketball players. SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUALITIES IN NCAA DIVISION I COLLEGE SPORTS I (2016).

25. SAMUEL R. GROSS ET AL., NAT’L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES iii (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=other> [<https://perma.cc/S7PQ-F8CZ>].

26. Michael Jones, *Believe the survivor? Here’s 11 Times Young Black Men Were Railroaded By Campus Sexual Assault Claims*, THE COLLEGE FIX (Nov. 7, 2018), <https://www.thecollegefix.com/believe-the-survivor-heres-11-times-young-black-men-were-railroaded-by-campus-sexual-assault-claims/>; See Reauthorizing The Higher Education Act: Combating Campus Sexual Assault: Hearing Of The Committee On Health, Education, Labor, And Pensions, 114 Cong. 672 (2015) (Statement of Janet Halley) (explaining her research indicates “the rate of complaints and sanctions against male (including transitioning to male) students of color is unreasonably high.”), <https://www.govinfo.gov/content/pkg/CHRG-114shrg95801/pdf/CHRG-114shrg95801.pdf>; See also Jeannie Suk Gersen, *Shutting Down Conversations About Rape At Harvard Law*, NY MAG (Dec. 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school> (writing that the “dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations”).

27. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106–07 (2015).

Finally, the university's interest in the business of college athletics affects how it responds to Title IX complaints. Major college athletics, which include the revenue-generating sports of college football and men's basketball,<sup>28</sup> represent an \$11 billion-a-year industry.<sup>29</sup> The college football playoff system generates over \$500 million of revenue alone.<sup>30</sup> Some schools' football programs individually generate over \$100 million annually,<sup>31</sup> while a school's basketball team can generate tens of millions of dollars as well.<sup>32</sup> Colleges and universities spend tens of millions of dollars on sports facilities and stadiums, and alumni and boosters donate substantially to schools based on their sports programs.<sup>33</sup>

The fact that athletics are involved can affect how a Title IX investigation is conducted, even if it should not. Schools often prioritize sports and winning athletic teams above the well-being of their students and survivors of sexual assault.<sup>34</sup> As a result, colleges and universities should adopt guidelines for Title

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28. Cork Gaines, *The Average College Football Team Makes More Money Than the Next 25 College Sports Combined*, BUSINESS INSIDER (Oct. 20, 2016), <http://www.businessinsider.com/college-sports-revenue-2016-10> [<https://perma.cc/EW6P-RUQN>].

29. Marc E. Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1630-1631 (2017).

30. B. David Ridpath, *The College Football Playoff and other NCAA Revenues are an Exposé of Selfish Interest*, FORBES (Jan. 17, 2017), <https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#5c1bc5ff4e1a> [<https://perma.cc/899V-TMSE>].

31. See David Jones, *Which Are the 25 Richest College Football Programs? A Few Names Nearing the Top Might Surprise You*, PENN LIVE (May 8, 2017), [http://www.pennlive.com/pennstatefootball/index.ssf/2017/05/richest\\_college\\_football\\_progr.html](http://www.pennlive.com/pennstatefootball/index.ssf/2017/05/richest_college_football_progr.html) [<https://perma.cc/FCL5-A3YY>] (ranking the 25 richest football programs for the 2015–16 fiscal year); see also Michael Wayne Bratton, *Five of the Top 10 Richest College Football Programs are from the SEC*, SDS (June 2017), <https://www.saturdaydownsouth.com/sec-football/five-top-10-richest-college-football-programs-sec/> [<https://perma.cc/4H8U-AZNR>] (reporting Texas was ranked as the number one college football program with the highest revenue for the 2015 football season totaling \$127.5 million).

32. Chris Carlson, *Which College Basketball Programs Make the Most Money? Syracuse Among Top 5*, SYRACUSE.COM (Mar. 30, 2017), [http://www.syracuse.com/orangebasketball/index.ssf/2017/03/which\\_college\\_basketball\\_programs\\_make\\_the\\_most\\_money\\_syracuse\\_among\\_top\\_5.html](http://www.syracuse.com/orangebasketball/index.ssf/2017/03/which_college_basketball_programs_make_the_most_money_syracuse_among_top_5.html) [<https://perma.cc/6JPD-VZKD>] (listing the college basketball programs with the highest revenue and naming Louisville as the program with the highest revenue for the 2015–16 basketball season).

33. See *Rice Holds Ceremonial Groundbreaking for New Brian Patterson Sports Performance Center*, RICE OWLS (Mar. 10, 2015), <http://www.riceowls.com/genrel/031015aab.html>. [<https://perma.cc/9EF6-6QKC>]; The Capital-Journal, *K-State Football Announces Plans for Next Bill Snyder Family Stadium Project*, Topeka Cap.-J. (Sept. 9, 2015, 10:19 AM), <http://cjonline.com/sports/catzone/2015-09-09/k-state-football-announces-plans-next-bill-snyder-family-stadium-project> [<https://perma.cc/5S89-E9V7>] (discussing Kansas State University's "grand opening of the \$68 million" sports complex and the upcoming \$15 million stadium improvements).

34. See BAYLOR UNIVERSITY BOARD OF REGENTS FINDINGS OF FACT, <https://www.baylor.edu/thefacts/doc.php/266596.pdf> (conducting "an independent and external review of Baylor University's institutional response to Title IX and related compliance issues through the lens of specific cases"); see also Moorman & Osborne, *supra* note 17, at 545, 553–54 (2016) (detailing Florida State University's failure to investigate and address properly accusations

IX complaints against athletes that allow universities to remove athletes from their teams shortly after a Title IX accusation has been made.

The proposed guidelines must be fair, uniform, and just.<sup>35</sup> In order to achieve this, the federal government should require that when addressing sexual assault complaints, schools follow clear guidelines on when athletes should be removed from games, practices, meetings, and/or training sessions. A failure to do so should result in mandatory fines and sanctions, as the federal government can withhold all federal funds from a university for failing to comply with Title IX.<sup>36</sup>

As discussed in detail below, the new Title IX regulations mandate that after learning of an assault, a Title IX coordinator must promptly contact an alleged victim of sexual assault to discuss supportive measures.<sup>37</sup> Supportive measures are interim measures taken during the investigation of the sexual assault, which can include the accused's removal from his sports team.<sup>38</sup> This Article proposes that within five days of learning of the sexual assault allegation, the school's Title IX coordinator should use the proposed guidelines to remove an athlete from his team. The proposed guidelines attempt to remove a great deal of discretion from the university official (Title IX coordinator) by requiring the athlete's removal from the team for games, practices, meetings, and training sessions when corroborating evidence accompanies a Title IX complaint regarding sexual misconduct.<sup>39</sup> The guidelines recognize the low false reporting rates of sexual assaults to the police, which is instructive for Title IX sexual misconduct claims, while being mindful of the potential racial bias against the accused. The guidelines also include mitigating factors that, when present, could allow an athlete to avoid removal from the team for practices, meetings, and training sessions.

Part I of this Article discusses the applicable legal background of Title IX with respect to sexual assault. Part II discusses the need for proposed guidelines to create an equitable and consistent approach to handling athletes accused of sexual assault under Title IX. Part III sets forth the conflicting interests of

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of rape against its highly coveted quarterback Jameis Winston in a timely manner); *see also infra* Part II(B) *Schools Have Mishandled Title IX Complaints Against Athletes* of this Article.

35. See Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX's Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 581 (2016) (stating that "[u]niformity [of sanction] creates a culture that establishes a standard for all student-athletes and takes disciplinary measures out of the hands of the coach").

36. See 34 C.F.R. § 100.8(b) (1980) (permitting refusal of federal assistance for noncompliance with Title IX).

37. 34 C.F.R. § 106.44 (2020).

38. 34 C.F.R. § 106.30 (2020); Off. of Civ. Rts., Dept. of Ed., Final Rule at 569-70, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf> [<https://perma.cc/K5ED-DRPE>].

39. See Jayma M. Meyer, *It's on the NCAA: A Playbook For Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 411-12 (2017) (promoting suspension of an athlete if evidence supports the Title IX accusation).

universities, the accused, and the victim in creating the proposed guidelines. Part IV details the proposed guidelines and the rationale for each aspect. Part V discusses and responds to the counterarguments against the proposed guidelines.

This Article concludes that schools should follow the proposed guidelines and remove college athletes from their teams while a Title IX investigation is pending, and evidence warrants removal. This approach takes into account the interests and biases of the schools, athletes, and victims; limits the discretion of the schools in deciding when to remove the athlete; and sends a message to the rest of the university and student body that providing a safe academic environment for all students is more important than the school's athletic profits and success.

## I. LEGAL BACKGROUND

### A. *Title IX Prohibits Sexual Misconduct*

Title IX of the Education Amendments of 1972 provides the following: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”<sup>40</sup> Failing to provide equal athletic opportunities based on sexual discrimination is a Title IX violation.<sup>41</sup> The Supreme Court of the United States determined that Title IX also prohibits sexual assault and sexual misconduct by students against fellow students.<sup>42</sup> The new federal regulations specifically prohibit sexual harassment.<sup>43</sup> Sexual harassment “can interfere with a student’s academic performance and emotional and physical well-being. Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”<sup>44</sup> The government can withdraw funding from universities that fail to comply with Title IX.<sup>45</sup> Although this penalty exists, the government has yet to use it.<sup>46</sup> As nearly all universities and colleges receive some form of federal funding, nearly all are subject to the statute.<sup>47</sup>

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40. 20 U.S.C. §1681(a) (2012).

41. See 34 C.F.R. § 106.41 (2019); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000).

42. See generally *Davis v. Monroe Cty. Board of Edu.*, 526 U.S. 629 (1999).

43. See 34 C.F.R. §§ 106.30, 106.44, 106.45 (2020).

44. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512, (Jan. 19, 2001), available at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 Guidance].

45. See 34 C.F.R. § 100.8(b) (1980) (permitting refusal of Federal assistance for noncompliance with Title IX). Title IX, enacted under Congress’ Spending Clause powers, is treated as a contract between the federal government and school in which the government can withhold funds from schools if they do not comply with Title IX. See *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

46. See Erin E. Buzuvis, Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault, 78 Mont. L. Rev. 71, 79, 84 (2017).

47. See 34 C.F.R. § 100.6 (1982) (codifying the breadth of institutions required to comply

A university complies with Title IX by “adopt[ing] and publish[ing] grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging” sexual harassment.<sup>48</sup> A university must provide notification to students of the university’s “grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.”<sup>49</sup>

Title IX policy underwent major revisions recently culminating in substantial changes to the governing federal regulations that went into effect August 14, 2020.<sup>50</sup> The new regulations codify the standard applicable to universities regarding when and how universities must respond to Title IX sexual harassment allegations. “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”<sup>51</sup> The new regulations provide that “[a] recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”<sup>52</sup> In particular, the major aspects of a university’s obligation include the following: offer supportive measures (defined and discussed *infra* in Part I(D)) to the alleged victim, the complainant, promptly after a complaint is made, whether or not the complaint is a formal complaint<sup>53</sup>; follow a grievance process (described in the following paragraph) before imposing disciplinary sanctions or other actions, not including supportive measures, against the alleged perpetrator, the respondent; not restrict constitutionally protected rights of the parties; and investigate any sexual harassment allegations made in a formal complaint.<sup>54</sup>

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with Department of Education regulations, including Title IX regulations).

48. 34 C.F.R. § 106.8(c) (2020).

49. 34 C.F.R. § 106.8(c) (2020).

50. See generally 34 C.F.R. Part 106; Title IX: Fact Sheet: Final Title IX Regulations, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-fact-sheet.pdf> [https://perma.cc/P8BA-HEZF]. Critique or examination of every aspect of the new regulations go beyond the scope of this article. Only the relevant new provisions will be discussed.

51. 34 C.F.R. § 106.44 (2020). The regulations define actual knowledge as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.” 34 C.F.R. § 106.30 (2020). Education program or activity is limited to “locations, events, or circumstances over which the recipient [of Title IX funds, i.e., the University,] exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” *Id.*

52. 34 C.F.R. § 106.44 (2020).

53. A formal complaint is defined as “a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment,” which can be sent by email or through a portal for the purpose of reporting a Title IX complaint. 34 C.F.R. § 106.30 (2020).

54. 34 C.F.R. § 106.6(d) (2020) (discussing how a university cannot restrict a party’s constitutional rights through its response to a Title IX claim); *Id.* § 106.44 (requiring universities to offer supportive measures); *Id.* § 106.45 (discussing the grievance process); *Id.* § 106.45(b)(3)(i)

One of the areas of vast change involves the revamped grievance process that all universities must use to ensure compliance with Title IX.<sup>55</sup> Some of the essential elements and characteristics required of the new grievance process include the following:

- Beside written notice to both parties of the allegations, each party can select an advisor to represent them throughout the Title IX proceedings—the advisor may, but need not, be an attorney;
- Each party has “an equal opportunity to submit and review evidence throughout the investigation;”
- Trained and unbiased Title IX personnel must evaluate all relevant evidence objectively and without conflict or bias for or against either party;
- The parties’ privacy rights are protected in that a party’s written consent is required before its medical, psychological, or treatment records can be used during a grievance process; similarly, the rape shield protection applies and protects “complainants from inappropriately being asked about prior sexual history;”
- The parties must voluntarily consent in writing before an informal resolution process, such as mediation, is employed;
- The respondent is presumed innocent during the proceedings, and the school bears the burden to prove the respondent is responsible; the school can choose either preponderance of the evidence or clear and convincing as the standard so long as that standard applies in all Title IX proceedings (i.e., against either students or employees);
- Universities must “hold a live hearing and allow cross-examination by party advisors (never by the parties personally);” and the university will provide an advisor to a party, if it does not have one, to conduct cross-examination for that party;

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(mandating duty to investigate a formal complaint).

55. Several commentators believe the new regulations, in general, and the grievance process, in particular, favor the alleged perpetrator and create more barriers to justice for sexual assault survivors. See Debra Cassens Weiss, *New Title IX Regulations Give More Rights to College Students Accused of Sexual Misconduct*, ABAJOURNAL.COM (May 7, 2020), [https://www.abajournal.com/news/article/new-title-ix-regs-give-more-rights-to-students-accused-of-sexual-misconduct?utm\\_source=salesforce\\_206760&utm\\_medium=email&utm\\_campaign=weekly\\_email&utm\\_medium=email&utm\\_source=salesforce\\_206760&sc\\_sid=01075549&utm\\_campaign=&pr\\_omo=&utm\\_content=&additional4=&additional5=&sfmc\\_j=206760&sfmc\\_s=45062043&sfmc\\_l=1527&sfmc\\_jb=32&sfmc\\_mid=100027443&sfmc\\_u=6793803](https://www.abajournal.com/news/article/new-title-ix-regs-give-more-rights-to-students-accused-of-sexual-misconduct?utm_source=salesforce_206760&utm_medium=email&utm_campaign=weekly_email&utm_medium=email&utm_source=salesforce_206760&sc_sid=01075549&utm_campaign=&pr_omo=&utm_content=&additional4=&additional5=&sfmc_j=206760&sfmc_s=45062043&sfmc_l=1527&sfmc_jb=32&sfmc_mid=100027443&sfmc_u=6793803); [https://perma.cc/EL3M-KLUA]; Greta Anderson, *U.S. Publishes New Regulations On Campus Sexual Assault*, Inside Higher Ed (May 7, 2020), <https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations> [https://perma.cc/CLN3-N2GE].

