

## Marquette Sports Law Review

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Volume 26

Issue 2 Symposium: *The Changing Landscape of  
Collegiate Athletics*

Article 14

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# Are Institutions of Higher Education Failing to Protect Students?: An Analysis of Title IX's Sexual Violence Protections and College Athletics

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### Repository Citation

Anita M. Moorman and 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 (2016)

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# ARE INSTITUTIONS OF HIGHER EDUCATION FAILING TO PROTECT STUDENTS?: AN ANALYSIS OF TITLE IX'S SEXUAL VIOLENCE PROTECTIONS AND COLLEGE ATHLETICS

ANITA M. MOORMAN\* & BARBARA OSBORNE\*\*

## I. INTRODUCTION

On April 4, 2011, the Department of Education (DOE or Department) issued a Dear Colleague Letter reminding educational institutions of their duty under Title IX to respond promptly and effectively to peer-to-peer sexual harassment and sexual violence on their campuses.<sup>1</sup> Despite the 2011 Dear Colleague Letter, sexual assault on campuses continued at an alarming rate, investigatory practices were considered inconsistent or ineffective, and remedies and punishments were often seen as inadequate.<sup>2</sup> Led by Senator Claire McCaskill (D. Mo), the United States Senate hosted three congressional forums focused on sexual assault on college campuses. Senator McCaskill's subcommittee produced a 120-page report, unflinchingly entitled *Sexual Violence on Campus: How Too Many Institutions of Higher Education Are*

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1. Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFF. FOR C.R., U.S. DEP'T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Dear Colleague Letter* (2011)]; see also DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS (2011), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf>.

2. Kristen Lombardi, *Flurry of New Legislation Targets Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2014/07/30/15185/flurry-new-legislation-targets-sexual-assault-campus> (last updated Aug. 1, 2014).

*Failing to Protect Students.*<sup>3</sup>

Thus, the DOE issued two additional guidance documents supplementing the 2011 Dear Colleague Letter. First, a 2014 Guidance entitled *Questions and Answers on Title IX and Sexual Violence* was intended to assist universities in addressing their legal obligations relative to sexual violence.<sup>4</sup> Next, a 2015 Dear Colleague Letter provided clarification specifically related to the role and responsibilities of the mandated Title IX Coordinator.<sup>5</sup>

The Department followed the 2014 clarification with a list of more than eighty universities that were under investigation for possible violations of federal law based on their handling of sexual violence and harassment complaints.<sup>6</sup> As of December 2, 2015, there were 185 active Office of Civil Rights (OCR) complaints against 152 colleges and universities for possible violations of federal law based on their handling of sexual violence and harassment complaints.<sup>7</sup>

In response, universities have urgently revised policies, procedures, and personnel to comply with the DOE and Title IX's requirements related to sexual violence. Various victims' support groups and civil rights advocates have weighed in on the issue as well. For example, victims of sexual violence and numerous support groups have launched public campaigns demanding a stop to sexual violence on college campuses,<sup>8</sup> and new legislation was introduced at both the state and federal levels, including proposed amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) and the addition of the Campus Sexual Violence

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3. See generally CLAIRE MCCASKILL, SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS (2014), <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

4. See generally U.S. DEP'T EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter 2014 DOE GUIDANCE]. The 2014 DOE Guidance has been designated as a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices." *Id.* at i n.1. It is also the first guidance dedicated solely to the issue of sexual violence on college campuses and universities duties to respond to and prevent sexual violence. *Id.*

5. Catherine E. Lhamon, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, U.S. DEP'T EDUC. OFF. FOR C.R., (Apr. 24, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> [hereinafter *Dear Colleague Letter* (2015)].

6. *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

7. Telephone Interview with Staff, U.S. Dep't of Educ., Office for Civil Rights (Dec. 2, 2015).

8. *Call for Stronger Sexual Assault Response, Prevention, and Awareness at Brandeis University*, CHANGE, <https://www.change.org/p/stronger-sexual-assault-response-prevention-and-awareness-at-brandeis-university> (last visited June 9, 2016).

Elimination Act (Campus SaVE Act) to the Violence Against Women Act. Additionally, concerns were expressed questioning the wisdom of imposing quasi-criminal investigatory burdens on universities and whether university policies and procedures provide adequate protection for those accused of sexual assault. Numerous universities are facing, or have recently settled, private lawsuits based on their handling of sexual assault allegations involving student-athletes.<sup>9</sup> The rapidly expanding policy development in this area will likely create a number of legal questions and challenges.

Section II of this Article will discuss the history and current state of sexual assault on college campuses and the heightened impact on athletics programs and student-athletes. Section III will examine and summarize the legal requirements contained in the DOE's 2011 Dear Colleague Letter and 2014 Guidance together with various pending state and federal laws creating or clarifying the legal obligations of higher education institutions to address sexual violence. Section IV will conclude with a discussion of recommendations and implications for college administrators.

## II. SEXUAL ASSAULT ON COLLEGE CAMPUSES AND ATHLETICS

Sexual assault on college campuses in the United States has existed as a severe and persistent problem that does not appear to be subsiding. In 2014, the Department campus crime statistics reported the following number of crimes on college and university campuses: 4,250 stalking; 2,326 fondling; 2,831 domestic violence; 3,191 dating violence; and 4,462 rape.<sup>10</sup> These figures reflect only the number of cases reported by colleges and universities and have steadily increased every year.

### A. Prevalence of Sexual Violence in Higher Education

In 2007, a study commissioned by the National Institute of Justice (NIJ) and funded by the United States Department of Justice (DOJ) found that 19% of

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9. See, e.g., Rachel Axon, *Ex-NFL Player's Son, Patrick Swilling Jr., Implicated in Sexual Assault Lawsuit*, USA TODAY (Aug. 18, 2014), <http://www.usatoday.com/story/sports/ncaab/2014/08/18/patrick-swilling-tulsa-sexual-assault-lawsuit-title-ix/14104075/>; Rebecca Boone, *2 Women Sue Boise State over Sex Assault Response*, WASH. TIMES (Apr. 14, 2014), <http://www.washington-times.com/news/2014/apr/14/2-women-sue-boise-state-over-sex-assault-response/?page=all>; Lombardi, *supra* note 2; Tatiana Schlossberg, *UConn to Pay \$1.3 Million to End Suit on Rape Cases*, N.Y. TIMES (July 18, 2014), [http://www.nytimes.com/2014/07/19/nyregion/uconn-to-pay-1-3-million-to-end-suit-on-rape-cases.html?\\_r=1](http://www.nytimes.com/2014/07/19/nyregion/uconn-to-pay-1-3-million-to-end-suit-on-rape-cases.html?_r=1).

10. *The Campus Safety and Security Data Analysis Cutting Tool*, U.S. DEP'T EDUC., <http://ope.ed.gov/Security/> (last visited June 9, 2016).

women experienced sexual assault since entering college.<sup>11</sup> This frightening statistic, that one in five women will be sexually assaulted during their undergraduate experience, was cited in the 2011 Dear Colleague Letter, which was followed by an exponential increase in investigations by the Department into university procedures for such cases.<sup>12</sup> Critics subsequently challenged this alleged college rape epidemic for utilizing too small of a sample size that was composed of two large universities and too broad a definition of sexual assault in the questionnaire.<sup>13</sup> However, as new studies emerge with similar results, the alarming number of sexual assaults of college students appears to be an accurate representation of a continuing problem.

Together with the Kaiser Foundation, the Washington Post published findings from its national survey this year that one in five female students experience sexual assault while in college.<sup>14</sup> In contrast to the NIJ survey, participants in this study spanned more than 500 colleges and universities from every state, totaling 1,053 male and female undergraduate students ages seventeen to twenty-six.<sup>15</sup> The survey also addressed the NIJ study's frequently criticized expansive definition of sexual assault by narrowing the term to include only five types of undesired contact: forced touching of a sexual nature, oral sex, vaginal sexual intercourse, anal sex, and sexual penetration with a finger or object.<sup>16</sup> Based on this definition, 5% of men and 20% of women in colleges nationwide reported they were sexually assaulted in college.<sup>17</sup>

Even with the elimination of variables at issue in the NIJ study, some critics were still not convinced of the statistic confirmed by the Washington Post's results. A contributing editor at Reason Cathy Young expressed concern that the totals in the study included some sexual encounters that were experienced while intoxicated.<sup>18</sup> Studies reported between 78% and 88% of rape victims were under the influence of alcohol, with 66% so intoxicated that they

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11. CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-1 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

12. *Dear Colleague Letter* (2011), *supra* note 1, at 2.

13. Carey et al., *Incapacitated and Forcible Rape of College Women: Prevalence Across the First Year*, 56 J. ADOLESCENT HEALTH 678, 678–80 (2015).

14. 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/>.

15. *Id.*

16. *Id.*

17. *Id.*

18. Scott Jaschik, *1 in 5 After All?*, INSIDE HIGHER ED (June 15, 2015), <https://insidehighered.com/news/2015/06/15/new-survey-finds-1-5-college-women-have-experienced-sexual-assault>.

had no clear memory of the assault, had passed out, or were blacked out.<sup>19</sup> The majority of perpetrators were also found to be under the influence.<sup>20</sup> This raised the questions of whether the victim was actually incapacitated or just had momentarily impaired judgment and whether the alleged perpetrator had the intent to rape.