- The determination reached by the decision-maker must be sent to both parties after the hearing, and it must be in a writing that explains how and why the decision-maker reached its conclusions;
- Each party has an opportunity to appeal the decision.<sup>56</sup>

Furthermore, if the respondent is found responsible, then the university must “implement remedies for a complainant,” and everyone in the Title IX process, such as the parties, witnesses, and potential witnesses, are protected from retaliation.<sup>57</sup>

The new federal regulations also define sexual harassment using three categories. The first category is quid pro quo where “[a]n employee of the recipient condition[s] the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct.”<sup>58</sup> The second category entails “[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”<sup>59</sup> Finally, the third category includes “ ‘[s]exual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”<sup>60</sup>

Rape and sexual assault fall under the second category of severe, pervasive, and objectively offensive unwelcome conduct, as well as the third category that includes sexual assault.<sup>61</sup> Sexual assault is defined in the new regulations by 20 U.S.C. 1092(f)(6)(A)(v), which states that “‘sexual assault’ means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.”<sup>62</sup> Under the FBI’s crime reporting system, sexual assault includes the following forcible sex offenses: rape, sodomy, sexual assault with an object, and fondling.<sup>63</sup>

Rape is defined as “[t]he carnal knowledge of a person, without the consent

56. 34 C.F.R. § 106.45 (2020).

57. 34 C.F.R. § 106.45 (2020).

58. 34 C.F.R. § 106.30 (2020).

59. 34 C.F.R. § 106.30 (2020).

60. 34 C.F.R. § 106.30 (2020). Domestic violence under VAWA “includes felony or misdemeanor crimes of violence” between persons in a relationship (via marriage or ex-marriage, sharing a child, cohabitating), which can include sexual assault. 34 U.S.C. 12291(a)(8). Dating violence, which involves people in a social, romantic, or intimate relationship, can also include sexual assault. 34 U.S.C. 12291(a)(10). Stalking does not fall under the proposed guidelines in this article.

61. See *Equal Opportunity, Nondiscrimination, Sexual and Other Forms of Harassment*, ST. MARY’S UNIV. (Dec. 2018) available at <https://www.stmarytx.edu/policies/human-resources/equal-opportunity-nondiscrimination-sexual-forms-harassment/> [<https://perma.cc/V78V-EVVH>] (citing TEX. PENAL CODE ANN. § 22.011(b) (West 2017)).

62. 20 U.S.C. 1092(f)(6)(A)(v).

63. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41–42, 60, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [<https://perma.cc/X9NP-Q98E>].

of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.” Carnal knowledge, or sexual intercourse, includes even the “slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).”<sup>64</sup> Sodomy involves “[o]ral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”<sup>65</sup> Sexual assault with an object entails using an object or instrument, which can be anything other than genitalia, such as a finger, bottle, handgun, or stick, “to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”<sup>66</sup> And, finally, fondling includes “[t]he touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”<sup>67</sup>

*B. Supreme Court Precedent and the Standard for Plaintiff Victims to Sue Universities*

The Supreme Court has examined Title IX in the context of sexual harassment in three cases. First, in *Franklin v. Gwinnett County Schools*, the Supreme Court established that, under Title IX, students subjected to sexual harassment in public schools have a private right of action to sue the school for damages.<sup>68</sup> In *Franklin*, a high school student alleged she was continually sexually harassed by a teacher who was also a sports coach at the high school.<sup>69</sup> The student claimed, among other things, that the teacher spoke with her about her sexual experiences, “forcibly kissed her on the mouth in the school parking

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64. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [<https://perma.cc/X9NP-Q98E>].

65. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [<https://perma.cc/X9NP-Q98E>].

66. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [<https://perma.cc/X9NP-Q98E>].

67. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [<https://perma.cc/X9NP-Q98E>]. The non-forcible sex offenses – incest (“Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law”) and statutory rape – (“Non-Forcible sexual intercourse with a person who is under the statutory age of consent”), do not fall under the proposed guidelines in this article. *Id.* at 42, 60.

68. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63 (1992).

69. *Id.* at 63.



lot,” and “subjected her to coercive intercourse.”<sup>70</sup> The student also alleged that teachers and administrators learned of the sexual harassment but did nothing to stop it.<sup>71</sup> Instead, they dissuaded her from pursuing criminal charges against the teacher.<sup>72</sup> The Court determined that Congress did not intend to limit any remedies available to a plaintiff in Title IX cases.<sup>73</sup>

In *Gebser v. Lago Vista Independent School District*, the Supreme Court provided that a private right of action exists against a school only when a school official with proper authority has actual notice of the sexual harassment and fails to respond appropriately.<sup>74</sup> In *Gebser*, a high school teacher engaged in a sexual relationship with a student during her freshman spring semester, the following summer, and part of the next fall semester, which included sexual “intercourse during class time, although never on school property.”<sup>75</sup> Eventually, a police officer found them engaging in sexual intercourse and arrested the teacher.<sup>76</sup> The school district subsequently terminated the teacher’s employment.<sup>77</sup> The Supreme Court reiterated that a school district can be held liable for the sexual harassment of a student by one of its teachers, but it held that no liability existed here because no school official had actual notice of the sexual relationship and, thus, did not have the opportunity to respond adequately.<sup>78</sup> Once a school official learned of the sexual relationship between the teacher and student, which was after the teacher’s arrest, the school district immediately terminated the teacher.<sup>79</sup>

Lastly, in *Davis v. Monroe County Board of Education*, the Supreme Court allowed for a private right of action for damages against an institution when a student sexually harassed another student.<sup>80</sup> In *Davis*, a fifth-grade girl sued the school board after she suffered from months of sexual harassment by her fifth-grade classmate.<sup>81</sup> Among other things, the classmate “attempted to touch [her] breasts and genital area,” made vulgar comments to her including “I want to get in bed with you” and “I want to feel your boobs,” and he “rubbed his body against [hers] in the school hallway” in a “sexually suggestive manner.”<sup>82</sup> After months of this behavior, the classmate pleaded guilty to sexual battery based on his misconduct.<sup>83</sup> According to the complaint, the girl’s grades dropped because of the sexual harassment, and her father found a suicide note she had written.<sup>84</sup>

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70. *Id.* (citing complaint).

71. *Id.*

72. *Id.*

73. *Id.* at 73.

74. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277–78 (1998).

75. *Id.* at 278.

76. *Id.* at 278.

77. *Id.*

78. *Id.* at 281, 290–91.

79. *Id.* at 291.

80. *Davis*, 526 U.S. at 633.

81. *Id.* at 632.

82. *Id.* at 633–34 (citing complaint).

83. *Id.* at 634 (citing complaint).

84. *Id.*

After each of the various acts of sexual harassment, the student's teachers were informed, but they allegedly did nothing.<sup>85</sup> The Supreme Court held that the complaint alleged a viable cause of action based on the severe and persistent sexual harassment the student suffered, as well as the school officials' failure to investigate and stop the alleged sexual harassment despite their knowledge of the misconduct.<sup>86</sup>

Thus, the precedent in these three cases establishes that, in a student-on-student sexual harassment case brought by a victim seeking to hold the school liable, the student victim must show that the school: "(1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school."<sup>87</sup> The deliberate indifference element is satisfied "only where the [school's] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."<sup>88</sup> The new regulations adopt and codify this approach.<sup>89</sup>

Following this precedent, in *Simpson v. University of Colorado Boulder* the Tenth Circuit Court of Appeals held in favor of the appellant plaintiffs in finding that the university was deliberately indifferent to sexual misconduct.<sup>90</sup> In *Simpson*, the plaintiffs alleged that University of Colorado at Boulder's ("CU") football players and recruits sexually assaulted them during a football recruiting visit.<sup>91</sup> The plaintiffs argued that CU was on notice of these assaults based on the fact that CU was aware of numerous prior alleged sexual assaults by CU players and recruits, and that the District Attorney's office previously requested that CU create policies to prevent this type of misconduct.<sup>92</sup> Indeed, in one prior incident, a CU football player raped a female trainer in the athletic department.<sup>93</sup> CU's head football coach at the time, Gary Barnett, met with the trainer "shortly after the rape."<sup>94</sup> Coach Barnett said that "her life would change" if she pressed charges, and he would support the player if his and her stories differed.<sup>95</sup> He also told her that he was not the player's father and therefore would not punish him, although "the player was ordered to do some extra running" and wrote an apology letter.<sup>96</sup> In another instance, Coach Barnett hired an assistant coach and former player "who had been accused of assaulting a woman a few years earlier

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85. *Id.* at 633–34 (citing complaint).

86. *Id.* at 653–54.

87. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)).

88. *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 (10th Cir. 2008) (quoting *Davis*, 526 U.S. at 648) (internal quotation marks omitted).

89. 34 C.F.R. § 106.44 (2020).

90. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007).

91. *Id.*

92. *Id.* at 1173, 1181–83.

93. *Id.* at 1173, 1183.

94. *Id.*

95. *Id.* at 1183.

96. *Id.*

and had been banned from the CU campus.”<sup>97</sup>

Notably, after one of the plaintiffs reported the sexual assault in the Simpson case to the police, the four players allegedly involved lost their spring scholarships but were nevertheless allowed to play in the January bowl game as CU was contending for the national championship.<sup>98</sup> Conversely, a female athlete at CU who spoke to the police about what she witnessed regarding the sexual assaults at issue in Simpson, lost her scholarship and was banned from the athletic facilities.<sup>99</sup>

As a result, the court held that CU was not entitled to summary judgment because the plaintiffs’ evidence supported the following: (1) CU maintained “an official policy of showing high-school football recruits a ‘good time’ on their visits to the CU campus;” (2) CU failed both in supervising these recruiting visits adequately and in training players who hosted the recruits on appropriate behavior and limits, which resulted in the sexual assaults at issue in the complaint; and (3) “the likelihood of such misconduct was so obvious that CU’s failure was the result of deliberate indifference.”<sup>100</sup>

### C. *The Accused’s Ability to Sue Universities*

Some students accused of sexual misconduct sue schools based on the purported “unfairness in their disciplinary proceedings and for allegedly wrongful disciplinary action taken against them.”<sup>101</sup> These students use various theories of liability including breach of contract, deprivation of due process rights, and Title IX gender discrimination.<sup>102</sup> For example, in *Doe v. Purdue University*, the Seventh Circuit Court of Appeals held that the school’s disciplinary proceedings both violated Title IX and the male defendant’s due process rights because it discriminated against him on the basis of sex.<sup>103</sup>

In *Purdue*, the accused male student (John) and alleged victim (Jane) both participated in the Navy’s Reserve Officers’ Training Corps (ROTC) program at Purdue University.<sup>104</sup> John alleged they dated during the fall of 2015 and engaged in consensual sexual intercourse between fifteen to twenty times during that semester.<sup>105</sup> According to the complaint, Jane’s behavior changed dramatically, and she “attempted suicide in front of John.”<sup>106</sup> John reported the attempted suicide to a couple of resident assistants and an advisor, which upset

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97. *Id.* at 1183–84.

98. *Id.* at 1184.

99. *Id.*

100. *Id.*

101. Amy R. LaMendola, *School’s or School Official’s Liability for Unfair Disciplinary Action Against Student Accused of Sexual Harassment or Assault*, 34 A.L.R.7th Art. 1 (2017).

102. *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

103. *Id.* at 663–64, 660–670.

104. *Id.* at 656.

105. *Id.*

106. *Id.*

Jane.<sup>107</sup> They stopped dating in January.<sup>108</sup>

Purdue hosted over a dozen events for Sexual Assault Awareness Month in April 2016, many of which were sponsored by the Center for Advocacy, Response, and Education (CARE), which is a university “center dedicated to supporting victims of sexual violence.”<sup>109</sup> CARE posted an article on Facebook published by *The Washington Post*, which was titled, “Alcohol isn’t the cause of campus sexual assault. Men are.”<sup>110</sup>

During that month of April, Jane reported John for sexual assault.<sup>111</sup> She claimed, among other things, that he groped her and digitally penetrated her while she was asleep, both of which occurred without her consent.<sup>112</sup> A panel found him guilty of sexual violence based on the preponderance of the evidence standard. John was suspended from Purdue for one academic year, ordered to complete bystander intervention training, and required to meet with a representative of CARE before returning to school.<sup>113</sup> Upon appeal, the Vice President for Ethics and Compliance of Purdue affirmed the panel’s decision.<sup>114</sup>

John’s first claim under the Due Process Clause of the Fourteenth Amendment alleged that Purdue’s disciplinary process was fundamentally unfair and therefore violated his constitutional rights. John was denied the opportunity to review the evidence submitted by Jane.<sup>115</sup> Also, “two of the three panel members candidly admitted that they had not read the investigative report, which suggests that they decided that John was guilty based on the accusation rather than the evidence.”<sup>116</sup> Moreover, no one in the university’s disciplinary process (such as the investigators or the panel) examined Jane’s credibility; they simply concluded that she was credible and he was not, even though she never testified or even submitted her own witness statement.<sup>117</sup> Finally, the university officials refused to speak with John’s roommate who “maintained that he was present at the time of the alleged assault and that Jane’s rendition of events was false.”<sup>118</sup> As a result, the Seventh Circuit determined that the process was fundamentally unfair.<sup>119</sup>

As for the Title IX claim, John alleged that a guidance letter on Title IX from the federal government put pressure on Purdue to more aggressively adjudicate and punish sexual assault cases against males or risk losing federal

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107. *Id.*

108. *Purdue Univ.*, 928 F.3d at 656.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 656–57.

113. *Id.* at 658.

114. *Purdue Univ.*, 928 F.3d at 658.

115. *Id.* at 633.

116. *Id.*

117. *Id.* at 644.

118. *Id.*

119. *Id.*

funding.<sup>120</sup> The fact that Purdue had two open cases being investigated in 2016 by the Office of Civil Rights also contributed to the pressure to find more sexual assault perpetrators.<sup>121</sup> Moreover, the finding that Jane was credible but John was not, the failure of two panelists to review the record and evidence yet find John guilty, and a CARE Facebook post ostensibly blaming men for all sexual assault on campuses, sufficed to raise a claim under Title IX that the school discriminated against John on the basis of sex.<sup>122</sup> The new Title IX regulations now explicitly require due process for both the victim and the accused, which includes a live hearing, cross-examination of the parties, and a presumption that the accused is innocent until proven responsible for the alleged Title IX violation.<sup>123</sup>

*D. Universities May Take Supportive Measures While a Title IX Investigation is Pending Including Removing a College Athlete From His Team*

The new Title IX regulations mandate that universities offer free supportive measures to a complainant, regardless of whether a formal complaint has been or will be filed.<sup>124</sup> Supportive measures are defined as “non-disciplinary, non-punitive individualized services offered as appropriate[, and] are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”<sup>125</sup>

The regulations specifically mention removal from sports teams as a viable supportive measure.<sup>126</sup> The government states that any supportive measure, including removal from a sports team, must be based on an individualized fact-specific basis.<sup>127</sup> According to the government, the analysis for “whether the burden is ‘unreasonable’ does not depend [solely] on whether the respondent still

120. Purdue Univ., 928 F.3d at 668. The guidance letter was the 2011 Dear Colleague Letter, which was later rescinded by the 2017 Dear Colleague Letter. Dear Colleague Letter from U.S. Dept. of Educ., Office of Civil Rights (Sept. 22, 2017). Dear Colleague letters are not law, they merely provide guidance to universities and colleges on how to implement Title IX policies. *Mercer Island Sch. Dist. v. Office of the Superintendent of Pub. Instruction*, 347 P.3d 924, 939 n.21 (Wash. Ct. App. Div. 1 2015) (citing Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 Duke L. J. 487, 488 n.5 (2012)).

121. Purdue Univ., 928 F.3d at 668.

122. *Id.* at 669–70.

123. 34 C.F.R. § 106.45 (2020).

124. 34 C.F.R. § 106.44 (2020); 34 C.F.R. § 106.30 (2020) (stating supportive measures are free of charge).

125. 34 C.F.R. § 106.30 (2020) (emphasis added).

126. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

127. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, 30182 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

has access to academic programs.”<sup>128</sup> The analysis regarding the burden “also includes analyzing whether a respondent’s access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened.”<sup>129</sup>

A supportive measure cannot be disciplinary or punitive because the new regulations prevent a university from taking any disciplinary action or other action taken against a respondent until the extensive grievance process in section 106.45 takes place.<sup>130</sup> Actions that a university lists or describes as being consequences of a section 106.45 grievance procedure finding of responsibility are disciplinary by nature.<sup>131</sup> Therefore, if a university lists removal from sports teams as a disciplinary action it might take after the grievance process, then it cannot use removal from sports teams as a supportive measure; if, however, the university does not list removal from a sports team as a possible disciplinary action, then it can use it as a supportive measure provided the action is not disciplinary, punitive, or unreasonably burdensome to the respondent.<sup>132</sup>

A university should remove a player from his team for games and practices, training sessions, and/or team meetings as a supportive measure. If an athlete

128. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, 30182 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

129. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). In this section, the government gives an example that changing a class schedule “may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth,” but this is only a hypothetical example and is subject to an individual case-by-case analysis. *Id.* Indeed, in an individual case, if corroborating evidence exists of sexual assault by an athlete against another student, then the supportive measure of removal from a sports team would be appropriate. *See* discussion immediately below and *infra* Part IV.

130. 34 C.F.R. §§ 106.30, 106.44, 106.45 (2020). This is predicated on the notion of due process such that an alleged perpetrator is presumed innocent until found responsible for the alleged Title IX violation.

131. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, 30182 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). A university is required to describe or list the sanctions it may use against someone found responsible after a section 106.45 grievance process. 34 C.F.R. §§ 106.45(b)(1)(i), (vi), (ix), 106.30 (2020).

132. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, 30182 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). The new regulations also include an emergency removal procedure under 106.44(c) that allows a university to remove a respondent from an educational program or activity when there exists “an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment.” 34 C.F.R. § 106.44(c) (2020). The government states that the purpose of the emergency removal provision “is not to impose an interim suspension or expulsion on a respondent, or penalize a respondent by suspending the respondent from, for instance, playing on a sports team or holding a student government position, while a grievance process is pending.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). Nevertheless, when the high threshold is met and there exists “an immediate threat to a person’s physical health or safety” to justify the removal, then a college athlete can be removed from the team. 34 C.F.R. § 106.44(c) (2020); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

accused of sexual assault, provided corroborating evidence exists (see discussion *infra* Part IV), is removed from the team, then the complainant and other students will feel that they are in a safe and respectful learning environment. Athletes are three times more likely than non-athletes to be accused of sexual assault,<sup>133</sup> and they represent a high percentage of repeat offenders.<sup>134</sup> Removing an athlete from the team demonstrates to all of the students that sexual misconduct is not acceptable at the university and serves as a powerful deterrent to further sexual misconduct by that student and other college athletes. This, in turn, protects the safety of the university's educational environment.

Removing an athlete from the team for games is not an unreasonable burden. Under the proposed guidelines in this article, if the person accused is found not responsible, then they would remain eligible to play in the amount of games they missed in the subsequent season. Also, if mitigating evidence (see discussion *infra* Part IV) exists, then the athlete may still be able to practice, train, and/or meet with the team, further reducing any burden. Moreover, since the new federal regulations emphasize the concept of innocent until proven responsible, the ability to participate in some team activities will help reduce the stigma and loss of reputation that could accompany a removal from the team. In cases where no corroborating evidence exists, removal would not be appropriate, which aligns with the case-by-case analysis required by the new regulations.

Moreover, certain circumstances should warrant an athlete's complete removal from the team while the grievance process is pending. For instance, if the complainant is a part of the athletic team as a manager, trainer, or some other capacity, then that fact, along with corroborating evidence, would support a removal from the team for games and any team-related activities, such as practices, meetings, and training sessions. Removing the accused athlete from team-related activities would help preserve the complainant's access to the sports team, protect the complainant's safety, and deter sexual harassment of other individuals involved with that sports team.

Furthermore, removing a college athlete from the team for games and team activities would not violate any constitutional right, even at a public school, because an athlete does not have a protected property interest or liberty interest in playing intercollegiate athletics.<sup>135</sup> Courts consistently rule that while a college athlete may have a property right in a scholarship, he possesses no right to play college sports.<sup>136</sup> And, because participation in intercollegiate athletics is

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133. Lavigne, *supra* note 7.

134. Keehan et al., *supra* note 7.

135. See *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 944–45 (D. Kan. 1987) (holding college football players possess a property right in their scholarship funds, but they do not possess a property interest in playing college football or any liberty interest since there is no right to pursue a college football career); see also *Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. 885, 896 (D. Colo. 1976) (stating college athletes “have no constitutionally protected property or liberty interest in participation in intercollegiate athletics” and college athletes also have no procedural due process protection).

136. *Ifeanyi v. Alvey*, No. 1:18-CV-193, 2018 WL 8805034, at \*7 (S.D. Ohio July 23, 2018)

not a property right or liberty interest, but a privilege, it is not entitled to procedural due process protections.<sup>137</sup> As a result, a university maintains the authority to remove a player from participating in sports under Title IX without infringing upon the player's protected rights.<sup>138</sup> Therefore, a college can legally remove an athlete from his team pending investigation of a sexual misconduct claim.

## II. NECESSITY FOR PROPOSED GUIDELINES FOR UNIVERSITIES DEALING WITH ATHLETES ACCUSED OF TITLE IX VIOLATIONS

The minimal standards and wide latitude that universities possess when handling a Title IX complaint against an athlete, along with the inconsistent and deplorable approach that some schools exhibit, require guidelines for universities to follow in determining when an athlete should be removed from his team following a report of sexual assault under Title IX.

### A. *The Current Law Does Not Provide a Consistent and Uniform Approach to Address Title IX Complaints Against Athletes*

As set forth above, a party may bring a private right of action against a college or university based on the handling of a Title IX claim concerning student-on-student sexual misconduct. The student plaintiff must show that the institution: “(1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school.”<sup>139</sup> The deliberate indifference element is satisfied “only where the [school’s] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>140</sup> Title IX does not “require flawless investigations or perfect solutions.”<sup>141</sup> The legal standard only requires that schools “respond to known harassment in a manner that is not clearly

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(citing *Graham v. Nat’l Collegiate Athletic Ass’n*, 804 F.2d 953, 959 (6th Cir. 1986)); see *Marcantonio v. Dudzinski*, 155 F. Supp. 3d 619, 635 (W.D. Va. 2015) (“Cases widely hold that college athletic scholarships and participation in collegiate athletics are not cognizable property interests.”); *Awrey v. Gilbertson*, 833 F. Supp. 2d 738, 742 (E.D. Mich. 2011) (finding no property interest in participating in college athletics).

137. See *id.*; see also *Brennan v. Bd. of Trs.*, 95-2396 (La. App. 1 Cir. 03/27/97); 691 So. 2d 324; see also *Equity in Athletics, Inc. v. Dep’t. of Educ.*, 675 F. Supp. 2d 660, 681 (W.D. Va. 2009) (stating that playing college sports is a privilege, not a right).

138. See *id.*; see, e.g., *Doe v. Univ. of St. Thomas*, 368 F. Supp. 3d 1309 (D. Minn. 2019) (involving a university’s decision to suspend a male student for three semesters following a complaint by a female student of alleged sexual assault); see also, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance*, 85 Fed. Reg. 30026, (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (listing removal from sports team as a supportive measure)..

139. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1246 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)).

140. *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 (10th Cir. 2008) (quoting *Davis*, 526 U.S. at 648) (internal quotation marks omitted); 34 C.F.R. § 106.44 (2020).

141. *Rost*, 511 F.3d at 1122.



unreasonable.”<sup>142</sup> Moreover, courts give deference to the schools in determining whether the response was clearly unreasonable.<sup>143</sup>

The great latitude and deference afforded to universities in addressing Title IX claims creates inconsistent results that often reflect a priority on sports rather than on the educational environment or the victim. Also, the law currently allows universities to take minimal action provided the response is not clearly unreasonable.<sup>144</sup> For example, Title IX claims involving athletes included results where universities eventually found an athlete liable for sexual misconduct yet suspended the athlete during the offseason,<sup>145</sup> expelled the athletes after their eligibility expired,<sup>146</sup> or dismissed the athletes after the season ended.<sup>147</sup>

The accused can also bring an action against universities based on their mishandling of Title IX claims.<sup>148</sup> Schools have inappropriately handled Title IX claims for both victims and the accused, and schools have made significant mistakes when dealing with sexual misconduct claims against athletes.<sup>149</sup>

### B. Schools Have Mishandled Sexual Assault Complaints Against Athletes

It is no secret that universities mishandle sexual assault complaints against athletes, often to keep their football and basketball machines running. The most glaring instances involve Baylor University, which has failed in a variety of ways when Title IX complaints against athletes have arisen. At Baylor, “17 women reported 19 sexual or physical assaults involving football players since 2011—four of which were gang rapes.”<sup>150</sup> Baylor’s missteps included “a lack of

142. Davis, 526 U.S. at 649; 34 C.F.R. § 106.44 (2020).

143. Davis, 526 U.S. at 648 (“[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.”).

144. See *id.* at 649.

145. Doe v. Univ. of Ala. in Huntsville, 177 F. Supp. 3d 1380 (N.D. Ala. 2016).

146. See, e.g., Tom Ley, *Former Michigan Kicker Expelled for Sexual Misconduct*, DEADSPIN (Jan. 29, 2014), <https://deadspin.com/former-michigan-kicker-expelled-for-sexual-misconduct-1511488287> [<https://perma.cc/6VCZ-6J9E>] (questioning the timing of expulsion of former University of Michigan kicker five years after the alleged rape took place and his eligibility to play football expired).

147. See, e.g., Myron Medcalf, *Oregon Dismisses Three Players*, ESPN (May 9, 2014), <https://abc7.com/sports/oregon-dismisses-three-players/51842/> [<https://perma.cc/NZ2H-FEHX>] (dismissing players from the University of Oregon basketball team after the NCAA Tournament and season ended based on an investigation regarding sexual assault stemming from an incident that occurred prior to the tournament that the university had been apprised of by the alleged victim’s father). *But cf.* Keehan et al., *supra* note 7, at 13 (providing the results of a study showing most schools in the study found the accused athletes responsible for the sexual assault and finding expulsion was the most widely imposed discipline by the school). Nevertheless, in that same study, the schools discouraged over 40% of the victims from pursuing the reported Title IX complaint internally or reporting the incident to the police. *Id.* at 15 (including an “allegation[] that a staff member told [a] victim that the perpetrator had been ‘punished enough’”).

148. See, e.g., Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

149. See, e.g., *id.* (involving an accused); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007) (involving a victim).

150. Maya A. Jones, *Talking Race, Rape and Sexual Assault at the Black Student-Athlete Summit*, THE UNDEFEATED (Jan. 6, 2017), <http://theundefeated.com/features/talking-race-rape-and-sexual-assault-at-the-black-student-athlete-summit/> [<https://perma.cc/HP6L-M64N>].

institutional control” and a “failure to promote an atmosphere of compliance.”<sup>151</sup> Pepper Hamilton, a law firm, conducted an exhaustive review of Baylor’s handling, or mishandling, of Title IX complaints. The following are several of the firm’s findings that Baylor University’s Board of Regents accepted:

“University administrators ... directly discouraged complainants from reporting or participating in student conduct processes.”

The football program and Athletics Department leadership “fail[ed] to identify and respond to a pattern of sexual violence by a football player, to take action in response to reports of asexual assault by multiple football players, and to take action in response to a report of dating violence.”

- The football program used an internal discipline system instead of properly reporting complaints of sexual assault by its players to the proper university officials, and the football program “took affirmative steps ... to actively divert cases from the student conduct or criminal processes.”
- “Football staff conducted their own untrained internal inquiries, outside of policy, which improperly discredited complainants and denied them the right to a fair, impartial and informed investigation, interim measures[,] or processes promised under University policy.”
- In some instances, “football coaches or staff met directly with a complainant and/or a parent of a complainant and did not report the misconduct.”
- “The football program’s separate system of internal discipline reinforces the perception that rules applicable to other students are not applicable to football players, improperly insulates football players from appropriate disciplinary consequences, and puts students, the program, and the institution at risk of future misconduct.”
- Baylor’s administrators failed to address the concerns from other departments at the university that the Athletic Department improperly responded to athlete misconduct.
- The culture at Baylor fostered the notion that football was above the rules and “there was no culture of accountability for misconduct.”<sup>152</sup>

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151. *Report: NCAA Finds Violations in Baylor Sex Assault Scandal*, FOX 4 NEWS (Oct. 2, 2018, 7:00 AM), <http://www.fox4news.com/news/report-ncaa-completes-baylor-sexual-assault-investigation> [<https://perma.cc/4FNP-RQG7>].

152. BAYLOR UNIVERSITY BOARD OF REGENTS FINDINGS OF FACT (2016), <https://www.baylor.edu/thefacts/doc.php/266596.pdf> (conducting “an independent and external review of Baylor University’s institutional response to Title IX and related compliance issues through the lens of specific cases”); Court Order, *Doe 1 et al. v. Baylor Univ.*, No. 6:16-cv-00173-RP (W.D. Tex., Mar. 7, 2017); Sue Ambrose & David Tarrant, *The Silence of Ken Starr: Baylor’s President Focused on Football, Fumbled on Sex Assaults*, DALLAS MORNING NEWS (May 5, 2016), <http://interactives.dallasnews.com/2016/the-silence-of-ken->

Baylor is certainly not alone in its ineptitude.<sup>153</sup> Universities sometimes delay decisions to allow players to participate in high-profile or bowl games,<sup>154</sup> sanction the athlete during the offseason,<sup>155</sup> or provide minimal, if any, sanctions.<sup>156</sup>

In addition to mishandling Title IX complaints, schools allow misogynistic environments to thrive. The University of Louisville lost its hall of fame head coach, Rick Pitino, after a scandal involving “basketball staffers provid[ing] access to strippers for recruits and the use of attractive female students as hosts to accompany recruits on official visits,” the latter of which was a common practice for many universities in recruiting, including the University of Tennessee, Baylor, and CU.<sup>157</sup> In *Simpson*, discussed above, the court acknowledged evidence supporting the district court’s findings that the head football coach at the time had “general knowledge of the serious risk of sexual harassment and assault during college-football recruiting efforts” and “kn[ew] that such assaults had indeed occurred during CU recruiting visits.”<sup>158</sup> The head coach “nevertheless maintained an unsupervised player-host program to show high-school recruits ‘a good time.’”<sup>159</sup> A “good time” included female host

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[<https://perma.cc/5HB7-FJKE>]; Paula Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (Jul. 13, 2017), [http://www.espn.com/espn/otl/story/\\_id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims](http://www.espn.com/espn/otl/story/_id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims) [<https://perma.cc/P9CW-VAPB>] (citing Adam Grosbard, *Baylor Sexual Assault Scandal Timeline: From Football Convictions to Title IX Investigation*, [<https://perma.cc/2NEC-NG7R>]).