Individual universities have also conducted their own follow up studies that are yielding similar results to that of the national sample. This year, the University of Michigan released findings from an on-campus survey indicating more than 22% of female undergraduate students reported having experienced some type of sexual assault.<sup>21</sup> The survey defined sexual assault as “nonconsensual (also known as unwanted) kissing and touching; oral vaginal, or anal penetration” stemming from coercion, intoxication, or use of force.<sup>22</sup> Applying a more narrow definition of only encounters involving penetration, 12% of females reported having experienced sexual assault within the past year.<sup>23</sup>

Another study released this year by an upstate New York university found that 18.6% of women experienced either rape or attempted rape in college, “defined as vaginal, oral, or anal penetration achieved using threats of violence or use of physical force (FR), or using the tactic of victim incapacitation (IR).”<sup>24</sup> This total included only women who were sexually assaulted during their freshmen year in 2010.<sup>25</sup> An analysis conducted by United Educators of sexual assault reports between 2011 and 2013 revealed that more than half of alleged victims were freshmen, as were 88% of the alleged victims of reported gang assaults.<sup>26</sup> Including reports by sophomores, underclassman composed nearly three-quarters of the 305 cases from the insurance company’s 104 client colleges.<sup>27</sup>

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19. ALYSSA KEEHAN, EMILY CAPUTO, HILLARY PETTEGREW & MELANIE BENNETT, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 6 (2015), [https://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual\\_assault\\_claim\\_study.pdf](https://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual_assault_claim_study.pdf).

20. *See generally* ROBB JONES, UNDERSTANDING HOW AND WHY TITLE IX REGULATES CAMPUS SEXUAL VIOLENCE (2015), <https://www.ue.org/uploadedFiles/History%20of%20Title%20IX.pdf>.

21. UNIV. 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>.

22. *Id.* at 3.

23. *Id.* at 15.

24. Carey, Durney, Shephardson & Carey, *supra* note 13, at 679.

25. *Id.*

26. *Id.* at 679–80.

27. *Id.*

Finally, the Association of American Universities (AAU) developed a comprehensive campus climate survey for their twenty-seven member institutions.<sup>28</sup> The AAU survey adapted the design used by the White House Task Force to Protect Students from Sexual Assault survey and avoided words such as rape and assault, focusing instead on types of behaviors and tactics that constitute sexual assault and misconduct.<sup>29</sup> Twenty-six of the twenty-seven member institutions administered the survey on their campuses. The survey had a response rate of 19.3% with more than 150,000 students participating.<sup>30</sup> The survey found that across four different descriptions of sexual misconduct tactics, “[o]ne-third (33.1%) of senior females and 39.1 percent of seniors identifying TGQN report being a victim of nonconsensual sexual contact at least once” during college.<sup>31</sup>

As it becomes more and more evident how large and serious of a problem sexual assault is on campuses nationwide, it is important to keep in mind that many more cases go unreported. The United Educators report found that 40% of victims delayed reporting any sexual assault for an average of eleven months.<sup>32</sup> The DOJ study found that 80% of campus rapes went unreported, as compared to approximately 67% of rape assaults in the general population.<sup>33</sup> Because rape is such a personal and traumatic experience, lack of reporting, delayed reporting, and research may never produce a genuine indication of the true number of sexual assaults in the college community. For the critics who believe the percentage of victims is below the 20% result in past and current studies, it is necessary to consider that these numbers are still likely an underrepresentation of the victims who have suffered from unwanted sexual experiences.

### B. Sexual Violence and College Athletics

The research data paints a very bleak picture about the sexual assault

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28. See generally DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSHIK LEE, CAROL BRUCE & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015), [https://www.aau.edu/uploaded-Files/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misc%20onduct.pdf](https://www.aau.edu/uploaded-Files/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misc%20onduct.pdf).

29. *Id.* at vi.

30. *Id.*

31. *Id.* at 23. “[T]ransgender, genderqueer, nonconforming, questioning or not listed (TGQN)” was identified as a separate group for the study. *Id.* at vii. The other groups were male, female, and decline to state. *Id.*

32. KEEHAN, CAPUTO, PETTEGREW & BENNETT, *supra* note 19, at 4.

33. Mollie Lam, *Here’s Your Talking-Points Memo on Campus Sexual Assault*, AAUW <http://www.aauw.org/resource/campus-sexual-assault-talking-points/> (last visited June 9, 2016).

climate on college campuses overall, but the research is even more alarming when examining student-athlete involvement in sexual assault. Of those accused of rape on campus, 25% are varsity athletes; this is a disproportionately high figure, as student-athletes typically comprise 10%–15% of a student population.<sup>34</sup> Twenty percent of repeat perpetrators are also student-athletes,<sup>35</sup> raising issues about recruiting student-athletes with a previous history of sexual assault or athletics department cover-ups.<sup>36</sup> Hyper-masculine environments, such as men's athletics programs, often have a culture promoting sexual objectification of women.<sup>37</sup> This, combined with high profile athletes' feelings of entitlement and rewards for aggressive behavior, increases the likelihood of acquaintance rape, sexual assault, and rape.<sup>38</sup> Research also indicates that 10% of all sexual assault reports involve multiple perpetrators, but an alarming 40% of multiple perpetrator assaults involve student-athletes, likely fueled by the aforementioned culture, peer support, and a failure of coaches and administrators to discipline student-athletes for inappropriate behavior.<sup>39</sup>

Studies, complaints, and case law indicate that student-athletes accused of sexual assault receive favorable treatment in several ways. First, when recruiting or admitting student-athletes to colleges and universities, an athlete's prior history of accusations or charges of sexual violence are overlooked as a determining factor.<sup>40</sup> Next, athletics departments often take charge of sexual violence cases involving student-athletes, often resulting in coercion of the victim to recant and failure to report the incident through the proper university channels for investigation.<sup>41</sup> Finally, sanctions imposed on student-athletes are often minimal and few institutions impose athletic-based

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34. KEEHAN, CAPUTO, PETTEGREW & BENNETT, *supra* note 19, at 4.

35. *Id.*

36. *See generally* J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 WL 4446712 (D. Ariz. 2008); Paula Lavigne & Nicole Noren, *Athletes, Assaults and Inaction*, ESPN (Aug. 25, 2014), [http://espn.go.com/espn/otl/story/\\_/id/11381416/missouri-tulsa-southern-idaho-face-allegations-did-not-investigate-title-ix-cases](http://espn.go.com/espn/otl/story/_/id/11381416/missouri-tulsa-southern-idaho-face-allegations-did-not-investigate-title-ix-cases).

37. Todd W. Crosset, James Ptacek, Mark A. McDonald & Jeffrey R. Benedict, *Male Student-Athletes and Violence Against Women: A Survey of Campus Judicial Affairs Offices*, in *DEVIANCE AND DEVIANTS: AN ANTHOLOGY* 239, 240–41 (Richard Tewksbury & Patricia Gagné eds., 2000).

38. *Id.*

39. *See* JONES, *supra* note 20. *See generally* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007).

40. *See generally* Simpson, 500 F.3d 1170; Williams, 477 F.3d 1282; Ariz. Bd. of Regents, 2008 WL 4446712; Lavigne & Noren, *supra* note 36.

41. *See* MCCASKILL, *supra* note 3, at 11; *see also* S.S. v. Alexander, 177 P.3d 724, 726 (Wash. Ct. App. 2008). *See generally* Complaint & Demand for Jury Trial, Doe v. Fla. State Univ. Bd. of Trs., No. 6:15-cv-00016-GAP-KRS, 2015 WL 105900 (M.D. Fla. Jan. 7, 2015).



sanctions, such as immediate suspension from play.<sup>42</sup>

### 1. Athlete's Prior History

A prior history of sexual harassment or assault is often ignored when schools want to obtain a highly talented athlete. Coach Jim Harrick offered Tony Cole a scholarship to play basketball at the University of Rhode Island (URI), but when Harrick accepted a job at the University of Georgia, URI would not admit Cole.<sup>43</sup> “Harrick [instead] arranged for Cole to play basketball at the Community College of Rhode Island (‘CCRI’).”<sup>44</sup> “CCRI dismissed Cole . . . [when] two female employees in the athletic department alleged that Cole groped and threatened them . . . .”<sup>45</sup> Cole then transferred to Wabash Community College and played one season before being dismissed for a series of problems including sexually harassing a female store clerk.<sup>46</sup> Harrick then recruited Cole to the University of Georgia, where he was accused of raping another UGA student.<sup>47</sup> At Arizona State University, a Title IX lawsuit was settled for \$850,000; a football recruit who was expelled from a summer bridge program on campus for grabbing and touching women in the dorm, exposing himself to female staff members, and threatening freshmen women was still admitted to the university and eventually raped another student in the student's dormitory room.<sup>48</sup> In 2012, a basketball player at the University of Southern Idaho was accused of raping a student; he transferred to the University of Tulsa and has since been accused of attempted sexual assault and sexual assault by two women.<sup>49</sup> Since 2011, more than a dozen athletes with a history of sexual harassment or sexual violence accusations were admitted to a second (and sometimes third) college or university.<sup>50</sup>

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42. *Thorpe v. Va. State Univ.*, 6 F. Supp. 2d 507, 509 n.2 (E.D. Va. 1998); MCCASKILL, *supra* note 3.

43. Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 96 (2010).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 95.

48. *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at \*1–3 (D. Ariz. 2008).