153. Grace Bird, *Alleged Sexual Assault at Michigan State*, INSIDE HIGHER ED, (Jan. 29, 2018), <https://www.insidehighered.com/news/2018/01/29/michigan-state-ncaa-under-fire-over-sex-assault-cases> [<https://perma.cc/DUC6-FQVR>]; see generally *Simpson*, 500 F. 3d at 1170 (involving recruiting tactics where sexual misconduct was likely to occur, and did occur, and the football program knew and encouraged these tactics).

154. See Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX’s Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 553-54 (2016) (detailing Florida State University’s failure to investigate and address properly accusations of rape against its highly coveted quarterback Jameis Winston in a timely manner, thus allowing him to complete the season and win a national championship for the school).

155. *Doe v. Univ. of Ala.*, 177 F. Supp. 3d 1380, 1385-86 (N.D. Ala. 2016).

156. See *S.S. v. Alexander*, 177 P.3d 724, 730-732 (Wash. Ct. App. 2008) (receiving punishment of counseling and community service for alleged rape by an athlete); *Doe v. Univ. of Tennessee*, 186 F. Supp. 3d 788, 799 (M.D. Tenn. 2016) (alleging in the complaint that one of the victim plaintiffs was raped by a football player whose only punishment entailed missing one scrimmage game in the spring); *Simpson*, 500 F.3d 1170, 1183 (10th Cir. 2007) (ordering extra running for raping a female athletic trainer); Moorman & Osborne, *supra* note 17, at 553-54 (detailing Florida State University’s failure to investigate and address properly accusations of rape against its highly coveted quarterback Jameis Winston in a timely manner, thus allowing him to complete the season and win a national championship for the school).

157. Paige Lavigne, *Outside the Lines: College Athletes Three Times More Likely to Be Named in Title IX Sexual Misconduct Complaints*, ESPN, (Nov. 2, 2018, 3:47 PM), [http://www.espn.com/espn/otl/story/\\_id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints](http://www.espn.com/espn/otl/story/_id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints) [<https://perma.cc/3DTS-S8HH>]; see also *Simpson*, 500 F.3d at 1183 (explaining the CU football recruiting process).

158. *Simpson*, 500 F.3d at 1184.

159. *Id.*

ambassadors spending time with recruits, player-hosts entertaining the recruits, and, in some cases, including in the *Simpson* case, recruits being promised the opportunity to have sex with female students.<sup>160</sup>

Furthermore, some schools recruit athletes with histories of sexual violence yet neglect to provide sufficient sexual harassment and violence training, thus the schools fail to protect other students.<sup>161</sup> As Senator Claire McCaskill advocated at the 2015 National Association of Collegiate Directors of Athletics convention, athletics directors should “stop shielding athletes accused of sexual assault and protecting the athletics program and instead put the safety of students on campus first.”<sup>162</sup>

### III. PROPOSED GUIDELINES MUST BE SENSITIVE TO AND WARY OF THE VARIOUS INTERESTS INVOLVED REGARDING REMOVING ATHLETES ACCUSED OF TITLE IX VIOLATIONS FROM THEIR TEAMS

This part of the Article addresses the conflicting interests of victims, universities, and the accused that must be considered when creating proposed guidelines.

#### A. *Victim's Interests*

Survivors of sexual assault seek justice, support, and continued participation in a safe and secure environment. Women who come forward with complaints of sexual assault are likely telling the truth. According to several studies, the percentage of false reporting of sexual assaults to the police ranges between 2% and 8%, meaning that over 90% of sexual assault reports are accurate.<sup>163</sup> This is not surprising when one considers the strength and courage that is required to report an assault. When the accusation involves a prominent athlete, the survivor of the assault knows that they will likely be blamed and harassed by those who support the accused. This reality and the stigma surrounding sexual assault deter many women from reporting assaults that actually occurred, and thus make it even less likely that someone would make a false accusation. Therefore, the overwhelming number of reports of sexual assault are true.<sup>164</sup>

160. *Id.* at 1180.

161. *See Williams v. Bd. of Regents*, 477 F.3d 1282, 1289–90 (11th Cir. 2007) (admitting an athlete into the school with a history of sexual violence who allegedly raped or sexually assaulted fellow students).

162. Moorman & Osborne, *supra* note 17, at 553 (citing Molly Geary & Mike Fiammetta, *Senator Calls for No Special Treatment for Athletes in Criminal Cases*, SPORTS ILLUSTRATED (June 17, 2015), [www.si.com/college-football/2015/06/17/clair-mccaskill-college-athletes-sexual-assault-cases](http://www.si.com/college-football/2015/06/17/clair-mccaskill-college-athletes-sexual-assault-cases)).

163. Grace et al., *supra* note 19 (discussing 8 percent false reporting statistic); Kelly et al., *supra* note 19 (citing a 3 percent rate of false reporting); Heenan & Murray, *supra* note 19 (discussing a 2.1 percent false reporting rate).

164. *See* NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, *supra* note 18 (“Research shows that rates of false reporting are frequently inflated, in part because of...a weak understanding of sexual assault.”). One could argue that false reporting to the police might be a lower number than

When a survivor comes forward with a sexual assault complaint, she wants justice via an appropriate punishment for the perpetrator. Watching a perpetrator continue to play in games on national television while receiving accolades does not equate to justice. As set forth above, common punishments by schools and coaches—e.g., suspension for a college athlete during the summer when no official practices or games are scheduled, extra running for an alleged perpetrator, community service, and counseling—fail to resemble anything close to justice.

A survivor wants to be heard and supported. Many survivors feel ashamed and blame themselves after a sexual assault.<sup>165</sup> Research indicates sexual assault survivors do not discuss their assaults “because they feel embarrassed, ashamed, and helpless,”<sup>166</sup> which sometimes results in survivors not reporting those assaults.<sup>167</sup> In a previous study funded by the United States Department of Justice, researchers found that 88% of women who were raped in college did not report those assaults to law enforcement.<sup>168</sup> When survivors do report, for example, to university and college administrators, those officials often blame the victim by asking questions such as the following: “What were you wearing?”<sup>169</sup> “What could you have done differently?”<sup>170</sup> “Why didn’t you fight back?”<sup>171</sup> In one instance, a survivor recounted that the administrator told her that *rape was like a game and she should think about what happened and what she could have*

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false reporting of Title IX sexual assault claims because the former is itself a crime. This argument ignores the criticism, embarrassment, and shame that survivors of Title IX sexual assaults endure when they bring a complaint against a fellow student and athlete. In any event, the argument highlights the need to impose strict penalties on individuals who make false Title IX complaints, just as false reporting constitutes a crime.

165. Rivera, 840 P.2d at 938 (stating that victims of a sexual assault commonly do not report the incident because of feelings of shame and self-blame).

166. Michele Berger, Comment, *We Need More Than Locks: A Call for Intimate Partner Violence Education, Training, and Reform in the Workplace*, 49 U.S.F. L. REV. 215, 228 (2015).

167. Kaelyn Ford, *Why More Women Don’t Report Sexual Assault: A Survivor Speaks Out*, ABC NEWS (Sept. 27, 2018), <https://abcnews.go.com/US/women-report-sexual-assaults-survivor-speaks/story?id=57985818> [<https://perma.cc/JQ54-KUR6>] (noting that survivors sometimes feel too ashamed to report their assault).

168. DEAN KILPATRICK ET AL., MED. UNIV. OF S.C., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE 3 (July 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>.

169. THE HUNTING GROUND (Chain Camera Pictures 2015); Doe v. Baylor Univ., 336 F. Supp. 3d 763, 770–73 (2018) (involving a university retaliating against the victim where the university allegedly failed to allow the victim to re-enroll based on her reporting a sexual assault).

170. THE HUNTING GROUND (Chain Camera Pictures 2015); Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, N.Y. TIMES (July 12, 2014), at 3, <https://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html> (detailing an instance in which university administrators asked the victim of a sexual assault insensitive and absurd questions).

171. THE HUNTING GROUND (Chain Camera Pictures 2015); Karasek v. Regents of the Univ. of Cal., 2015 U.S. Dist. LEXIS 166524 at \*4 (N.D. Cal., Dec. 11, 2015) (explaining an instance in which the victim of an alleged sexual assault was repeatedly asked by an administrator if she had rebuffed the perpetrator’s advances and followed up by asking her “how [the perpetrator] was supposed to know his conduct was not welcome if she never affirmatively rebuffed him”).

done differently.<sup>172</sup> These questions are insensitive, repulsive, harmful, and demonstrate a fundamental misunderstanding of sexual assault. People typically respond to sexual assault through fight, flight, or freeze.<sup>173</sup> Many survivors freeze, as data shows that fighting may result in more harm or even the loss of their own life, particularly if the assailant is much larger than the victim.<sup>174</sup> Universities must hear survivors' voices and make sure to provide them with comfort and support. Sexual harassment negatively affects the well-being and academic performance of a victim.<sup>175</sup> The mental health issues and physical trials survivors face include, among others: increased risks of suicide and suicidal thoughts; post-traumatic stress disorder (PTSD), anxiety; substance abuse; and depression.<sup>176</sup> Without proper assistance from their universities, survivors will face these overwhelming obstacles alone.

Victims want to feel secure and protected by their universities so they can continue to participate in programs and activities. Under Title IX, a victim cannot "...be excluded from participation in, be denied the benefits of, or be subjected

172. THE HUNTING GROUND (Chain Camera Pictures 2015) (emphasis added).

173. See Kasia Kozłowska et al., *Fear and the Defense Cascade: Clinical Implications and Management*, 23 HARV. REV. OF PSYCHIATRY, July-Aug. 2015 263, 264, 270 ("And in 2004, Stefan Bracha developed a broader human model that included not only the freeze, flight, and flight responses associated with predatory imminence but also tonic and collapsed immobility."); Shaila Dewan, *Why Women Can Take Years to Come Forward With Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html> ("Neurobiological research has shown that the so-called fight-or-flight response to danger would more accurately be called 'fight, flight, or freeze.'"); James W. Hopper, *Why Many Rape Victims Don't Fight or Yell*, WASH. POST (June 23, 2015), [https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/?utm\\_term=.faada33f8a90](https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/?utm_term=.faada33f8a90) ("The body is primed for fight or flight...[but] neither fight nor flight necessarily follows").

174. *Common Misconceptions*, THE BLUE BENCH (last visited May 30, 2019), <https://thebluebench.org/learn/common-misconceptions.html> [<https://perma.cc/GM88-G4GG>] (listing reasons a sexual assault victim might not physically fight their attacker include "shock, fear, threats or the size and strength of the attacker"). Data suggests that nearly fifty percent of rape victims experience tonic immobility, a form of temporary paralysis, during sexual assault. See Anna Moller, et al., *Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression*, 96 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 932 (2017) ("Tonic immobility (TI) in animals has been considered an evolutionary adaptive defensive reaction to a predatory attack when resistance is not possible and other resources are unavailable." (citing Brian P. Marx, et al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors*, 15 CLINICAL PSYCHOL. SCI. PRAC. 74 (2008)); see also Francine Russo, *Sexual Assault May Trigger Involuntary Paralysis*, PUB. BROAD. SYS. (Aug. 5, 2017, 12:14 PM), <https://www.pbs.org/newshour/health/sexual-assault-may-trigger-involuntary-paralysis> [<https://perma.cc/CV85-L4BX>] ("[T]onic immobility is designed to activate when there is contact with a predator (akin to the sexual abuse situation). Theoretically, one could expect it to activate when there is physical contact, high arousal and fear, and no possibility of running away").

175. Revised Sexual Harassment Guidance, 66 Fed. Reg. 5512 (Jan. 19, 2001), available at <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [<https://perma.cc/2VLL-MAVR>] [hereinafter 2001 Guidance].

176. RAINN, *supra* 3; Yates, *supra* note 4; Ross, *supra* 56 (citing Timothy D. Brewerton, *Eating Disorders, Trauma, and Comorbidity: Focus on PTSD*, 15 J. OF TREATMENT & PREVENTION 285, 293 (2007) (finding that victims of sexual trauma were more likely to suffer from PTSD and eating disorders).

to discrimination under any education program or activity receiving Federal financial assistance.”<sup>177</sup> As set forth above, “Preventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”<sup>178</sup> Survivors of sexual assault have an interest in their claims being taken seriously to ensure that they can fully participate in university activities and benefit from the college experience. For instance, the *Simpson* case (discussed *infra*) involves a female trainer at CU who was raped by a CU football player.<sup>179</sup> The head coach of the football team at the time met with her and dissuaded her from pressing charges.<sup>180</sup> “[T]he player was ordered to do some extra running” and wrote an apology letter to the victim.<sup>181</sup> The female trainer could not have felt safe, secure, or supported as her assailant continued to participate fully in his athletic activities.

Academic excellence and fostering a safe and respectful learning environment must take precedence over athletic success. A university must not succumb to pressure from athletic departments, coaches, boosters, and alumni who prioritize their teams’ success over the interests of sexual assault survivors. Seeing the accused removed from their teams provides some justice for survivors and sends a message that sexual misconduct will not be tolerated.

### B. School’s Interests

Colleges and universities can receive a substantial amount of revenue from successful sports teams. For instance, the farther a team advances in the Men’s NCAA Basketball Tournament, the more money that school’s conference receives.<sup>182</sup> In 2016, the Atlantic Coast Conference (ACC) received nearly \$40 million based on its teams’ performances in the tournament.<sup>183</sup> Over a three-year span from 2015 through 2017, the ACC received over \$100 million based on its success in the tournament.<sup>184</sup>

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177. 20 U.S.C. §1681(a) (2012).

178. 2001 Guidance, *supra* note 45 at ii.

179. *Simpson*, 500 F.3d at 1173, 1183.

180. *Id.* at 1183.

181. According to the court, in addition to perpetuating an environment where sexual assaults were likely to occur, Coach Barnett hired an assistant coach and former player “who had been accused of assaulting a woman a few years earlier and had been banned from the CU campus.” *Id.* at 1183-84.

182. See Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016), [http://www.espn.com/mens-college-basketball/story/\\_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament](http://www.espn.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament) [https://perma.cc/E7E8-QJCV].

183. See Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016), [http://www.espn.com/mens-college-basketball/story/\\_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament](http://www.espn.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament) [https://perma.cc/E7E8-QJCV].

184. Darren Rovell, *ACC Will Make More Than \$100 Million Off Schools’ NCAA Tourney Runs over Past 3 Years*, (Mar. 31, 2017) [http://www.espn.com/mens-college-basketball/story/\\_/id/19045201/acc-make-100-million-men-basketball-teams-combined-ncaa-tourney-runs-last-three-years](http://www.espn.com/mens-college-basketball/story/_/id/19045201/acc-make-100-million-men-basketball-teams-combined-ncaa-tourney-runs-last-three-years) [https://perma.cc/9R73-KD8N].

Similarly, the more teams in a conference that earn spots in the College Football Playoff system bowl games, including the semifinal playoff games and the New Year's Six bowl games, the more money a conference makes.<sup>185</sup> For instance, after the Big Ten Conference saw several teams earn spots in these bowl games in the 2016-2017 season, they received \$132.5 million, which was then split amongst the teams.<sup>186</sup> Removing a player from a team during the season or postseason may negatively affect a team's ability to reach the postseason, such as the Men's NCAA Basketball Tournament, and advance through it. Likewise, if Florida State had investigated the rape allegations against its star quarterback in a timely manner and prohibited him from playing during the investigation, then they may not have won the national championship.<sup>187</sup>

When a school excels in sports, it sometimes experiences additional benefits, such as an increase in the number of prospective student applications.<sup>188</sup> This is known as the "Flutie Effect," which takes its name from Doug Flutie, the former Heisman Trophy winner whose Boston College Eagles defeated the University of Miami Hurricanes in a memorable Orange Bowl game.<sup>189</sup> Within the next two years following that game, Boston College's applications increased by 30 percent.<sup>190</sup> The prestigious Heisman Trophy is the award given annually to the most outstanding player in college football.<sup>191</sup> When Robert Griffin III

185. See *College Football Playoff Revenue Distribution Policies*, COLLEGE FOOTBALL PLAYOFFS, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 8, 2018) [<https://perma.cc/GR24-YT8L>] (detailing how revenue from college football playoffs are distributed); see also Kristi Dosh, *College Football Playoff Payouts by Conference for 2016-17*, FORBES (Dec. 31, 2016, 2:41 PM), <https://www.forbes.com/sites/kristidosh/2017/12/30/college-football-playoff-payouts-by-conference-for-2017-2018/#2513b04b2704> [<https://perma.cc/H7AC-ANXT>] (listing the payout for playoffs by each conference).

186. See *College Football Playoff Revenue Distribution Policies*, COLLEGE FOOTBALL PLAYOFFS, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 8, 2018) [<https://perma.cc/GR24-YT8L>] (detailing how revenue from college football playoffs are distributed); see also Kristi Dosh, *College Football Playoff Payouts by Conference for 2016-17*, FORBES (Dec. 31, 2016, 2:41 PM), <https://www.forbes.com/sites/kristidosh/2017/12/30/college-football-playoff-payouts-by-conference-for-2017-2018/#2513b04b2704> [<https://perma.cc/H7AC-ANXT>].

187. See Anita M. Moorman & Barbara Osbourne, *Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX's Sexual Assault Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 553-54 (2016).

188. See generally Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), <http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications> [<https://perma.cc/B2QZ-FEUW>] (describing the phenomenon known as the "Flutie Effect").

189. See *id.*; Doug Flutie, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/players/doug-flutie-1.html> [<https://perma.cc/SB35-PRPA>] (Last visited Mar. 17, 2019).

190. See Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), <http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications> [<https://perma.cc/B2QZ-FEUW>] (describing the phenomenon known as the "Flutie Effect").

191. *Heisman Trust*, THE HEISMAN TROPHY, <https://www.heisman.com/heisman-trust/>



won the award while playing at Baylor University, the estimated effects included over \$250 million in additional donations, sponsorship deals, a revised television deal, more ticket sales, and increased concession sales for Baylor University.<sup>192</sup> Jameis Winston, a former Florida State University football player accused of rape, also won the Heisman Trophy.<sup>193</sup> Universities maintain a strong interest in keeping players on the court and the field to earn money for the universities based on the teams' success. This can affect the way a university approaches a Title IX claim against an athlete. The reputation of a school is also at stake.

Universities want to avoid sexual assault scandals committed by players of their beloved sports teams because they can result in less financial support from boosters, alumni, and other donors. Universities and colleges maintain a strong interest in making sure that their athletes stay on the court or field and out of the negative limelight to protect the reputation of the school. There are several instances where universities and colleges discouraged victims of sexual assault from pursuing or continuing a Title IX investigation or from reporting the assault to the police.<sup>194</sup> For instance, in *S.S. v. Alexander*, a football equipment manager alleged that a football player she previously had a consensual relationship with raped her, and the school dissuaded her from filing a police report.<sup>195</sup> The school eventually determined that a mediation between the victim and the accused would be appropriate, and the resulting punishment for the accused included only counseling and community service.<sup>196</sup>

Universities, in addition to money and reputation, should also have an interest in protecting their students and creating an educational environment where students are free from discrimination and harm.<sup>197</sup> To that end, universities should strive to protect their alleged victims while treating the accused fairly.<sup>198</sup> Also, academics, not sports, should remain universities' priority.<sup>199</sup>

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[<https://perma.cc/QQ8H-ZBMJ>] (last visited Mar. 17, 2019).

192. Howard Bloom, *How Much is Winning Heisman Worth?*, *SPORTS BUS. NEWS* (DEC. 7, 2012, 10:00 PM), <http://sportsbusinessnews.com/content/how-much-winning-heisman-worth>. [<https://perma.cc/UL59-37ZL>]

193. *Heisman Trophy Winners List*, *THE HEISMAN TROPHY*, <https://www.heisman.com/heisman-winners/> [<https://perma.cc/29UX-J7YD>] (last visited Mar. 17, 2019).

194. *See, e.g., Doe v. University of Alabama in Huntsville*, 177 F.Supp.3d 1380, 1393 (2016); *S.S. v. Alexander*, 177 P.3d 724, 730 (Wash. Ct. App. 2008); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 701 (2007) (providing that a university's deliberate indifference to a potential Title IX violation may be considered ongoing discrimination on the part of the university).

195. *S.S. v. Alexander*, 177 P.3d 724, 730 (Wash. Ct. App. 2008).

196. *Id.* at 730–732.

197. U.S. Department of Education Office for Civil Rights, Revised Sexual Harassment Guidance (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/V4XQ-9VBU>].

198. U.S. Department of Education Office for Civil Rights, Revised Sexual Harassment Guidance (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/V4XQ-9VBU>].

199. *See Massive Spending Gap Between Athletes and Academics*, *HIGHERED* (July 10, 2018), <https://hepinc.com/newsroom/state-universities-spending-over-100000-per-athlete-8-to-12-times-more-than-academics/> [<https://perma.cc/JAQ5-FTYF>] (outlining the statistics that reflect

When a victim makes a complaint against an athlete and then watches that athlete continue to play despite such a serious allegation, how does that make the victim feel? When a female student comes forward with a complaint against an athlete and nothing happens to the athlete, how likely is the next victim of sexual assault by an athlete to come forward with a complaint? When one also considers the amount of fury and hate faced by a female student who accuses an athlete of sexual assault, it becomes clear that universities must take a more prudent approach to dealing with athletes accused of sexual assault. For example, universities should properly educate athletes and the entire student body on the topic of sexual assault to prevent such behavior and to guide the entire student body on how to conduct themselves after a sexual assault has been alleged. Also, universities should want to protect others at the school from repeat offenders, as well as initial offenders. Athletes are not only three times more likely than a non-athlete to be accused of a sexual assault, but they also represent a high percentage of repeat offenders.<sup>200</sup> Removing an athlete from a team demonstrates that sexual misconduct will not be tolerated at a university and serves to deter further sexual misconduct by that student and other college athletes who value playing sports.

Although universities and colleges benefit greatly from their teams' success in intercollegiate athletics, they should place their students' welfare and the educational environment above athletics.

### C. Athlete's Interests

For many athletes, playing as a professional athlete is the ultimate goal.<sup>201</sup>

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greater spending on athletics rather than academics at large and athletically competitive universities); *see also, e.g.*, FLORIDA STATE UNIVERSITY, MISSION, <https://www.fsu.edu/about/mission-vision.html> [HTTPS://PERMA.CC/6GDG-P7P7] (last visited Aug. 8, 2019)

"Florida State University preserves, expands, and disseminates *knowledge* in the *sciences, technology, arts, humanities, and professions*, while embracing a philosophy of *learning* strongly rooted in the traditions of the liberal arts. The university is dedicated to excellence in *teaching, research*, creative endeavors, and service. The university strives to instill the strength, skill, and character essential for *lifelong learning*, personal responsibility, and sustained achievement within a community that fosters free inquiry and embraces diversity."

(emphasis added); BAYLOR UNIVERSITY, MISSION STATEMENT, <https://www.baylor.edu/about/index.php?id=88781> [https://perma.cc/B58X-UW4D] (last visited Aug. 8, 2019) ("The mission of Baylor University is to *educate* men and women for worldwide leadership and service by integrating academic excellence and Christian commitment within a caring community.").

200. Keehan et al., *supra* note 7 (explaining that twenty percent of repeat offenders are college athletes).

201. NCAA, DIVISION I RESULTS FROM THE NCAA GOALS STUDY ON THE STUDENT-ATHLETE EXPERIENCE 30 (2011), [http://www.ncaa.org/sites/default/files/DI\\_GOALS\\_FARA\\_final\\_0.pdf](http://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_0.pdf) [https://perma.cc/4BKW-9569] (reporting data from a 2010 study that showed seventy-six percent of the Division I men's college basketball players and fifty-eight percent of the FBS players responding to a survey thought that it was "at least 'somewhat likely'" that they would become a professional and/or Olympic athlete in their sport). In reality, a little over one percent of college football and men's college basketball players make it to the professional ranks. *See* Estimated Probability of Competing in

If a college athlete does not reach the professional ranks, then his family may never escape poverty, but if a player can make it to the pros, then he can earn money that provides generational wealth that uplifts him and his family for years.<sup>202</sup> When an athlete is accused of sexual misconduct, his reputation will likely suffer permanently, and it will certainly suffer in the short-term, even if he is later exonerated.<sup>203</sup> If the accused athlete is Black, then the situation can be even more tenuous.

Black athletes may be falsely accused because of their race. There is evidence of higher wrongful convictions of Black defendants than White defendants in criminal cases.<sup>204</sup> Moreover, women who regret engaging in interracial sexual relations may falsely accuse a Black athlete of sexual misconduct.<sup>205</sup>

The Office of Civil Rights (OCR) investigates and determines whether universities and colleges handle Title IX complaints appropriately.<sup>206</sup> The OCR does not require that universities record, retain, or report statistics on the race of the accused or victim.<sup>207</sup> While statistics regarding the racial demographics of individuals accused of sexual assault are not readily available, there is substantial anecdotal evidence that suggests many students accused of sexual assault are Black.<sup>208</sup> For example, two Black college football players suffered immensely

Professional Athletics, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [<https://perma.cc/4WDY-B2NU>] (last visited August 6, 2019).

202. Kurt Badenhausen, *The Average Player Salary and Highest-Paid In NBA, MLB, NHL, NFL And MLS*, FORBES (Dec 15, 2016, 09:34am), <https://www.forbes.com/sites/kurtbadenhausen/2016/12/15/average-player-salaries-in-major-american-sports-leagues/#873296310505> [<https://perma.cc/JGR7-TJ7N>] (providing statistics on the average salaries of professional athletes in 2016 that shows that professional athletes get paid more than \$1 million a year on average).

203. Robert P. Mosteller, *The Ethical Limitations on Prosecutors When Preparing and Presenting Evidence: The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337, 1137 (2007) (providing an example of the short term consequences that several members of the Duke University lacrosse team faced when falsely accused of sexual assault); *Wells v. Xavier*, 7 F.Supp. 3d. 746, 748 (2014) (giving an example of an instance when a college athlete was expelled from the university in an allegedly unfair proceeding against the athlete).

204. Samuel Gross et al., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=srgross&httpsredir=1&article=1121&context=other> [<https://perma.cc/H5BP-F5YW>] (providing statistics that support the notion that Black people are more likely to get falsely convicted of crimes they did not commit compared to other races).

205. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015).

206. U.S. Department of Education Office for Civil Rights, Revised Sexual Harassment Guidance (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/V4XQ-9VBU>].

207. Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, THE ATLANTIC, (Sep. 11, 2017) <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/> [<https://perma.cc/RMF9-PNE2>].

208. *Id.*

after a White female college student falsely accused them of rape.<sup>209</sup> During a court hearing, one of the football players stated, “I just hope [the false accuser] knows what she has done to me, my life will never be the same. I did nothing wrong, but everything has been altered because of this.”<sup>210</sup> The other football player’s court statement acknowledged how hard the last two years of his life had been.<sup>211</sup> He endured a “roller coaster of emotions: fear, anger, sadness, embarrassment, depression, anxiety and the list goes on.”<sup>212</sup> The player continued, “I lost my scholarship, my dream of continuing to play football and now I am in debt \$30,000 and I’m simply trying to get ahead as best as I can.”<sup>213</sup> Both football players lost their college scholarships following the accusation.<sup>214</sup> The White female accuser admitted that she lied about the consensual encounter to gain sympathy and favor with a different male student whom she wanted to date.<sup>215</sup> She received a sentence of three years, two of which were suspended, for false reporting and interfering with police.<sup>216</sup> The false accusations temporarily tarnished these players and likely scarred them forever.

In a similar situation, a White female student accused Dezmine “Dez” Wells, a promising Black basketball player at Xavier University (Xavier), of sexual assault.<sup>217</sup> During the summer prior to his sophomore year, Wells played a game of “Truth or Dare” with several students and his resident advisor.<sup>218</sup> The game involved dares that were sexual in nature and included the resident advisor “exposing her breasts, removing her pants, giving Mr. Wells a lap dance, and

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209. Monique Judge, *White Woman Who Falsely Accused 2 Black Football Players of Rape Rolls Her Eyes Throughout Sentencing Hearing*, THE ROOT (Aug. 24, 2018, 9:00 PM), <https://www.theroot.com/white-woman-who-falsely-accused-2-black-football-player-1828591038> [<https://perma.cc/H5J9-WXLV>]; Bob Fredericks, *Woman Who Made False Rape Claim Sentenced to Prison*, NEW YORK POST (Aug. 23, 2018 4:56PM), <https://nypost.com/2018/08/23/woman-who-made-false-rape-claim-sentenced-to-prison/> [<https://perma.cc/2KPA-C2ES>] (providing an example of the lasting harm of a false allegation where two athletes from Sacred Heart University were falsely accused of rape).

210. Fredericks, *supra* note 193.

211. *Id.*

212. *Id.*; see Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CAN. J. CRIMINOLOGY AND CRIM. JUST. 165 (2004) (findings from a study evaluating personality changes in wrongfully convicted individuals include irritability, loss of sense and purpose, estrangement, and loss of capacity for intimacy); Ronald C. Huff, *Wrongful Conviction and Public Policy: The American Society of Criminology 2001 Presidential Address*, 40 CRIMINOLOGY 1 (2006) (discussing prolonged problems that the accused face in their social life and in their community, even if acquitted); *Defamation of Character Lawsuits: Proving Actual Harm*, ALL LAW, (last visited Jun. 7 2019) <https://www.alllaw.com/articles/nolo/civil-litigation/defamation-character-lawsuit-proving-harm.html> [<https://perma.cc/T9MF-9552>] (discussing the physical, emotional, social, and financial effects of defamatory statements on an individual).