49. Lavigne & Noren, *supra* note 36. The athlete vigorously denies all allegations. *Id.*

50. See Timothy Bella, *13 Student-Athletes Accused of Sexual Assault Who Just Transferred Schools*, AL JAZEERA AM. (Apr. 15, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/4/15/timeline-ncaa-sexual-assault-transfer.html>; David Ching, *SEC: Schools Can't Take Transfers with Serious Misconduct Past*, ESPN (May 30, 2015), [http://espn.go.com/college-football/story/\\_/id/12977228/sec-adopts-proposal-prevents-transfer-students-histories-domestic-violence](http://espn.go.com/college-football/story/_/id/12977228/sec-adopts-proposal-prevents-transfer-students-histories-domestic-violence)

## 2. Athletics Department Involvement

At the 2015 National Association of Collegiate Directors of Athletics (NACDA) convention, Senator Claire McCaskill challenged athletics directors to stop shielding athletes accused of sexual assault and protecting the athletics program and instead put the safety of students on campus first.<sup>51</sup> In *S.S. v. Alexander*, a female freshman equipment manager was raped by a football player who she previously had a consensual relationship with.<sup>52</sup> The alleged victim did not initially report the incident but was asked about it by an assistant football coach who had heard about it.<sup>53</sup> When the incident was reported to the assistant coach and also to the associate athletic director, both suggested that the victim transfer out of her position with the football team.<sup>54</sup> When the victim expressed interest in filing a police report, the athletics administrators asked her to wait while they explored options; the athletic director and Title IX Coordinator decided that the victim and alleged rapist should attend mediation.<sup>55</sup> The alleged rapist was uncooperative in mediation, but no other services were offered to the victim.<sup>56</sup> Months later, the victim met with athletics administrators again because she heard that another female student was raped by the same athlete.<sup>57</sup> There was no investigation or further action against the athlete.<sup>58</sup>

## 3. Investigation and Disciplinary Delays

Even in those situations where the Title IX Coordinator or other university officials are made aware of the case, investigations and hearings are often purposely delayed until the end of a season or the end of an accused student-athlete's eligibility, allowing the accused to continue to participate in

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sexual-assault; Jake New, *Black Eye for Baylor*, INSIDE HIGHER ED (Aug. 26, 2015), <https://www.insidehighered.com/news/2015/08/26/baylor-u-facing-questions-over-handling-sexual-assault-involving-football-player>; Jake New, *How Many Chances?*, INSIDE HIGHER ED (July 11, 2014), <https://www.insidehighered.com/news/2014/07/11/college-athlete-twice-accused-sexual-assault-may-play-basketball-again>.

51. Molly Geary & Mike Fiammetta, *Senator Calls for No Special Treatment for Athletes in Criminal Cases*, SI (June 17, 2015), [www.si.com/college-football/2015/06/17/claire-mccaskill-college-athletes-sexual-assault-cases](http://www.si.com/college-football/2015/06/17/claire-mccaskill-college-athletes-sexual-assault-cases).

52. 177 P.3d 724, 726 (Wash. Ct. App. 2008).

53. *Id.* at 729.

54. *Id.* at 726.

55. *Id.* at 730.

56. *Id.* at 730–31.

57. *Id.*

58. *Id.*

athletics.<sup>59</sup> A recent Title IX complaint filed by Jane Doe against the Florida State University (FSU) Board of Trustees illustrates not only significant athletics department involvement but also interference in the investigation and disciplinary delays.<sup>60</sup> In December 2012, the plaintiff, an FSU freshman, was raped at the residence of another FSU student.<sup>61</sup> The plaintiff reported the rape immediately.<sup>62</sup> On the first day of classes for the spring term, the plaintiff recognized the rapist in one of her classes and reported his identify to the police immediately.<sup>63</sup> Athletics administrators learned of the complaint from the Tallahassee Police Department and did not report knowledge of the incident through the appropriate university channels, but met with the accused and his lawyer.<sup>64</sup> “The FSU Athletics Department chose to violate school policy and not report to the FSU administration that their star recruit had been identified as the suspect in the December 7, 2012 rape investigation.”<sup>65</sup> The athletics department kept knowledge of the incident a secret for the next eleven months, allowing the accused to remain the starting quarterback for the football team and to lead that team in pursuit of a national championship in the fall of 2013.<sup>66</sup> The quarterback was accused of a second rape, and FSU finally inquired about the incident following the winning of the 2014 Bowl Championship Series (BCS) National Championship game.<sup>67</sup> Jameis Winston refused to answer questions, and FSU let the matter drop without further investigation.<sup>68</sup> A year later in December 2014, after intense media scrutiny, FSU held a Code of Conduct hearing; the adjudicator found insufficient evidence, and the accused student was not disciplined.<sup>69</sup> Winston continued as the starting quarterback in the College Football Playoffs and won the 2015 National Championship and the Heisman Trophy.

A Title IX complaint was also filed against the University of Alabama in Huntsville (UAH) by a plaintiff who was allegedly raped by a varsity hockey

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59. *See, e.g.*, *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1296–97 (11th Cir. 2007); *Complaint, Doe v. Univ. of Ala. in Huntsville*, 5:14-cv-02029-HGD, 2016 WL 1270605, ¶¶ 32–33 (N.D. Ala. Oct. 23, 2014).

60. *See generally* *Complaint & Demand for Jury Trial*, *supra* note 41.

61. *Id.* ¶ 9.

62. *Id.*

63. *Id.* ¶ 10.

64. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), [http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?\\_r=0](http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?_r=0).

65. *Complaint & Demand for Jury Trial*, *supra* note 41, ¶ 12.

66. *Id.* ¶ 13.

67. *Id.* ¶ 23.

68. *Id.*

69. *Id.* ¶ 25.

player in a university dorm room.<sup>70</sup> The victim was interviewed by the university police department, who indicated that they did not believe her story.<sup>71</sup> The UAH police contacted the accused, who confessed that he had sex with the plaintiff; he also acknowledged that she was incapable of giving consent due to consumption of alcohol.<sup>72</sup> After being told by the UAH Police Department that she would “never win in court,” the plaintiff pursued the matter through the UAH disciplinary system.<sup>73</sup> The disciplinary board determined that the hockey player’s athletic scholarship should be revoked and he should be immediately expelled from UAH.<sup>74</sup> However, the hockey player appealed the decision and was allowed to remain on campus until a final decision was made; that decision was conveniently timed after the hockey season was completed.<sup>75</sup> The expulsion was vacated, and the player was instead suspended for two semesters.<sup>76</sup> However, because the decision was made following the mid-point of the current term, the suspension was deferred until the end of the spring semester 2013 and the player was allowed to return to the athletic training facilities in August 2013.<sup>77</sup>

#### 4. Inadequate Sanctions Imposed

The UAH situation described above also illustrates sanctions imposed on student-athletes are often minimal and few schools impose athletic-based sanctions, such as immediate suspension from play. In *Thorpe v. Virginia State University*, the plaintiff sued the university for its lack of response to her report of gang rape by two football players.<sup>78</sup> The victim was never provided with the student handbook, the code of student conduct, or the school’s sexual harassment complaint procedure, nor was she informed her of her rights in connection with the situation.<sup>79</sup> The only disciplinary action imposed by the school was to ban the two accused students from the women’s dorm.<sup>80</sup>

These are just a few of the reported cases and recent complaints

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70. Complaint, *supra* note 59, ¶ 14.

71. *Id.* ¶¶ 17–19.

72. *Id.* ¶ 21.

73. *Id.* ¶ 22.

74. *Id.* ¶ 24.

75. *Id.* ¶¶ 25, 28, 30.

76. *Id.* ¶ 32.

77. *Id.* ¶ 33.

78. 6 F. Supp. 2d 507, 509 (E.D. Va. 1998).

79. *Id.*

80. *Id.*

illustrating the difficulty achieving justice when the accused rapist is a student-athlete and the efforts athletics departments will make to protect the accused and preserve his ability to continue to participate in intercollegiate athletics. The DOE guidance documents discussed in the next section provide detailed requirements and suggestions for responding to and preventing sexual violence on campus.

### III. OVERVIEW OF LEGAL REQUIREMENTS REGARDING SEXUAL VIOLENCE AND HIGHER EDUCATION

This section will examine and summarize the legal requirements contained in the DOE's 2011 Dear Colleague Letter and 2014 Guidance together with various pending federal laws creating or clarifying the legal obligations of higher education institutions to address sexual violence.

#### A. *Title IX Background and History*

Title IX is a comprehensive federal law prohibiting discrimination on the basis of sex in any federally funded education program or activity.<sup>81</sup> The principal objectives of Title IX are to avoid the use of federal money to support sex discrimination in education programs and to provide individual citizens effective protection against those practices. While the historical basis supporting Title IX was primarily focused on eliminating barriers and discrimination against women seeking higher education, since its enactment in 1972, Title IX has shaped the landscape of education far beyond its original beginnings.

A failed attempt under Title IX in 1980 by a group of Yale students alleging their male professors were offering better grades in exchange for sex actually set the stage for much of the activism surrounding sexual violence on college campuses today.<sup>82</sup> In *Alexander v. Yale University*, a group of female students was unsuccessful in arguing a novel theory under Title IX that the university's failure to provide a grievance procedure for sexual harassment claims for students was a form of discrimination based on sex.<sup>83</sup> Although the women did not win their case, the district court recognized the legal view that

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81. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2016). "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to [discrimination] under any education program or [activity] receiving Federal financial assistance . . ." *Id.*

82. Tyler Kingkade, *How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today's Sexual Assault Activism*, HUFFINGTON POST (June 10, 2014), [http://www.huffingtonpost.com/2014/06/10/title-ix-yale-catherine-mackinnon\\_n\\_5462140.html](http://www.huffingtonpost.com/2014/06/10/title-ix-yale-catherine-mackinnon_n_5462140.html).