213. Fredericks, *supra* note 193.

214. Judge, *supra* note 193.

215. *Id.*

216. Fredericks, *supra* note 193.

217. *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014).

218. *Id.*

kissing him several times.”<sup>219</sup> Wells claims that they engaged in consensual sex after the game. Several students observed the resident advisor afterwards and said she was acting normal.<sup>220</sup> Later that day, the resident advisor told campus police she was raped.<sup>221</sup> However, she informed the local police she did not want to press charges. After the resident advisor made the allegation, the prosecuting attorney advised Xavier to wait to make a decision until after the investigation was concluded.<sup>222</sup> Instead, Xavier expelled Wells one week before the grand jury decided not to indict Wells.<sup>223</sup> The prosecuting attorney investigated the case and said, “It wasn’t even close... We would never take anything like this to court. It just wouldn’t happen.”<sup>224</sup>

Wells eventually sued Xavier for libel regarding its press release concerning his expulsion, among other things.<sup>225</sup> Wells stated, “From the moment this nightmare began, I’ve told the truth. I am innocent. It’s time to make this right. Xavier needs to set the record straight.”<sup>226</sup> Wells and Xavier eventually settled their lawsuit.<sup>227</sup>

Wells believed the impetus for the expulsion was an overreaction and overcorrection for mistakes Xavier made in prior Title IX cases. This is especially likely given that Xavier had entered into a voluntary agreement with the Department of Education following its mishandling of Title IX cases.<sup>228</sup> The prosecutor said the following of Wells’ expulsion: “[It] should never have gotten to the point where someone’s reputation is ruined.”<sup>229</sup>

Black athletes also want to avoid the negative effects of implicit racial bias.

219. *Id.*

220. *Id.*; Amended Complaint at 23, *Wells v. Xavier Univ.*, No. 13–cv–575 (S.D. Ohio, Sept. 10, 2013) (“Following intercourse, Wells and Rogers returned to Wells’ room. . . at approximately 5:15 A.M. According to multiple witnesses, Rogers’ demeanor was completely normal when she retrieved her telephone.”).

221. Amended Complaint at 24, *Wells v. Xavier Univ.*, No. 13–cv–575 (S.D. Ohio, Sept. 10, 2013) (“On July 7, 2012, Rogers claimed to Xavier campus police that Wells had sexually assaulted her.”).

222. *Wells*, 7 F. Supp. 3d at 748.

223. *See id.* (showing the Xavier University Conduct Board held a hearing on August 2, 2012 “[d]espite the Prosecuting Attorney’s request[ing Xavier] to hold off on any campus proceedings pending the outcome of his official investigation”).

224. Mike DeCourcy, *Dez Well’s Expulsion from Xavier “Fundamentally Unfair,” Prosecutor Says*, SPORTING NEWS (Aug. 28, 2012), <http://www.sportingnews.com/us/ncaa-basketball/news/4042720-dez-wells-expelled-xavier-sexual-assault-no-charges> [<https://perma.cc/9VC9-FMV5>].

225. *Wells*, 7 F. Supp. 3d at 750.

226. Amanda L. Myers, *Basketball Star Dez Wells Settles Lawsuit against Xavier over False Rape Allegation*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS (Apr. 24, 2014), <http://www.saveservices.org/2014/04/basketball-star-dez-wells-settles-lawsuit-over-false-rape-allegation/> [<https://perma.cc/59QQ-95BJ>].

227. Alex Prewitt, *Terps Guard Dez Wells, Xavier Settle[s] Lawsuit over Expulsion*, WASH. POST (Apr. 24, 2014), [https://www.washingtonpost.com/news/terrapins-insider/wp/2014/04/24/terps-guard-dez-wells-xavier-settle-lawsuit-over-expulsion/?noredirect=on&utm\\_term=.f0d0fe1ce45d](https://www.washingtonpost.com/news/terrapins-insider/wp/2014/04/24/terps-guard-dez-wells-xavier-settle-lawsuit-over-expulsion/?noredirect=on&utm_term=.f0d0fe1ce45d) [<https://perma.cc/9HJN-KENA>].

228. *Wells*, 7 F. Supp. 3d at 750.

229. DeCourcy, *supra* note 208.

Studies have shown that Whites have implicit racial bias against Blacks and perceive Blacks as criminals, aggressive, and violent.<sup>230</sup> The proposed guidelines in this article recommend that implicit bias training, including implicit racial bias training, should be required for all university participants in the Title IX process, such as investigators, decision-makers, and coordinators.

Furthermore, as discussed *supra*, Black men make up a substantial percentage of college athletes (especially with respect to men's basketball and football).<sup>231</sup> Because of the extremely detrimental effects of false accusations, athletes have a substantial interest in ensuring the system treats them fairly. Given the high proportion of Black college athletes and the dangers of racial bias, this concern is particularly acute for Black athletes. Athletes fear most losing the opportunity to pursue a professional career that could allow him to earn a living playing the sport he loves while providing for his family. They want to avoid the undeserved consequences of a false Title IX complaint.<sup>232</sup> The new Title IX regulations certainly help the athletes' cause and presume an accused is innocent until proven responsible.<sup>233</sup> Nevertheless, suffering removal from the team, even if later exonerated, could negatively affect the athlete's reputation and his ability to earn a living as a professional athlete, coach, broadcaster, or media personality, which are common professions for former college or professional athletes.<sup>234</sup> The varying interests of the athlete, university, and victim, which were discussed in this Part, are taken into account in the proposed guidelines that follow.

#### IV. PROPOSED GUIDELINES FOR UNIVERSITIES DETERMINING WHETHER ATHLETES ACCUSED OF TITLE IX VIOLATIONS SHOULD BE REMOVED

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230. See Eva Paterson & Luke Edwards, *Implicit Injustice: Using Social Science to Combat Racism in the United States*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 15-18 (2015); Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U.J.L. & POL'Y 23, 29-30 (2014) (stating White Americans hold implicitly biased views that persons of color are savages, violent, promiscuous, slaves, and foreigners today).

231. Kevin Blackstone, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS 1 (2016), [https://nepc.colorado.edu/sites/default/files/publications/Harper\\_Sports\\_2016.pdf](https://nepc.colorado.edu/sites/default/files/publications/Harper_Sports_2016.pdf) [<https://perma.cc/92WS-Y2W8>].

232. See, e.g., *Ruff v. Board of Regents of University of New Mexico*, 272 F. Supp. 3d 1289, 1291 (2017) (involving two Black athletes accused of gang rape who were exonerated but not before being suspended from playing football).

233. 34 C.F.R. § 106.45 (2020).

234. Eriq Garder, *Ray Lewis, Shannon Sharpe and the Business of Turning Athletes Into Broadcasters*, THE HOLLYWOOD REPORTER (Aug. 15, 2013), <https://www.hollywoodreporter.com/news/ray-lewis-shannon-sharpe-business-604890> [<https://perma.cc/R5HB-Y8VF>] (explaining that the media now actively recruits athletes to become broadcasters when they retire); Fredericks, *supra* note 193 (providing a prime example of the harm caused by a false allegation of sexual assault as two athletes from Sacred Heart University falsely accused of rape, although later exonerated, lost their scholarships and the ability to continue playing football).

## FROM THEIR TEAMS

This part sets forth proposed guidelines for universities to use when responding to student allegations of sexual misconduct by an athlete. These proposed guidelines use the categories of sexual misconduct found in the new regulations.<sup>235</sup> Title IX already includes a built-in mechanism to address when college athletes are accused of Title IX violations via the supportive measures allowed under the statute.<sup>236</sup> Universities should adopt, or the federal government should require them to follow, these proposed guidelines to determine whether college athletes should be removed from their respective team(s) while the Title IX investigation is pending.<sup>237</sup>

*A. Summary of Proposed Guidelines, Definitions, and Timing & Procedure*

The new Title IX regulations require that a Title IX Coordinator promptly contact an alleged victim of sexual assault after a report of sexual assault to discuss supportive measures with the alleged victim.<sup>238</sup> Supportive measures are actions taken during the investigation of the sexual assault, which can include the accused's removal from his sports team.<sup>239</sup> Within five days of receiving a sexual assault report, the school's Title IX coordinator should use the proposed guidelines to determine whether to remove an athlete from his team. The following is a summary of the proposed guidelines, definitions for key terms found in the guidelines, and the timing and procedure relating to the proposed guidelines.

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235. 34 C.F.R. § 106.30 (2020) (referring to 20 U.S.C. 1092(f)(6)(A)(v) for the definition of sexual assault, which itself refers to the Uniform Crime Reporting System of the FBI); Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41–42, 60.

236. 34 C.F.R. § 106.30 (2020); Off. of Civ. Rts., Dept. of Ed., Final Rule at 569–70, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf> [<https://perma.cc/K5ED-DRPE>]; U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (Sept. 2017) <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/XG5E-67Q4>] (discussing various interim measures); see U.S. Dep't of Educ. Office for Civil Rights, Revised Sexual Harassment Guidance *supra* note 116. Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act 34 C.F.R. § 668.46(b)(11)(v) (2011)

237. See Moorman & Osborne *supra* note 17 (stating that “[a]ppropriate interim steps when a student-athlete is involved in a report of sexual violence must include an immediate suspension of playing privileges”); Mangan *supra* note 17 (“While there’s always a risk that a quick, public response could sully the reputation of a student who turns out to be falsely accused, failing to take action would be worse...”); U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCES GUIDE *supra* note 17; Meyer *supra* note 41 (recommending an athlete’s temporary suspension from all team activities when he is “plausibly accused of sexual assault”).

238. 34 C.F.R. § 106.44 (2020).

239. 34 C.F.R. § 106.30 (2020); Off. of Civ. Rts., Dept. of Ed., Final Rule at 569–70, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf> [<https://perma.cc/K5ED-DRPE>].

### *1. Summary of Guidelines*

Within five days after a university acquires actual knowledge of an alleged Title IX sexual assault, the complainant and the respondent may submit evidence to the Title IX Coordinator. If the complainant provides corroborating evidence of the sexual assault, then the respondent will be automatically removed from the team and that includes removal from the team for playing games, as well as practicing, meeting, and training sessions with his team. If the accusation involves rape, sodomy, or sexual assault with an object (as defined below), then the removal from the team for playing games will be indefinite. If the complaint involves fondling (as defined below), then the removal from the team will entail a removal from the team for four games. If the respondent provides mitigating evidence, then the Title IX Coordinator may, at her discretion, allow the respondent to practice, meet, and/or train with the team, but the removal from the team for playing games cannot be vacated.

#### *a. Definitions*

Complainant: “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”<sup>240</sup>

Respondent: “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment”<sup>241</sup>

Corroborating evidence: evidence provided by the complainant that tends to show sexual assault occurred under Title IX

Mitigating evidence: evidence provided by the respondent that may be used to reduce the measures faced by the respondent in allowing the respondent to practice, meet, and/or train with the team at the discretion of the Title IX Coordinator

Five-day period: a complainant or respondent can submit corroborating or mitigating evidence, respectively, within five days after a university acquires actual knowledge of an alleged Title IX violation; as soon as the corroborating evidence is received, whether it is the same day the knowledge is acquired or on the fifth day after the knowledge is acquired, the Title IX Coordinator will automatically remove the respondent from the team, which includes the removal from the team for playing games, as well as from practicing, meeting, and training sessions with his team; if and when the respondent provides mitigating evidence within those five days, then the Title IX Coordinator may reduce the removal from the team for practices, meetings, and/or training sessions with the team, but the Coordinator cannot reduce or vacate the removal for games

Removal involving Rape, Sodomy, or Sexual Assault with an Object: if a report involves a violation under Title IX of rape, sodomy, or sexual assault with an object, then when corroborating evidence is provided by the complainant, the

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240. 34 C.F.R. § 106.30 (2020).

241. 34 C.F.R. § 106.30 (2020).



respondent will automatically be removed from the team indefinitely for games

Rape: “[t]he carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity;” carnal knowledge, or sexual intercourse, includes even the “slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis)”<sup>242</sup>

Sodomy: “[o]ral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity”<sup>243</sup>

Sexual Assault with an Object: using an object or instrument, which can be anything other than genitalia, such as a finger, bottle, handgun, or stick, “to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity”<sup>244</sup>

Fondling: “[t]he touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity”<sup>245</sup>

Removal involving Fondling: if a report involves a violation under Title IX of fondling, then when corroborating evidence is provided by the complainant, the respondent will be automatically removed from the team for four games

Implicit Bias Training: training of all University personnel who will be involved in the Title IX process, including investigators, decision-makers, and coordinators, must receive implicit bias training, including implicit racial bias training

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242. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> manual [https://perma.cc/X9NP-Q98E].

243. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [https://perma.cc/X9NP-Q98E].

244. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> manual [https://perma.cc/X9NP-Q98E].

245. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [https://perma.cc/X9NP-Q98E]. The non-forcible sex offenses—incest (“Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law”) and statutory rape (“Non-Forcible sexual intercourse with a person who is under the statutory age of consent”)—do not fall under the proposed guidelines in this article. *Id.*

## 2. Proposed Guidelines: Timing & Procedure

Within five days of a university acquiring actual knowledge of an alleged sexual assault by an athlete (hereinafter the respondent)<sup>246</sup>, the University's Title IX Coordinator will remove the athlete from the team and that includes removing him from participating in any activities relating to his sport, including playing games, practicing, meeting, and/or training sessions with his team, if corroborating evidence is provided by the complainant. Corroborating evidence is set forth in the "Proposed Guidelines: Removal from the Team for Rape, Sodomy, and Sexual Assault with an Object" or "Removal from the Team for Fondling" (both *infra*). The Title IX Coordinator may, at her discretion, allow the respondent to practice, meet, and/or train with the team if the respondent provides mitigating evidence, but the removal from the team for playing games cannot be vacated. Mitigating evidence can be found in "Proposed Guidelines: Mitigating Factors for Removal from the Team for Rape, Sodomy, and Sexual Assault with an Object" and "Removal from the Team for Fondling and Mitigating Factors" (both *infra*). Removal from the team will not prohibit the respondent from attending classes or accessing the university campus unless such measures are explicitly warranted. The respondent will be granted additional eligibility for games missed if the Title IX investigation concludes the respondent did not commit the alleged act.<sup>247</sup>

Upon a university acquiring actual knowledge of an alleged sexual assault by an athlete, both parties—the complainant and respondent— must be duly notified and permitted to present evidence to the Title IX Coordinator within those five days. As soon as the corroborating evidence is received, whether it is on the same day the university acquires the knowledge or on the fifth day after the knowledge is acquired, the Title IX Coordinator will automatically remove the respondent from the team and that includes removal from the team for games, as well as practices, meetings, and training sessions with his team. If and when the respondent provides mitigating evidence within those five days, then the Title IX Coordinator may vacate the removal from the team for practices, meetings, and/or training sessions with the team, but the Coordinator cannot vacate the removal from the team for games.

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246. This Article uses the terms victims and accuser, as well as accused and perpetrators, which represent charged terms that invoke emotion from the reader, as well as a presumption of guilt or innocence. An effective policy should include more objective titles for the parties, such as complainant (for the alleged victim) and respondent (for the alleged perpetrator) as this proposed policy does.

247. Thus, if the respondent is a senior football player and is wrongfully removed from the team and cannot participate in two games, then he would be able to keep his scholarship through the next fall to make up those two games during the following season. *See, e.g.,* Billy Witz, *N.C.A.A. Allows Extra Year of Eligibility for Athletes in Curtailed Spring Sports*, N. Y. TIMES, Mar. 30, 2020, <https://www.nytimes.com/2020/03/30/sports/ncaa-spring-sports-eligibility.html> [<https://perma.cc/Z44L-J7GG>] (discussing how the NCAA permitted additional eligibility for athletes whose seasons were cut short by COVID-19). The senior, of course, could forgo those two games if he wanted to enter the NFL draft or the workforce. The senior could also take graduate classes (as some college athletes do) while on scholarship and complete those two games.

Under the proposed guidelines, as soon as the Title IX Coordinator receives the corroborating evidence from the complainant, the respondent is automatically removed from the team for games, practices, meetings, and training sessions with the team. The Title IX Coordinator does not need to wait to receive the mitigating evidence to remove the respondent from the team because the Coordinator will not weigh the corroborating and mitigating evidence against each other to determine if removal is warranted—the removal is automatic. This takes discretion away from the university administrator. The Title IX Coordinator has the discretion to determine whether to allow the respondent to practice, meet, and/or train with the team if and when the respondent provides mitigating evidence. In addition, the Title IX Coordinator, depending on the corroborating evidence received, may decide that suspension from all classes and expulsion from the school grounds are justified, in addition to removing the player from the team indefinitely. The five-day window also allows the university to take swift and decisive action in the face of sexual misconduct, which reinforces the school's commitment under Title IX to provide a safe and nurturing environment for its students.

Although procedural due process—i.e., fair notice and fair hearing—is not required to remove a player from the team for games, practices, meetings, and training sessions because an athlete does not possess a protected interest in playing sports,<sup>248</sup> the proposed guidelines nevertheless include a notice provision and an opportunity for both parties to provide evidence. This procedural framework attempts to provide a fair and equitable process to protect the students—the victim and the accused—and provide relief, if borne by the evidence, for victims. It also comports with the new regulations of Title IX.<sup>249</sup>

The new regulations also “[r]equire that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”<sup>250</sup> The regulations require training for those involved with conducting a Title IX investigation, hearing, and appeal regarding bias, but they leave it to the discretion of universities to determine what

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248. See *Hyshaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940 (D. Kan. 1987) (holding that college football players do possess a property right in their scholarship funds, but they possess neither a property interest nor a liberty interest in playing college football, since there is no right to pursue a college football career); *Colorado Seminary (Univ. of Denver) v. Nat'l Collegiate Athletic Ass'n*, 417 F. Supp. at 896 (stating that college athletes “have no constitutionally protected property or liberty interest in participation in intercollegiate athletics” and college athletes also have no procedural due process protection relating to their participation in college sports).

249. 34 C.F.R. § 106.30 (2020); Off. of Civ. Rts., Dept. of Ed., Final Rule at 569–70, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf> [<https://perma.cc/K5ED-DRPE>]; WASH. ADMIN. CODE § 132Q-10-320 (2017); see U.S. Dep't of Educ. Office for Civil Rights, Revised Sexual Harassment Guidance, 66 Fed. Reg. 5512 (Jan. 19, 2001); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309–10 (5th Cir. 1987) (holding that a company's quick decision to remove the harasser from the victim was adequate remedial action).

250. See 34 C.F.R. § 106.45(b)(1)(iii) (2020).

type of training will take place.<sup>251</sup> Implicit racial bias training must be included to protect Black athletes. Studies have shown that Whites have implicit racial bias against Blacks and perceive Blacks as criminals, aggressive, and violent.<sup>252</sup> Bias training should also include overcoming negative stereotypes of victims for those who may be predisposed to blame the victim or side with the athlete because great athletes are generally revered in society.<sup>253</sup>

*B. Guidelines for Rape, Sodomy, and Sexual Assault with an Object*

If an athlete is accused of rape, sodomy, or sexual assault with an object, then the Title IX Coordinator will follow these guidelines to determine whether to remove the athlete from his team:

*1. Proposed Guidelines: Removal from the Team for Rape, Sodomy, or Sexual Assault with an Object*

A Title IX Coordinator shall remove a respondent from the team who is accused of rape, sodomy, or sexual assault with an object for the entire season and indefinitely after the season ends, which includes removing the respondent from the team for games, practices, meetings, and training sessions with his team during that removal, provided that any of the following pieces of corroborating evidence are present:

- (1) Evidence that the complainant sought and obtained a sexual assault forensic exam, which is also known as a rape kit;
- (2) Physical evidence, including, but not limited to, evidence collected from the sexual assault forensic exam, bruises on the complainant, scrapes on the complainant, torn clothing, as well as suicidal thoughts or behaviors of the complainant;
- (3) Admission of intercourse, even if allegedly consensual, by the respondent;
- (4) Contemporaneous or near contemporaneous filing of a police report for the same alleged misconduct;
- (5) A prior incident of sexual misconduct by the respondent;

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251. See 34 C.F.R. § 106.45(b)(1)(iii) (2020); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, 30182 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

252. See Eva Paterson & Luke Edwards, *Implicit Injustice: Using Social Science to Combat Racism in the United States*, 2015 HARV. J. RACIAL & ETHNIC JUST. ONLINE 1, 15-18 (2015); Darren Lenard Hutchinson, "Continually Reminded of Their Inferior Position": *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U.J.L. & POL'Y 23, 29-30 (2014) (stating White Americans hold implicitly biased views that persons of color are savages, violent, promiscuous, slaves, and foreigners today).

253. See Douglas E. Abrams, *Player Safety in Youth Sports: Sportsmanship and Respect as an Injury-Prevention Strategy*, 22 SETON HALL J. SPORTS & ENT. L. 1, 19 fn. 112 (2012) (stating that athletes are revered in American society) (citation omitted).

or

(6) Corroborating evidence from a reliable witness(es).

As an initial matter, these proposed guidelines limit the discretion of the reviewer to protect against biases and favoritism towards athletes or victims. A procedure that gives the reviewer more discretion, such as allowing the review of the totality of the circumstances through protracted evidentiary hearings and procedures, provides too much leeway for school officials to find avenues to allow the athlete to play while delaying the school's decision on whether the athlete should continue to participate in intercollegiate athletics.

A brief explanation of each of the six types of corroborating evidence is warranted. The first type of evidence, that a complainant sought and obtained a sexual assault forensic exam, requires little explanation because the fact that an individual obtained a rape kit after a sexual encounter is reliable evidence that sexual misconduct likely took place. Rape kits involve an extremely invasive process that may include “internal examinations of the mouth, vagina, and/or anus,” obtaining blood and urine samples, providing “swabs of body surface areas, and sometimes hair samples,” and giving details of recent consensual sexual activity and details of the assault itself.<sup>254</sup> The exam may also include pictures taken of the victim's “body to document injuries and the examination.”<sup>255</sup> Given that victims often feel embarrassed and ashamed after an assault,<sup>256</sup> the fact that a victim musters up the courage to obtain a rape kit, which is a lengthy and difficult process, both physically and emotionally, as well as a barrier to reporting sexual assault, indicates sexual misconduct likely occurred.<sup>257</sup>

The second type of evidence, physical evidence, should also be self-explanatory. Also, if a complainant provided evidence that she experienced suicidal thoughts or behaviors, then that would constitute reliable evidence that a sexual assault occurred because of the higher rates of suicidal thoughts and behaviors of sexual assault survivors. Moreover, this type of evidence is particularly reliable to show that sexual misconduct occurred since a stigma still

254. What Is a Sexual Assault Forensic Exam?, RAPE, ABUSE & INCEST NAT'L NETWORK (last visited Sept. 6, 2020), <https://www.rainn.org/articles/rape-kit>

255. What Is a Sexual Assault Forensic Exam?, RAPE, ABUSE & INCEST NAT'L NETWORK (last visited Sept. 6, 2020), <https://www.rainn.org/articles/rape-kit>

256. Michele Berger, Comment, *We Need More Than Locks: A Call for Intimate Partner Violence Education, Training, and Reform in the Workplace*, 49 U.S.F. L. Rev. 215, 228 (2015).

257. See Erin Gordon, *Untested Rape Kits: Delays, Destruction, and Disregarded Victims*, ABA Publications: Perspectives (May 17, 2019), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/may/untested-rape-kits-delays-destruction-and-disregarded-victims/> [<https://perma.cc/385A-A6B7>] (“The process of getting an exam is difficult for victims—it's invasive”); Resources, *False Reporting*, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER (2012), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf) [<https://perma.cc/5YXS-EFQJ>] (describing completing a “rape kit” as a struggle for victims: “answering personal questions, enduring an intensive physical exam and evidence collection prevents some victims from pursuing a criminal justice resolution.”).

exists in society regarding mental health that would deter someone from admitting to these types of thoughts and behaviors unless they were likely true.

The third type of evidence, an admission of intercourse, even if allegedly consensual, supports removal from the team because the number of false reports of sexual assaults is incredibly low,<sup>258</sup> and the number of sexual assaults on campuses is appallingly high.<sup>259</sup> As a result, if someone reports sexual misconduct, and the accused admits to intercourse, then it is more likely than not that the intercourse was non-consensual. Athletes can simply abstain from sexual activities with students at the school to avoid removal from the team with this type of corroborating evidence. In any event, the risk should fall on the athlete to ensure all of their sexual interactions are consensual.

Two safeguards are necessary based on these guidelines. First, filing a false Title IX complaint should result in some type of serious sanction, up to and including expulsion from the institution, just as filing a false police report can result in criminal punishment.<sup>260</sup> Second, if the athlete initially denies intercourse or that sexual activities occurred when those events actually did occur, then the athlete should be severely sanctioned for his initial misrepresentation, up to and including expulsion from the institution during the investigation. In other words, even though the athlete made the misrepresentation to, among other things, avoid removal from the team, the athlete should still be punished if the athlete either later admits those acts occurred but were consensual or the final hearing determination demonstrates intercourse occurred. This strict rule against misrepresentations places the onus on the parties to provide honest accounts of what occurred. The rule also encourages athletes to either make sure all sexual interactions are consensual or refrain from engaging in sexual activities with students at their school.<sup>261</sup> The new Title IX regulations allow a university to charge a student “with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding.”<sup>262</sup> The ability to

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258. *False Reporting*, NAT’L SEXUAL VIOLENCE RES. CENTER., <https://www.nsvrc.org/publications/false-reporting-overview> [https://perma.cc/562B-EDQ8] (last visited Mar. 12, 2019).

259. *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT’L NETWORK, <https://www.rainn.org/statistics/campus-sexual-violence> [https://perma.cc/327X-ZZL5] (last visited Mar. 12, 2019) (“Women ages 18-24 are at an elevated risk of sexual violence...Sexual violence on campus is pervasive.”).

260. *See, e.g.*, CAL. PENAL CODE § 148.5 (“Every person who reports to any other peace officer...that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.”).

261. *Church Educational System Honor Code*, BYU, (Aug. 13, 2018), <https://policy.byu.edu/view/index.php?p=26> (“[T]he Honor Code requires all members of the university community to manifest a strict commitment to the law of chastity.”).

262. *See* 34 C.F.R. § 106.71(b)(2) (2020). The new regulations provide “that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.” In other words, if a party is found responsible for a Title IX violation, then that finding by itself cannot be enough to conclude that the respondent made a materially false statement in bad faith, and vice versa; if the respondent is found not responsible, then the complainant is not automatically determined to have made a materially false statement in bad faith.

sanction a complainant, respondent, or witness for making false statements should be applicable in every Title IX proceeding, regardless of whether a university's code of conduct allows for sanctions based on false statements in its particular code of conduct, and the sanctions should be harsh.<sup>263</sup>

The next type of corroborating evidence, contemporaneous or near contemporaneous filing of a police report for the same alleged misconduct, warrants removal of the accused because filing a false police report constitutes a crime.<sup>264</sup> The threat of criminal punishment for filing a false police report serves as a deterrent to keep people from making false accusations. Thus, if a police report is filed at or around the same time that a Title IX complaint is made, it is likely that sexual misconduct occurred, and the respondent should therefore be removed from the team.

A prior incident of sexual misconduct by the accused is the fifth type of corroborating evidence that warrants removal of the accused from the team. Universities and colleges have admitted athletes with histories of sexual misconduct,<sup>265</sup> and they will likely continue to do so if they believe such players can help their teams win. Athletes with a history of sexual misconduct are more likely to be repeat offenders.<sup>266</sup> Universities should either perform due diligence to avoid recruiting players with prior sexual assault convictions, or they should be prepared to lose a player if similar conduct allegedly occurs during his time at the university.<sup>267</sup> Many people believe that everyone deserves a second chance, but if that chance is given, it should be revoked immediately when someone purportedly repeats his previous poor behavior. Playing intercollegiate sports is a privilege, not a right.<sup>268</sup>

Finally, when a reliable witness provides corroborating evidence, such as testimony in the form of affidavits or written statements subject to severe penalties for false testimony, removal must occur. For example, if someone heard the victim struggling or screaming in the other room, observed threatening behavior by the accused against the victim, or witnessed the athlete slip an unknown substance into the victim's drink, then removal from the team is appropriate.

263. See 34 C.F.R. § 106.45(b)(2)(i)(B) (2020) (providing notice must be given to parties if university's code of conduct prohibits making false statements during the grievance process); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance, 85 Fed. Reg. 30026, 30182 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

264. See, e.g., CAL. PENAL CODE § 148.5.

265. See *Williams v. Bd. of Regents*, 477 F.3d at 1282 (discussing the admission of an athlete with a history of sexual violence who allegedly raped or sexually assaulted fellow students).

266. Keehan et al., *supra* note 7 (“One in five perpetrators was accused of sexually assaulting more than one student; 44 percent of these repeat perpetrators were athletes.”).

267. See Caitlin M. Cullitan, *I'm His Coach, Not His Father: A Title IX Analysis of Sexual Harassment in College Sports*, 12 TEX. REV. ENT. & SPORTS L. 53, 75 (2010) (discussing Title IX and the need for required background checks of recruited athletes as a “precautionary, protective measure”).

268. *Equity in Athletics v. Dep't of Educ.*, 675 F. Supp. 2d at 681 (stating that playing college sports is a privilege, not a right).

Overall, the proposed guidelines serve the victim's interests of safety and justice because the athlete is removed from the team within five days after a report of a Title IX violation. The proposed guidelines also attempt to protect the athlete by requiring removal from the team only when corroborating evidence exists, as opposed to removing the athlete simply when someone asserts a Title IX complaint against him.<sup>269</sup> Moreover, an athlete can avoid removal either by learning about informed consent and ensuring that all of his sexual interactions are consensual or by abstaining from sexual activity altogether, thereby staying away from situations that could lead to false accusations. These proposed guidelines require strong penalties, such as suspension or expulsion, for making a false Title IX claim or providing a false statement as a purported witness.<sup>270</sup> The proposed guidelines attempt to strike a delicate balance between the reality of low rates of false reporting of sexual assaults to police with the high rates of wrongful criminal convictions of Black people. Thus, the guidelines provide for automatic removal when corroborating evidence exists to reflect the low rates of false sexual assault reporting. At the same time, the guidelines protect college athletes, including Black athletes, from false accusations alone by allowing removal from the team only when corroborating evidence exists. The proposed guidelines also include mandatory implicit bias training, including implicit racial bias training, to further help protect Black athletes.