83. *See generally* 631 F.2d 178 (2d Cir. 1980).

“it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education.”<sup>84</sup> The *Alexander* case and subsequent movement across the United States instituting grievance procedures for sexual harassment supported the concept of sexual harassment as a form of sex discrimination.

The Supreme Court first recognized a private right of action under Title IX in 1979. However, the Court would not recognize sexual harassment as a form of sex discrimination in employment until 1986. And it was not until cases in 1997 and 1998 that the Supreme Court applied that same reasoning to higher education, holding that schools could be liable for private damages for sexual harassment committed by employees<sup>85</sup> and student-on-student harassment<sup>86</sup> as well. Guidelines released by the OCR in March of 1997 were developed to clarify schools’ responsibilities in preventing sexual harassment and handling allegations of sexual harassment once they arise.<sup>87</sup> While the guidelines are not legally binding on the courts, they do serve as authoritative guidance as to what the Department of Education does and does not consider required under Title IX.

According to United Educators, a movement began in the 1980s to re-conceptualize rape by attacking the myth that rape was largely accomplished by violent strangers. Even during the 1980s an epidemic of sexual assaults on college campuses prompted women’s advocacy groups to begin challenging the criminal justice system’s inadequate response to acquaintance rape.<sup>88</sup> Suing colleges and universities was seen as a better alternative than the criminal justice system for victims of sexual violence on college campuses. Although *Gebser* confirmed that a Title IX private right of action for damages was available to victims of sexual harassment and sexual

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84. *Alexander v. Yale*, 459 F. Supp. 1, 4 (D. Conn. 1977); *Title IX - The Nine: A Look at Nine People Who Have Shaped Title IX and Educational Equality over the Past 40 Years*, AM. C.L. UNION, <https://www.aclu.org/title-ix-nine?redirect=womens-rights/title-ix-nine> (last visited June 9, 2016).

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

86. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

87. *Sexual Harassment Guidance 1997: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T EDUC. <http://www2.ed.gov/about/offices/list/ocr/docs/sex-har01.html> (last visited June 9, 2016). The 1997 Guidance adopts a similar framework as established under Title VII for sexual harassment claims involving employees for both quid pro quo sexual harassment and hostile environment sexual harassment. *Id.* It reinforces that a school’s liability for quid pro quo sexual harassment by employees is based on agency principles; thus, a school will always be liable for a single instance of quid pro quo harassment by a school employee. *Id.* Conversely, liability for peer sexual harassment extends to hostile environment that a school knew or should have known about and failed to take immediate and appropriate corrective action. *Id.*

88. JONES, *supra* note 20, at 1–2.

violence, to recover money damages, victims must prove that the university had actual knowledge of the discrimination and acted with deliberate indifference.<sup>89</sup> However, this deliberate indifference standard only applies to plaintiffs seeking money damages, not to regulatory investigations into Title IX violations by the Department of Education.<sup>90</sup> Thus, as universities were creating and implementing policies related to student misconduct and sexual violence, they had a duty to eliminate harassing conduct and provide access to their programs and activities free from discrimination.<sup>91</sup>

Since 1997, the Department of Education has continued to clarify and explain the obligations of educational institutions to address sexual harassment and sexual violence on college campuses. In 2001, the Office of Civil Rights released its Revised Sexual Harassment Guidance (2001 Guidance).<sup>92</sup> The guidance defined sexual harassment and identified legitimate nonsexual touching or other nonsexual conduct which would fall outside the scope of Title IX's prohibition.<sup>93</sup> The 2001 Guidance was intended to clarify and explain the Supreme Court's decisions in *Gebser* and *Davis* regarding sexual harassment and to reinforce the regulatory authority of the DOE to enforce Title IX's nondiscrimination mandate.<sup>94</sup> The 2001 Guidance recognized a need for further clarification related to the relationship between Title IX and Family Education

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89. *Id.* at 3.

90. *Id.*

91. *Id.*

92. See generally U.S. DEP'T EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 DOE GUIDANCE].

93. *Id.* at 2.

For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment. Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment. For example, a teacher's repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

*Id.* (citation omitted).

94. *Id.* at i-iii. The 2001 Guidance reminded universities that the Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private actions for monetary damages. See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998). The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate," even in circumstances that would not give rise to a claim for money damages. *Gebser*, 524 U.S. at 292.

Rights and Privacy Act (FERPA), specifically regarding the following issues: (1) the harassed student's right to information about the outcome of a sexual harassment complaint against another student, including information about sanctions imposed on a student found guilty of harassment;<sup>95</sup> and (2) the due process rights of individuals, including teachers, accused of sexual harassment by a student, to obtain information about the identity of the complainant and the nature of the allegations.<sup>96</sup>

However, the 2001 Guidance provided only minimal direction specifically related to sexual assault and sexual violence on college campuses. The 2001 Guidance did clarify key elements of a university's responsibility to address sexual harassment: (1) take prompt and effective action to stop harassment and prevent its recurrence; (2) consider to be put on notice if a reasonable employee knew or in the exercise of reasonable care should have known about the harassment; (3) adopt and publish grievance procedures for prompt and equitable resolution of complaints; (4) conduct prompt investigations; (5) discuss confidentiality standards; (6) designate at least one employee to coordinate its efforts to comply with its Title IX responsibilities; and (7) interpret Title IX consistent with federal due process rights of the accused.<sup>97</sup> However, it was not until 2011 that the Department of Education issued its first guidance directly addressing sexual violence and reminding educational institutions of their duty under Title IX to respond promptly and effectively to both peer-to-peer sexual harassment as well as sexual violence on campus.<sup>98</sup>

### *B. Department of Education Guidance Related to Sexual Violence*

The Department of Education's Title IX guidance documents and the regulatory framework related to sexual harassment and sexual violence contain at least three consistent themes: first, the breadth of the universities' duties and responsibilities under Title IX; second, the standard for imposing liability in

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95. 2001 DOE GUIDANCE, *supra* note 92, at v–vii.

96. *Id.* at vii–viii.

97. The DOE issued a Dear Colleague Letter on January 25, 2006, again reminding educational institutions of the 2001 Guidance and notifying institutions of plans to conduct compliance reviews related to sexual harassment. Stephanie Monroe, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFF. FOR C.R., U.S. DEP'T EDUC. (Jan. 25, 2006), <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>. Then, on October 26, 2010, the DOE issued another Dear Colleague Letter addressing bullying as a form of harassment and discrimination under Title IX. Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFF. FOR C.R., U.S. DEP'T EDUC. (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

98. *See generally* *Dear Colleague Letter* (2011), *supra* note 1.



private litigation versus regulatory compliance; and third, the specific procedural duties and responsibilities for minimum compliance, including notification and policy requirements, investigatory requirements, and appropriate steps to eliminate the discrimination.

### 1. Breadth

The guidance documents reaffirm that Title IX protects students from sexual harassment (including sexual violence) as a form of sex discrimination in a school's education programs and activities, including all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program, at a school-sponsored event at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip. "If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."<sup>99</sup>

### 2. Standard for Imposing Liability

The guidance documents reiterate the clarification provided in 2001 that Title IX regulatory standards are distinct and separate from the standards applicable to private litigation for money damages. As explained in the OCR's 2001 Guidance, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious enough that it interferes with or limits "a student's ability to participate in or benefit from the [school's] program."<sup>100</sup> In *Gebser* and *Davis*, the Supreme Court addressed the appropriate standards for determining when a school district is liable under Title IX for money damages in a private lawsuit brought by or on behalf of a student who was sexually harassed.<sup>101</sup> The *Gebser* Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX.<sup>102</sup> In *Gebser*, the

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99. *Id.* at 4 (citation omitted).

100. 2001 DOE GUIDANCE, *supra* note 92, at v. "The more severe the conduct, the less need [there is] to show a repetitive series of incidents" to prove a hostile environment, "particularly . . . if the harassment is physical." *Id.* at 6. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. *Id.* For instance, a single instance of rape is sufficiently severe to create a hostile environment. *See id.* Title IX requires schools to eliminate harassment, prevent its recurrence, and address its effects. *Id.* at iii.

101. *See generally Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

102. *See generally Gebser*, 524 U.S. 274.

Court's deliberate indifference standard addressed its concern with the possibility of a money damages award against a school for harassment about which it had no knowledge.<sup>103</sup> In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms.<sup>104</sup> Thus, the administrative enforcement standards reflected in the 1997 Guidance remain valid in OCR enforcement actions.<sup>105</sup>

### 3. Procedural Requirements

The guidance documents identify specific procedures, practices, and policies a school must have in place to prevent sexual harassment and violence: (1) every school must have and distribute a policy against sex discrimination; (2) every school must have a Title IX Coordinator; and (3) every school must have and make known procedures for students to file complaints.<sup>106</sup>

In the next section, the 2011 Dear Colleague Letter and 2014 Guidance will be analyzed and discussed.