Even though any of the six types of corroborating evidence described above would result in the athlete's removal from the team for games, the athlete could provide mitigating evidence that might allow him to at least practice meet, and/or train with the team. The following section proposes guidelines for when a Title IX Coordinator may consider mitigating evidence provided by the respondent.

2. *Proposed Guidelines: Mitigating Factors for Removal from the Team Based on Rape, Sodomy, or Sexual Assault with an Object*

The Title IX Coordinator may consider mitigating evidence to determine if the respondent may still be allowed to meet, train, and/or practice with the team, but not play in games. Mitigating evidence includes the following:

- (1) Denial that sex occurred;
- (2) The fact that the respondent has a clean and exemplary record;  
or
- (3) A statement from a reliable witness disputing the allegation.

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269. See Moorman & Osborne, *supra* note 17, at 581 (arguing that an athlete should be immediately suspended from playing when he is "involved in a report of sexual violence").

270. The definition of the false reporting of a Title IX claim could mirror the false reporting of a crime: a reported Title IX claim to a university "that an investigation factually proves never occurred." *False Reporting*, NAT'L SEXUAL VIOLENCE RES. CENTER, <https://www.nsvrc.org/publications/false-reporting-overview> [https://perma.cc/562B-EDQ8] (last visited Mar. 12, 2019) (defining false reporting as "a reported crime to a law enforcement agency that an investigation factually proves never occurred").



If the complainant is an athletic trainer or manager of respondent's team or is otherwise affiliated with the respondent's team and regularly attends practice, meetings, or training sessions, then the respondent will be removed from the team for any and all of those activities that the complainant attends, regardless of whether any mitigating factors are present.

This section gives the Title IX Coordinator a certain degree of discretion in determining which activities warrant removal of the respondent from the team for, such as practices, meetings, participating, and training sessions with the team. However, it is important to note that the presence of mitigating evidence does not affect an athlete's eligibility to play in games. If corroborating evidence is provided, the respondent will at the very least be prevented from playing in games. Also, if the victim attends practice, meetings, and/or training sessions because she is affiliated with the athletic team, then the accused must be removed from the team for those activities, even if mitigating factors exist. This is designed to minimize contact between the victim and the accused. Furthermore, this policy ensures that the victim is not inadvertently forced to leave her position with the team or athletic department based on the alleged sexual misconduct by the accused.

The mitigating evidence outlined above for the first category is straightforward, but the other two categories, the respondent's clean and exemplary record and a statement from a reliable witness disputing the allegation, deserve discussion. As for the second category, a respondent's clean and exemplary record includes the athlete's criminal record (or lack thereof), disciplinary record in schools (or lack thereof), academic record (such as grades), and record of service to the community.

With regard to the third category, witness testimony must be both reliable and credible in order to be used as either corroborating or mitigating evidence. If a witness for the complainant provides vague and nondescript testimony, that evidence is likely not reliable or credible enough to remove an athlete from his team. Factors that contribute to whether witness testimony or statements are reliable and credible include the following: "eyewitness knowledge, contemporaneous [or near-contemporaneous] reporting, and accountability" (i.e., is the witness subject to serious consequences if they are providing false testimony/statement).<sup>271</sup>

In any event, if corroborating evidence is presented, then mitigating evidence might still allow a player to meet, practice, and/or train with the team, but the presence of mitigating evidence will not affect the player's removal from

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271. See *United States v. Mosley*, 878 F.3d 246, 252-53 (8th Cir. 2017) (listing factors for when a "witness's tip [i]s reliable and provide[s] reasonable suspicion to make [a] stop" under the Fourth Amendment and explaining that "[w]hen evaluating tips, reasonable suspicion 'is dependent upon both the content of the information possessed by the police and its degree of reliability'"). This aspect also involves some limited discretion of the Title IX Coordinator under the proposed guidelines.

the team for games.

*C. Guidelines for Removal from the Team for Fondling*<sup>272</sup>

The following section outlines the proposed guidelines for dealing with allegations of fondling by an athlete.

*1. Proposed Guidelines: Removal from the Team for Fondling and Mitigating Factors*

A Title IX Coordinator shall remove a respondent accused of fondling from the team for four games and for practices, meetings, and training sessions with the team until the four-games are completed, provided any of the following pieces of corroborating evidence are present:

- (1) Tangible evidence of the fondling (e.g., a recording of the incident);
- (2) Admission of the fondling, even if allegedly consensual, by the respondent;
- (3) Contemporaneous or near contemporaneous filing of a police report for the same alleged misconduct;
- (4) A prior incident of sexual misconduct by the respondent; or
- (5) Corroborating evidence from a reliable witness(es).

The Title IX Coordinator may consider the following types of mitigating evidence to determine if the respondent should still be allowed to meet, train, and/or practice with the team, but not play during those four games:

- (1) Denial that fondling occurred;
- (2) The fact that the respondent has a clean and exemplary record; or
- (3) A statement from a reliable witness disputing the allegation.

If the complainant is an athletic trainer or manager of respondent's team or is otherwise affiliated with the respondent's team and regularly attends practice, meetings, or training sessions, then the respondent will be removed from the team for any and all of those activities that the complainant attends regardless of whether any mitigating factors are present.

The offense of fondling includes a shorter removal from the team than the other categories of sexual misconduct (i.e., rape, sodomy, and sexual assault with an object) because fondling is a lesser offense, although it is still serious and egregious. Corroborating evidence leads to automatic removal from the team for games but mitigating evidence can result in the athlete still participating in practice, meetings, and/or training sessions with the team, unless the complainant is affiliated with the respondent's team and regularly attends that team's

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272. Criminal Justice Information Services Division Uniform Crime Reporting Program, 2019 National Incident-Based Reporting System User Manual at 41, <https://ucr.fbi.gov/nibrs/nibrs-user-manual> [<https://perma.cc/X9NP-Q98E>].

activities.

#### V. COUNTER-ARGUMENTS TO THE PROPOSED GUIDELINES AND RESPONSES THERE TO

As discussed previously, one of the main arguments against the proposed guidelines and responses thereto is that the guidelines limit the discretion of the school in deciding whether to remove an athlete from the team after a Title IX allegation against an athlete. However, that discretion limit is necessary because schools have failed to exercise their discretion properly in the past (see *supra* Part II (B)). This section addresses three other major arguments against the proposed guidelines: (1) schools will not voluntarily adopt these guidelines; (2) the proposed guidelines favor the victims; and (3) these guidelines target athletes. These counterarguments are addressed below.

##### A. *Schools Will Not Voluntarily Adopt These Guidelines*

A common argument is that universities, which historically have prioritized athletics over the safety and well-being of victims, will likely not voluntarily adopt the proposed guidelines. There is merit to this argument. Expecting universities to adopt guidelines that may prevent star players from participating in games, which could cost the schools millions in revenue and unknown amounts in lost alumni and booster donations, may seem hopeful at best. Because of this, the federal government should adopt these guidelines to ensure that Title IX is enforced and to show a proactive response to the epidemic of sexual assault on college campuses. Alternatively, societal pressure or the threat of litigation may prompt universities to adopt these guidelines on their own.<sup>273</sup> Moreover, student groups or activists may be able to persuade forward-thinking universities to change their policies to adopt these guidelines.<sup>274</sup>

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273. See Ralph D. Russo, *Why NCAA Sexual Assault Policy Stops Short of Punishment*, CHI. TRIB., (Mar. 30, 2018), <https://www.chicagotribune.com/sports/college/ct-spt-ncaa-sexual-assault-policy-punishment-20180330-story.html> [http://perma.cc/RPM7-SD7S] (“Campus backlash prompted Youngstown State to ban [athlete] from playing last season.”); Katherine Mangan, *Colleges Walk a Fine Line When Athletes are Accused of Sexual Assault*, THE CHRON. OF HIGHER EDUC. (Oct. 9, 2014), <https://www.chronicle.com/article/Colleges-Walk-a-Fine-Line-When/149291> [http://perma.cc/A2MY-YULJ] (“While there’s always a risk that a quick, public response could sully the reputation of a student who turns out to be falsely accused, failing to take action would be worse....”).

274. Marina Starleaf Riker & Nick Talbot, *UTSA Announces New Policy To Fight Sexual Misconduct By Student-Athletes*, SAN ANTONIO EXPRESS-NEWS (Sep. 18, 2019), <https://www.expressnews.com/news/local/article/UTSA-announces-new-policy-to-fight-sexual-14448010.php> (detailing how Brenda Tracy, noted activist for reform of rules regarding sexual assault on campus, successfully advocated for the Tracy Rule, which “ban[s] students with verified histories of violence or sexual abuse from participating in its athletic programs” and “prohibit[s] them] from receiving sports scholarships, competing in games or attending practices”, and the University of Texas San Antonio adopted in the fall of 2019).

*B. The Proposed Guidelines Favor the Victims*

Another argument is that the proposed guidelines favor the victims because they allow for automatic removal from team activities without a hearing, which is unfair for the athlete.<sup>275</sup> The new Title IX regulations provide several procedural protections for the accused.<sup>276</sup> In response to this concern, the guidelines state that a university may remove a player from the team only if evidence corroborating the sexual misconduct allegation is produced. Moreover, the accused may present mitigating evidence to reduce the extent of the removal. Based on the low rates of false reporting and high rates of sexual assault on college campuses, if a student makes a Title IX complaint and can provide corroborating evidence, the burden should properly shift to the athlete to show that no misconduct occurred. A university's number one priority should be to protect its students and foster a nurturing academic environment, and these guidelines are designed to further these goals. Without these guidelines, the results become inconsistent and unjust. Survivors of sexual assault receive little in the way of justice, while the athletes accused of assaulting them continue as if nothing has happened. Moreover, as discussed *supra*, this process is not unconstitutional because a university may remove an athlete in college from the team for games and team activities without violating his due process rights.<sup>277</sup>

Others may similarly argue that removing an athlete from the team before the criminal investigation concludes is also unfair. This argument fails for two main reasons. First, a Title IX investigation need not wait for a criminal investigation to conclude before it ends. Title IX requires a university to implement grievance procedures “that provide for a prompt and equitable resolution” of sexual assault complaints.<sup>278</sup>

Second, victims may decide that they do not want to press charges, or prosecutors may choose not to prosecute a case for many reasons, resulting in a lack of a criminal investigation and adjudication. Based on how previous survivors have been treated, victims may be afraid to place a prominent athlete in the criminal justice system knowing the potential for fan backlash.<sup>279</sup> Prosecutors may decline to prosecute a sexual misconduct case for several reasons, including a lack of evidence or a belief that they cannot prove their case to the very high standard of beyond a reasonable doubt.<sup>280</sup> Thus, a criminal

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275. See *Goss v. Lopez*, 419 U.S. 565, 573-76 (1975) (holding that high school students were entitled to a public education, thus a ten-day suspension from school without a hearing prior to the suspension violated the Due Process clause of the Fourteenth Amendment).

276. 34 C.F.R. § 106.45 (2020).

277. Playing intercollegiate sports is not a constitutionally protected right, and a college athlete possesses no procedural due process rights with regard to playing. *Equity in Athletics v. Dep't of Educ.*, 675 F. Supp. 2d at 681.

278. 34 C.F.R. §§ 106.8(c), 106.30, 106.44, 106.45 (2020).

279. See, e.g., *THE HUNTING GROUND* (Chain Camera Pictures 2015) (discussing how a Florida State student received death threats after her complaint against its star quarterback became public).

280. Sofia Resnick, *Why Do D.C. Prosecutors Decline Cases So Frequently? Rape Survivors*

conviction may not materialize, but that does not mean sexual misconduct did not occur. The proposed guidelines protect the interests of all stakeholders.

### C. *These Guidelines Target Athletes*

Others may argue that these proposed guidelines target athletes. While college athletes are accused of sexual misconduct at a higher rate than non-athletes, the fact remains that athletes make up a much smaller percentage of the student population than non-athletes and, in total, are involved in fewer Title IX complaints than non-athletes.<sup>281</sup> The response to this argument is two-fold. First, the issue of sexual misconduct on college campuses has largely come into focus and gained awareness because athletes are involved.<sup>282</sup> Catherine Lhamon, the chairperson of the United States Commission on Civil Rights, who formerly worked for the Department of Education, stated, “The capturing of the hearts and minds of the American public is what has moved this issue... The response of student communities to sexual violence among athletes has been really important.”<sup>283</sup> Without the media and attention athletes draw to the issue, she contends that the campaign to increase awareness of sexual assault on campus “would be largely nonexistent.”<sup>284</sup> When the focus of the guidelines remains on athletes, these guidelines could raise awareness of this topic for all victims and all those accused.

Second, the guidelines can and should be applied to all college students engaged in extracurricular activities, not just athletes.<sup>285</sup> Students participating in fraternities, ROTC, club sports, as well as music, theater, and drama programs, and any other extracurricular activities, should be subject to these proposed guidelines if they are accused of sexual misconduct. Students engaged in extracurricular activities should be removed from their activities in the same manner as athletes under these guidelines. Universities should work tirelessly to rid their campuses of sexual misconduct committed by anyone, including athletes

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*Seek Answers*, REWIRE.NEWS (Mar. 11, 2016), <https://rewire.news/article/2016/03/11/d-c-prosecutors-decline-cases-frequently-rape-survivors-seek-answers/> (noting that the beyond a reasonable doubt standard is a very difficult standard to meet in criminal sexual assault cases); *What to Expect from the Criminal Justice System*, RAPE, ABUSE & INCEST NAT'L NETWORK (last visited Mar. 18, 2020), <https://www.rainn.org/articles/what-expect-criminal-justice-system> (stating lack of evidence as a reason why a sexual assault case is not prosecuted).

281. Paula Lavigne, *Outside the Lines: College Athletes Three Times More Likely to be Named in Title IX Sexual Misconduct Complaints*, ENTMT & SPORTS NETWORK (Nov. 1, 2018), [http://www.espn.com/espn/otl/story/\\_id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints](http://www.espn.com/espn/otl/story/_id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints) [<http://perma.cc/7GPM-VZZF>] (“[athletes] represent, on average, just 1.7 percent of total student enrollment at the [Power Five] universities.”).

282. *Id.*

283. *Id.*

284. *Id.*

285. The language of the proposed guidelines in this Article could be revised to cover all extracurricular activities. For example, instead of a “removal from the team for games, practices, meetings, and training sessions,” it could read, “removal from the extracurricular activity for performances/games/ceremonies, practices, meetings, and training sessions.” Proposed Guidelines, Part IV.B, at page 38 of this Article.

and non-athletes.

#### CONCLUSION

Sexual assault on college campuses remains an epidemic. As universities attempt to handle alleged Title IX violations concerning sexual misconduct, they must protect the academic environment and integrity of their schools. Since athletes are three times more likely to be accused of sexual assault than non-athletes,<sup>286</sup> and schools have historically mishandled complaints against athletes, the proposed guidelines in this Article provide an equitable approach for determining when an athlete should be removed from his team based on a report that an athlete violated Title IX. Universities need to protect their students by ensuring a safe and nurturing educational environment, recall the lofty aspirations and ideals that they claim to stand for, such as justice, fairness, and equality, and send an unequivocal message to their communities that academics and student safety are more important than the success of, and profits accumulated by, the university's athletic teams.

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286. Lavigne, *supra* note 260.