#### *C. 2011 Dear Colleague Letter: Title IX and Sexual Violence in College*

The DOE's 2011 Dear Colleague Letter initially affirms that "[s]exual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX."<sup>107</sup> The letter explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and defines sexual violence<sup>108</sup> as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol."<sup>109</sup> The letter has two primary purposes: (1) to discuss "Title IX's requirements related to student-on-student sexual harassment including sexual violence"; and (2) to discuss "proactive [steps

103. *Id.* at 292–93.

104. *See generally* 2001 DOE GUIDANCE, *supra* note 92.

105. *Id.* at iii.

106. *Id.* at 4.

107. *Dear Colleague Letter* (2011), *supra* note 1, at 1.

108. *Id.* at 1–2. "A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX." *Id.*

109. *Id.* at 1. "An individual also may be unable to give consent due to an intellectual or other disability." *Id.*

universities] can take to prevent sexual harassment and violence” and to provide remedies for such conduct.<sup>110</sup>

### 1. Notice of Non-Discrimination

Title IX regulations require the adoption and dissemination of a notice of nondiscrimination.<sup>111</sup> The notice must acknowledge the universities’ obligations under Title IX to not discriminate on the basis of sex in its program and activities, and it must refer any inquiries to the Title IX Coordinator or OCR.<sup>112</sup> The Title IX Coordinator’s name, address, phone number, and email address should be provided.<sup>113</sup> The notice should be widely distributed and easily accessible and OCR recommended the notice be prominently posted on websites and electronic and print publications.<sup>114</sup> While a university need not have a specific policy prohibiting sexual harassment or sexual violence, if the general sex nondiscrimination policy does not make students aware that sexual harassment and sexual violence is a form of prohibited sex discrimination, then the policy is probably ineffective to fulfill the notice requirements.<sup>115</sup> OCR recommends that the non-discrimination policy state that sexual harassment and sexual violence are prohibited and includes examples of the types of conduct covered by the policy.<sup>116</sup>

### 2. Title IX Coordinator

Since 1997, Title IX regulations have required educational institutions to designate at least one person to coordinate the institution’s compliance with Title IX. The 2011 Guidance once again specifies the duties and expectations of this position.<sup>117</sup> The Title IX Coordinator is responsible for “overseeing all Title IX complaints . . . identifying and addressing any patterns or systemic | problems” revealed in the complaints, and “be[ing] available to meet with students as needed.”<sup>118</sup> More than one Title IX Coordinator may be designated, but one of those individuals should have the “ultimate oversight responsibility, and the other coordinators should have titles clearly showing”

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110. *Id.* at 2.

111. *Id.* at 6.

112. *Id.*

113. *Id.*

114. *Id.* at 6–7.

115. *Id.* at 7.

116. *Id.*

117. *Id.*

118. *Id.*

their designations, such as deputy or associate indicating their supporting role relative to the senior coordinator.<sup>119</sup> “Title IX coordinators should not have any other job responsibilities that m[ight] create a conflict of interest.”<sup>120</sup> Examples provided in the 2011 Guidance include disciplinary hearing board members or general counsel positions as positions that may create a conflict of interest if those individuals were designated as a Title IX Coordinator.<sup>121</sup>

### 3. Procedures for Filing Complaints

The bulk of the 2011 Dear Colleague Letter outlines specific procedures universities must follow to provide prompt and equitable resolution of student complaints against employees, other students, or third parties.<sup>122</sup> Universities may use the same disciplinary procedures for sexual harassment and sexual violence complaints as other types of complaints so long as they are effective at meeting the requirement of prompt and equitable resolution.<sup>123</sup> Voluntary informal mechanisms for resolving disputes are permitted so long as alleged victims are not required to resolve the problem directly with the alleged perpetrators; some university involvement, either through a mediator or appropriate administrator, should be present.<sup>124</sup> The 2011 Guidance is also clear that informal processes are not appropriate even on a voluntary basis for cases involving sexual assault.<sup>125</sup> Grievance procedures should be clear that mediation of sexual assault complaints is not permitted.<sup>126</sup>

The OCR identified several elements to evaluate and determine whether a university’s procedures provide for prompt and equitable resolution of sexual harassment or sexual violence complaints.<sup>127</sup> These elements include

- [n]otice to students, parents . . . and employees of the

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 8–14.

123. *Id.* at 8. “These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures.” *Id.* at 8, n.22; *see also* S.S. v. Alexander, 177 P.3d 724, 726 (Wash. Ct. App. 2008).

124. *Dear Colleague Letter* (2011), *supra* note 1, at 8.

125. *Id.*

126. *Id.*

127. *Id.* at 9.

grievance procedures<sup>128</sup> . . .

- [a]pplication of the procedures . . . [for] harassment . . . by employees, other students, or third parties;
- [a]dequate, reliable, and impartial investigation<sup>129</sup> . . . [with] . . . opportunit[ies] for both parties to present witnesses and other evidence;<sup>130</sup>
- [d]esignated and reasonably prompt time frames for . . . the complaint process;<sup>131</sup>
- [n]otice to the parties of the outcome of the complaint;<sup>132</sup> and

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128. Notices should be written in plain, easy to understand language and widely distributed on websites, electronic information materials, and major publications. *Id.*

129. Universities must not dissuade victims from pursuing criminal complaints when an act of sexual harassment or sexual violence may also constitute a criminal violation. *Id.* at 10. In addition, schools must conduct their own Title IX investigation and “should not wait for the conclusion of a criminal investigation or . . . proceeding.” *Id.* Police investigations may be useful for fact gathering, but the standards of proof for criminal investigations are not determinative of whether a Title IX violation has occurred. *See id.* Schools should be using a preponderance of the evidence standard for evaluating complaints. *Id.* The OCR uses a preponderance of the evidence standard when it resolves complaints and in its fund termination administrative hearings. *Id.* at 11. Schools that use a “clear and convincing” evidence standard are using a standard inconsistent with the standards of proof for civil rights laws, and therefore, are not considered equitable under Title IX. *Id.*

130. “[T]he parties must have equal opportunity to present relevant witnesses and other evidence.” *Id.* Both parties should have equal “and timely access to any information . . . used at the hearing,” and whatever procedures were adopted should apply equally to both the victim and the alleged perpetrator. *Id.* Schools do not have to allow lawyers to be involved in the proceedings, but if they are permitted, both parties must have the same opportunities. *Id.* at 12. The “OCR strongly discourages . . . allowing” either the alleged perpetrator or the victim “to directly question or cross-examine each other during the hearing.” *Id.* Public schools must also provide due process to the alleged perpetrator, but such due process should “not restrict or unnecessarily delay the Title IX protections for the complainant.” *Id.*

131.

Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. . . . [A] typical investigation takes approximately 60 calendar days following receipt of the complaint.

*Id.*

- [a]n assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects . . . if appropriate.<sup>133</sup>

#### 4. Prevention and Proactive Steps Recommended by the OCR

In addition to the duties and obligations described in the previous section, Title IX also requires universities to take proactive steps to prevent sexual harassment and sexual violence.<sup>134</sup> Preventative education programs should be implemented across campuses, schools, academic units, and athletics. The OCR expressly identifies four areas where education programs should be implemented, including “(1) orientation programs for new students, faculty, staff, and employees; (2) training” programs for residence hall staff and advisors; “(3) training [programs] for student-athletes and coaches; and (4)” informational programs associated with school assemblies and “back to school nights.”<sup>135</sup> Victim resources and services are also required.<sup>136</sup> The OCR also advises schools to be aware that victims are often deterred from

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132. “Both parties must be notified, in writing, about the outcome of both the complaint and any appeal, [including] whether harassment was found to have occurred.” *Id.* at 13. Concurrent notification is recommended. *Id.* “FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment . . . .” *Id.* “[W]hen conduct involves a crime of violence or a non-forcible sex offense, FERPA permits a postsecondary institution to disclose to the alleged victim the final results of a disciplinary proceeding against the alleged perpetrator, regardless whether . . . [it is] concluded that a violation was committed.” *Id.* at 13–14 (citations omitted) (citing 34 C.F.R. § 99.31(a)(13) (2016)).

[A] postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegation made, the student has committed a violation of the institution’s rules or policies.

*Id.* at 14 (citation omitted) (citing 34 C.F.R. § 99.31(a)(14) (2016)).

133. *Id.* at 9 (citation omitted) (citations added). Universities “should implement preventive education programs and make victim resources, including comprehensive victim services, available.” *Id.* at 14. Education programs should be included “in their (1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and ‘back to school nights.’” *Id.*

134. *Id.* at 14–19.

135. *Id.* at 14–15. The programs should include information designed to encourage students to report incidents of sexual violence. *Id.* The programs should include discussion of acts and behaviors that constitute sexual harassment and sexual violence, review of schools policies and procedures, and consequences for violations of these policies. *Id.*

136. *Id.* at 14.

reporting incidents of sexual violence if drugs or alcohol were involved, so disciplinary policies need to be evaluated if they might further deter students from reporting violations.<sup>137</sup>

The OCR's guidance also includes specific prevention requirements applicable to the complainant during an ongoing investigation. For example, universities should take interim steps as needed to prevent further harassment or discrimination.<sup>138</sup> Such steps might include providing an escort for the complainant to move safely between classes and activities; ensuring that the complainant and alleged perpetrator do not attend the same classes or reside in the same residence hall; providing counseling, medical, and academic support services; arranging for the complainant to repeat or withdraw from courses without penalty; and reviewing disciplinary actions against the complainant to see if the alleged harassment is connected to the alleged misconduct.<sup>139</sup> Lastly, prevention steps recommended for the general student population include counseling and training services,<sup>140</sup> development and implementation of policies and procedures,<sup>141</sup> and assessment of school investigations and OCR reports.<sup>142</sup>

*D. 2014 Clarification —Questions and Answers on Title IX and Sexual Violence*

On April 29, 2014, the OCR issued another Title IX guidance clarifying questions raised following the 2011 Dear Colleague Letter with regard

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137. *Id.* at 15.

138. *Id.* at 16.

139. *Id.* at 16–17.

140. *Id.* at 17. Such services include counseling, health, and victims services to all students, having counselor's on-call to assist victims of sexual harassment or violence, training for Title IX Coordinators and other employees that includes information on the link between alcohol and drugs and sexual harassment and violence, training school law enforcement unit personnel on the university's Title IX responsibilities, informing students of their options to notify law enforcement, and providing assistance for notifying these authorities. *Id.*

141. *Id.* Policies and procedures should be widely distributed and contain clear definitions of what constitute sexual harassment or violence and how to report, file a complaint, and contact Title IX Coordinator. *Id.* at 17–18. The university should create a committee of students and school officials to ensure students know their rights, how to recognize sex discrimination, and feel comfortable that school officials will respond promptly and equitably to reports. *Id.* at 18. Policies and grievance procedures should be regularly reviewed and revised to ensure prompt and equitable handling of complaints. *Id.*

142. *Id.* Universities should periodically assess student activities and conduct independent investigations to determine if school employees with knowledge of sexual harassment or violence failed to carry out their duties. *Id.* Universities should also conduct campus climate evaluations with the involvement of student leaders to assess the effectiveness of prevention efforts and use that information to inform future proactive steps. *Id.* Lastly, the OCR should be informed of all grievances including documentation of the investigation processes and any appeals. *Id.* at 19.

specifically to sexual violence.<sup>143</sup> As previously mentioned, the 2011 Dear Colleague Letter addressed both sexual harassment and sexual violence and provided a framework to guide universities' Title IX compliance efforts. The guiding principles of that framework clarified that sexual violence raised unique concerns for universities and required specialized and proactive efforts. Key elements of the framework included the universities' independent responsibility to investigate allegations of sexual violence, develop and publish non-discrimination policies and grievance procedures for sexual violence, designate and train one or more Title IX Coordinators, and understand the interplay between Title IX, FERPA, and the Clery Act.

Based on numerous requests for technical assistance following the 2011 Dear Colleague Letter, the OCR determined that institutions needed additional guidance regarding their obligations under Title IX specifically related to addressing sexual violence as a form of sexual harassment. Thus, the 2014 Clarification provided, in question and answer format, further clarification on institutions' duties and responsibilities related solely to sexual violence.<sup>144</sup> The most consequential areas of clarification related to (1) notice and responsible employees; (2) timeliness and conduct of investigations; (3) protected students and covered activities; (4) role and responsibilities of the Title IX Coordinator; (5) confidentiality; and (6) interim measures and remedies.<sup>145</sup>

### 1. Notice and Responsible Employees

The responsible employee clarification relates directly to whether a university is on notice of potential discrimination that is a required element of a Title IX claim.<sup>146</sup> Universities often defend against Title IX cases contending they were not aware of the potential discrimination because an appropriate university employee was not notified of the allegations.<sup>147</sup> The 2014 Guidance helps to clarify when a university is on notice by clarifying which employees are responsible to report alleged violations and the range of persons who might inform university officials of potential violations.<sup>148</sup> A responsible

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143. See generally 2014 DOE GUIDANCE, *supra* note 4.

144. See generally *id.*

145. See generally *id.*

146. *Id.* at 14–18.

147. *Id.* at 15; see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (holding schools could only be liable for money damages in a private lawsuit if there is actual notice to school officials with authority to address the alleged discrimination).

148. See generally 2014 DOE GUIDANCE, *supra* note 4. A university can receive notice of sexual violence from students, parents, friends of victims, staff, campus law enforcement, faculty, administrators, and persons responsible for reporting. *Id.* at 2. A university may also receive notice



employee is an individual obligated to report incidents of alleged sexual violence to the Title IX Coordinator or other appropriate school designee.<sup>149</sup> Universities are required to address sexual violence that they knew or should have known occurred.<sup>150</sup> Thus, if a responsible employee has knowledge, but fails to report that information as required to the Title IX Coordinator, the notice requirement is satisfied because the university should have known of the sexual violence had the responsible employee met his or her obligations to report.<sup>151</sup>

The OCR's 2001 Guidance defined a responsible employee as any employee with authority to redress sexual violence who has been given the duty of reporting, other appropriate school designees, and those persons whom a student could reasonably believe has the authority or duty.<sup>152</sup> The 2014 Guidance provides that the concept of a responsible employee under the OCR's administrative enforcement is broader than the notice standards set forth in *Gebser*.<sup>153</sup> "[W]hen a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence."<sup>154</sup>

## 2. Timeliness and Conduct of Investigations

The 2011 Dear Colleague Letter contained a sixty-calendar day timeframe for investigations.<sup>155</sup> The 2014 Clarification explains that this timeframe refers to the entire investigation process including fact-finding, conducting any hearing(s), engaging in a decision making process to determine whether the sexual violence occurred and created a hostile environment, and determining corrective actions including sanctions against the perpetrator and remedies for the complainant and university community. However, the sixty-day timeframe is not a firm requirement, but rather representative of a typical case to ensure prompt and equitable resolutions. The OCR evaluates each investigation on a case-by-case basis to determine whether the prompt and equitable standard was satisfied.<sup>156</sup> Affected students should receive regular progress reports.<sup>157</sup>

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from indirect sources, such as social networking sites and the media. *Id.*

149. *Id.* at 15–16. School counselors are exempt from these reporting requirements. *Id.* at 14–15.

150. *Id.* at 14.

151. *Id.* at 14–15.

152. *Id.* at 15.

153. *Id.* at 15 n.23.

154. *Id.* at 15.

155. *Id.* at 31.

156. *Id.* at 32. Many factors can impact the timing of an investigation including the complexity of the investigation, severity of the conduct, parallel criminal investigations, and school breaks. *Id.*

157. *Id.*

The 2014 Guidance re-emphasizes that a university's investigation is independent of any parallel criminal investigation and the university investigation should not be delayed until a criminal investigation is concluded.<sup>158</sup> There may be some brief delays in the fact-finding phase while the criminal investigation proceeds, but those typically last only a few days.<sup>159</sup> Lastly, the OCR clarifies that during all phases of an investigation, the complainant and alleged perpetrator must be treated equally.<sup>160</sup> For example, if witnesses are permitted, both parties may present witnesses; if appeals are provided, both parties must have the right to appeal; and if lawyers or advisors are permitted, lawyers or advisors must be permitted equally for both parties.<sup>161</sup>

### 3. Protected Students and Covered Activities

The OCR clarifies that Title IX covers all students. The 2014 Guidance expressly addresses lesbian, gay, bisexual, and transgender (LGBT) students, students with disabilities, and international students.<sup>162</sup> LGBT youth report high rates of sexual harassment and sexual violence. Universities should use the same procedures for investigating and resolving allegations related to LGBT students as other students and should also ensure their staff is provided culturally competent counseling.<sup>163</sup> If an allegation involves a student with a disability, additional federal civil rights law may also be implicated and require the university to investigate and resolve the complaint.<sup>164</sup> Additionally, unique issues may arise when an international student on a student visa experiences sexual violence. For example, a victim of sexual violence may often take a reduced course load or seek to withdraw from classes to recover from the sexual violence. However, an international student must maintain full-time student status to fulfill his or her visa requirements; thus, the officials responsible for counseling international students need training on how to handle these special issues and counsel the students on how his or her visa may be impacted, taking care to prevent the student's immigration status from

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158. *Id.* at 1, 28.

159. *See id.* at 28.

160. *Id.* at 26–37.

161. *Id.* at 26.

162. *Id.* at 5.

163. *Id.* at 5–6.

164. *Id.* at 6–7. For example, “Section 504 of the Rehabilitation Act of 1973 . . . prohibits disability discrimination [in] public and private entities that receive federal financial assistance, and Title II of the Americans with Disabilities Act of 1990 . . . prohibits disability discrimination by all . . . public entities.” *Id.* at 6 n.12.

detering the student from filing a Title IX complaint.<sup>165</sup>

#### 4. Role and Responsibilities of the Title IX Coordinator

The 2014 Guidance reiterates the essential core responsibilities of the Title IX Coordinator to oversee universities' responses to Title IX reports and complaints and to identify and address any patterns of systemic problems. "If a [university] designates more than one Title IX Coordinator, the . . . notice of nondiscrimination and Title IX grievance procedures should describe each coordinator's responsibilities, and [a single] coordinator should be designated as having ultimate oversight responsibility."<sup>166</sup> All Title IX Coordinators must have appropriate qualifications, training, authority, and time to address complaints throughout the institution. The listing of individuals who should likely not be designated as Title IX Coordinators due to potential conflicts of interest was expanded to include disciplinary board members, general counsel, dean of students, and athletics directors.<sup>167</sup> A full-time Title IX Coordinator minimizes the risk of conflicts of interest and will also ensure sufficient time is available to perform the expected duties.<sup>168</sup>

#### 5. Confidentiality

Often times, complainants wish to remain anonymous and not have their identity revealed or do not wish to pursue an official investigation. The 2014 Guidance strongly supports the student's confidentiality request in cases involving sexual violence. The OCR recognizes that there are situations in which a university may not be able to honor that request and also meet their Title IX obligation. While there is no absolute rule regarding confidentiality, the OCR clearly recognizes the importance of confidentiality protections to ensure, and not deter, reporting. To the extent information must be revealed, the university should notify the complainant of what information will be

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165. *Id.* at 7–8.

166. *Id.* at 11.

167. *Id.* at 12.

168. *Dear Colleague Letter* (2015), *supra* note 5, at 3. The 2015 Dear Colleague Letter specifically addresses the role and responsibilities of the Title IX Coordinator. *Id.* at 3–4. The OCR emphasized the importance of independence, full-time commitment, and value of having multiple coordinators. *Id.* With regard to independence, the Title IX Coordinator must report directly to senior leadership, such as the university president. *Id.* at 2–3. The OCR also suggests it may be a good practice for larger schools, colleges, and universities to designate multiple Title IX Coordinators either by building, unit, or campus to improve staff and student familiarity with the Title IX Coordinator and more effective training and improved reporting for the school community. *Id.* at 3. However, the 2011 and 2014 expectation that one individual should be designated as the senior coordinator with ultimate oversight responsibility remains intact. *Id.*

disclosed, to whom it will be disclosed, and why it will be disclosed. If a student requests confidentiality, the university should inform him or her that not disclosing his or her identity might limit the university's ability to respond fully to the incident. If the student still requests confidentiality, the university must determine whether it can honor the request and still provide a safe and nondiscriminatory environment. The university's policies and procedures should identify the employee responsible for making these determinations.<sup>169</sup> If the university determines that it can honor the student's request for confidentiality, it may also take other reasonable responsive steps to prevent the recurrence of sexual violence.<sup>170</sup>

## 6. Interim Measures and Remedies

The 2014 Guidance confirms the need for universities to take immediate steps to address reports of sexual violence. These interim measures should be taken prior to a final outcome to ensure equal access to programs and activities.<sup>171</sup> Interim steps allow universities to prevent a recurrence of the sexual violence while also simultaneously conducting its investigation. Specific interim measures will vary from case to case, but in determining its interim steps, the university should consider the needs expressed by the complainant, the age of the students involved, severity or pervasiveness of the allegations, any continuing effects on the complainant, and whether the complainant and alleged perpetrator share common spaces such as residence and dining halls, classes, transportation, or job locations.<sup>172</sup> If counseling is recommended as an interim measure, the complainant cannot be required to pay for this service.<sup>173</sup> The OCR also provides several general categories of remedies that might be available both to address the specific report of sexual violence, as well as remedies for the broader student population.<sup>174</sup>

This section synthesized and discussed the regulatory framework under

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169. *Id.* at 2. Normally, the Title IX Coordinator is in the best position to make this determination. *Id.*

170. 2014 DOE GUIDANCE, *supra* note 4, at 20. Examples of steps that can be taken while still honoring a student's confidentiality request include increasing "supervision, or security . . . where the misconduct occurred; providing [additional] training," revising "school's policies on sexual violence," "conducting climate surveys," notifying and counseling the alleged perpetrator without revealing the complainant's identity, changing living arrangements, and modifying course schedules and assignments. *Id.*

171. *Id.* at 21.

172. *Id.* at 33.

173. *Id.* at 33.

174. *Id.* at 34–36.

Title IX regarding sexual violence in higher education. The next section will review relevant federal legislation enacted, amended, or proposed since the 2011 Dear Colleague Letter that also impacts an institution's responsibilities to address sexual violence in higher education.

*E. Additional Federal Legislation Related to Sexual Violence in Higher Education*

Since the 2011 Dear Colleague Letter and resulting national attention focused on the crisis of sexual violence in higher education, several federal legislative efforts have emerged that also relate to or impact how universities respond to and report efforts to prevent sexual violence.

*F. Federal Campus SaVE Act*

The Campus Sexual Violence Elimination Act (Campus SaVE Act) is a 2013 amendment within the Violence Against Women Act to the Clery Act of the Higher Education Act of 1965.<sup>175</sup> The Clery Act is federal law that requires schools to report campus safety policies and all crimes that occur on campus, which are published each year in an Annual Security Report on the institution's website.<sup>176</sup> Crimes that are required to be reported include murder, manslaughter, robberies, burglary, motor vehicle theft, arson, liquor, drug, and weapons possession violations, and forcible and non-forcible sex offenses.<sup>177</sup> Since March 2014, the Clery Act is enforced by the United States Department of Education Clery Act Compliance Division, which processes complaints and may fine institutions up to \$35,000 per violation. The Department of Education may also limit or suspend an institution's federal funding, including federal student aid programs,<sup>178</sup> but like Title IX, this significant punishment has never been implemented.

The Campus SaVE Act expands the Clery Act in four ways by (1) broadening the range of sexual violence incidents that are required to be

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175. Higher Education Act of 1965, § 485(f), 20 U.S.C. § 1092(f) (2016), *amended by* Violence Against Women Act of 1994, 42 U.S.C. § 13925 (2016), *amended by* Campus SaVE Act of 2013, 42 U.S.C. § 13925 (2016).

176. *See id.*

177. *Id.* § 1092(f)(1)(F)(i).

178. Funding may not be terminated until the Department of Education determines that noncompliance cannot be achieved by voluntary means; the recipient is given a hearing before an administrative law judge, who makes a recommendation subject to administrative and judicial review; and a report is filed with the appropriate House and Senate committees and no action is taken on that report for thirty days. *See* 34 C.F.R. §§ 100.6–100.11 (2016).

reported; (2) improving education and awareness programs so that students (and victims) know their rights; (3) improving the complaint process and requiring equitable disciplinary proceedings; and (4) offering resources from federal agencies for schools to improve their policies, procedures, and practices.<sup>179</sup>

### 1. Reporting

The Clery Act now requires institutions to report statistics on stalking, dating violence, and domestic violence incidents on campus, in addition to sexual assault and rape.<sup>180</sup> This reporting provides greater transparency about the range of sexually related violent acts that occur on campus. Schools are also required to publish information about the proper procedures for reporting sexual violence, including who to make the report to, to ensure that the statistics accurately reflect the conditions on campus.<sup>181</sup>

### 2. Educational Programs

While the Title IX sexual violence guidance recommends educational programs, the Campus SaVE Act requires specific prevention and awareness programs.<sup>182</sup> “[P]rimary prevention and awareness programs” are required in orientation for new students and employees.<sup>183</sup> Required components of this programming include a definitive statement that acts of sexual violence are prohibited;<sup>184</sup> definitions of the various acts of sexual violence including stalking, dating violence, domestic violence, and sexual assault;<sup>185</sup> a description of how consent to sexual activity is defined in that jurisdiction;<sup>186</sup> risk reduction measures to recognize dangerous behaviors and to reduce or avoid incidents;<sup>187</sup> education on bystander intervention;<sup>188</sup> and information on the institution’s policies and procedures for reporting and discipline.<sup>189</sup> The

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179. See *Understanding the Campus SaVE Act*, KNOW YOUR IX, <http://knowyourix.org/understanding-the-campus-save-act/> (last visited June 9, 2016).

180. 20 U.S.C. § 1092(f)(1)(F)(iii); § 1092(1)(J)(6)(A)(i).

181. *Id.* § 1092(f)(1)(A).

182. *Id.* § 1092(f)(1)(J)(8)(B).

183. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I).

184. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I)(aa).

185. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I)(bb).

186. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I)(cc).

187. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I)(ee).

188. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I)(dd).

189. *Id.* § 1092(f)(1)(J)(8)(B)(i)(I)(ff).

goal for mandatory education is to increase awareness and therefore reduce the number of sexual violence incidents on campus.

### 3. Complaint Process and Disciplinary Hearings

As previously indicated, the institution is required to publish and make readily available information on how to report incidents and who to report them to.<sup>190</sup> The procedures that the university will follow once an incident has been reported must be developed and distributed.<sup>191</sup> The Campus SaVE Act is silent relative to the investigation process but reiterates the Title IX sexual violence guidance to “provide a prompt, fair, and [impartial] investigation and resolution.”<sup>192</sup> Training on sexual violence issues is required for the officials who conduct the investigations and hearings,<sup>193</sup> and most of the emphasis in the Campus SaVE Act focuses on providing an equitable process for both the victim and the accused.<sup>194</sup> The rights of both parties include having an advisor present throughout the disciplinary process,<sup>195</sup> receiving the results of the final proceeding in writing,<sup>196</sup> and having the ability to appeal the disciplinary decision.<sup>197</sup> Institutions must adhere to the protective measures and sanctions included in the policies and procedures.<sup>198</sup>

### 4. Victims’ Rights

Colleges have a responsibility to protect victim’s rights, which include confidentially protecting the identity of victims.<sup>199</sup> The procedures that the victim should follow when an act of sexual violence occurs must be in writing.<sup>200</sup> This requirement includes publishing information for the victim on the importance of preserving the evidence of the crime<sup>201</sup> and providing options about notifying law enforcement<sup>202</sup> or declining to notify them.<sup>203</sup>

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190. *Id.* § 1092(f)(1)(J)(8)(A)(ii).

191. *Id.*

192. *Id.* § 1092(f)(1)(J)(8)(B)(iv)(I)(aa).

193. *Id.* § 1092(f)(1)(J)(8)(B)(iv)(I)(bb).

194. *Id.* § 1092(f)(1)(J)(8)(B)(iv)(II).

195. *Id.*

196. *Id.* § 1092(f)(1)(J)(8)(B)(iv)(III).

197. *Id.* § 1092(f)(1)(J)(8)(B)(iv)(III)(bb).

198. *Id.* § 1092(f)(1)(J)(8)(B)(ii).

199. *Id.* § 1092(f)(1)(J)(8)(B)(v).

200. *Id.* § 1092(f)(1)(J)(8)(B)(iii).

201. *Id.* § 1092(f)(1)(J)(8)(B)(iii)(I).

202. *Id.* § 1092(f)(1)(J)(8)(B)(iii)(III)(aa).

203. *Id.* § 1092(f)(1)(J)(8)(B)(iii)(III)(cc).

Victims must be notified about counseling, health and victim advocacy programs, and availability of legal assistance and other services available either on-campus or off-campus.<sup>204</sup> Victims must also be notified in writing about the options related to changing living and academic arrangements as well as transportation and work environments.<sup>205</sup> Finally, individuals who exercise their rights under the Campus SaVE Act cannot be intimidated or retaliated against.<sup>206</sup>

#### 5. Federal Resources

A significant criticism of the 2011 Title IX Sexual Violence guidance was that it required developing policies and procedures but failed to provide information on how to do so. The Campus SaVE Act requires the United States Attorney General and the Secretary of Health and Human Services to develop information on best practices and to distribute that information to all colleges and universities.<sup>207</sup> Successful institutional policies, prevention programs, and proper responses to sexual violence incidents “based on evidence-based outcome measurements” will be provided.<sup>208</sup>

#### *G. Safe Campus Act*

While the Title IX guidance and Campus SaVE Act have had an immediate impact on raising awareness about sexual violence on campus, as evidenced by the dramatic rise in the number of incidents reported, federal legislation is currently being considered that would undermine most of the progress that has been made. The Safe Campus Act of 2015<sup>209</sup> is a proposal to amend the Higher Education Act of 1965 (which includes Title IX) by adding “Part F – Treatment of Allegations of Sexual Violence.”<sup>210</sup> The proposal narrows the definition of sexual violence to criminal definitions of battery, sexual assault, and rape and would no longer include stalking, dating violence, or domestic violence.<sup>211</sup> It would also only encourage education programs and

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204. *Id.* § 1092(f)(1)(J)(8)(B)(vi).

205. *Id.* § 1092(f)(1)(J)(8)(B)(vii).

206. *Id.* § 1092(f)(1)(J)(17).

207. *Id.* § 1092(f)(1)(J)(16)(B).

208. *Id.*

209. H.R. 3403, 114th Cong. (2015).

210. *Id.* § 2(a).

211. *Id.* § 161(b)(3).



support services,<sup>212</sup> revoking the mandates of the Campus SaVE Act that requires these programs and services. Volunteer advisors for student organizations would not be required to serve as a “campus security authority” for mandatory reporting purposes,<sup>213</sup> weakening the ability for the institution to properly respond and investigate.

Perhaps the most limiting aspect of the proposed legislation is the section detailing the “role of law enforcement agencies in investigation of allegations of sexual violence.”<sup>214</sup> This section would prevent campus Title IX investigators from responding immediately and conducting a prompt and thorough investigation for at least thirty days while public law enforcement officers conduct a criminal investigation and for subsequent thirty-day periods until their investigations are complete.<sup>215</sup> The school is prohibited from conducting disciplinary proceedings until law enforcement investigations are completed<sup>216</sup> and may never conduct disciplinary proceedings if the alleged victim is not willing to report the sexual violence allegations to law enforcement within forty-eight hours.<sup>217</sup> The proposal does allow institutions to “impose interim sanctions” if it is determined that these sanctions are “a reasonable measure to promote campus safety and student well-being.”<sup>218</sup> These temporary sanctions would be limited to fifteen days for an individual or ten days for a student organization and could only be extended if there is proof that the sanctions are “necessary because the student poses an immediate threat to campus safety and student well-being.”<sup>219</sup> Interim sanctions would expire upon completion of law enforcement’s criminal investigation unless a criminal indictment was issued.<sup>220</sup> Additionally, if the alleged victim files a joint request with law enforcement officials to not impose sanctions on the alleged perpetrator, the institution would not be able to impose sanctions at all.<sup>221</sup> The final nail in the coffin undermining Title IX is the safe harbors provision that prevents institutions from Title IX claims for failure to investigate.<sup>222</sup>

The proposal also imposes higher due process standards on disciplinary proceedings than are typically required of administrative hearings within

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212. *Id.* § 162(a)–(b).

213. *Id.* § 162(c)(1)–(2).

214. *Id.* § 163.

215. *Id.* § 163(b)(2).

216. *Id.* § 163(b)(1).

217. *Id.* § 163(a)(1)–(2).

218. *Id.* § 163(c)(1).

219. *Id.* § 163(c)(2)(A).

220. *Id.* § 163(c)(3).

221. *Id.* § 163(c)(4).

222. *Id.* § 163(d)(1).

higher education. A written notice detailing all allegations and describing possible sanctions must be provided to all parties at least two weeks prior to a hearing.<sup>223</sup> Similar to procedures in a civil trial, defendants must have “a meaningful opportunity to admit or contest the allegation.”<sup>224</sup> Additionally, “access to all material evidence” must be provided at least one week prior to any proceedings.<sup>225</sup> Each student would also be entitled to be represented by an attorney (or other advocate) throughout the entire process.<sup>226</sup> Civil trial procedures allowing cross examination, through written questions submitted to the hearing officer, of the parties and witnesses would also be allowed<sup>227</sup> contrary to research indicating that this type of confrontational proceeding further victimizes the accuser. Finally, instead of an internal appeals process, the proposal allows for an appeal directly to a federal district court and allows for damages to the prevailing party.<sup>228</sup>

#### IV. DISCUSSION AND IMPLICATIONS FOR COLLEGE AND ATHLETICS ADMINISTRATORS

The DOE guidance documents discussed above provide a framework for organizing Title IX compliance efforts related to sexual violence. Many elements of the DOE requirements directly relate to or impact athletics. As discussed in Section II, both student-athletes and athletics administration are often centrally involved in cases involving sexual violence. Student-athletes are disproportionately represented among sexual violence perpetrators relative to their numbers among the general student body and many instances of direct involvement of athletics in investigations and disciplinary processes were identified.

##### A. DOE Guidance Impact on Athletics

The DOE guidance documents integrate several requirements and examples specifically applied to athletics. For example, we know that the Director of Athletics should not be a designated Title IX Coordinator due to a conflict of interest.<sup>229</sup> The practice of having anyone in athletics responsible for

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223. *Id.* § 164(a)(1).

224. *Id.* § 164(a)(2).

225. *Id.* § 164(a)(3).

226. *Id.* § 164(a)(4).

227. *Id.* § 164(a)(5).

228. *Id.* § 164(c).

229. *Dear Colleague Letter* (2015), *supra* note 5, at 3.

investigating reports of sexual violence has also been sharply criticized by Senator McCaskill's subcommittee task force. It is reasonable to conclude that no person whose full-time employment resides in athletics should have any Title IX Coordinator responsibilities for sexual violence reports. Thus, while athletics personnel may naturally have responsibility for Title IX compliance with regard to gender equity in athletics, neither those same personnel, nor other athletics personnel should have responsibility for Title IX sexual violence compliance. Quite the contrary, the designated Title IX Coordinator should be provided access to any and all information needed to monitor the university's policies and procedures including information related to a student's participation in athletics independent of the athletics department.<sup>230</sup>

The 2011 Dear Colleague Letter makes it clear that the grievance procedures must apply to all students including athletes and expressly states that "complaints must not be addressed solely by athletics department procedures."<sup>231</sup> The 2011 Dear Colleague Letter also requires training for student-athletes and coaches as part of the university's education and prevention program.<sup>232</sup> It further requires information about sexual violence be included in student-athlete handbooks and policies, rules, and resources specific to sexual violence be provided for coaches.<sup>233</sup> Lastly, the 2011 Dear Colleague Letter illustrates a university's responsibility to protect third parties from sexual harassment or violence to include a visiting student-athlete.<sup>234</sup>

The 2014 Guidance also identifies athletic coaches as persons likely to witness or receive reports of sexual violence and, thus, should be provided specific training for handling these reports consistent with university policy and procedures and should also be protected from retaliation for formally or informally reporting complaints or participating in investigations.<sup>235</sup> Targeted training for groups of students such as an athletic team is also included among the many examples of interim remedies that can be taken to protect the broader student population.<sup>236</sup> Athletic team travel is identified among the variety of off-campus activities that are clearly covered by Title IX's mandate.<sup>237</sup> Additionally, even acts by a visiting student-athlete against a home athlete or

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230. *Id.* at 4.

231. *Dear Colleague Letter* (2011), *supra* note 1, at 8 n.22.

232. *Id.* at 14.

233. *Id.* at 15.

234. *Id.* at 4 n.11.

235. 2014 DOE GUIDANCE, *supra* note 4, at 38, 42.

236. *Id.* at 36.

237. *Id.* at 29.

student would need to be, at a minimum, reported to the visiting school.<sup>238</sup>

*B. Recommendations for College Administrators to Respond to Sexual Violence in Athletics*

In addition to the federal compliance framework discussed in this Article, many college administrators must also be familiar with expanding regulations and requirements stemming from state law. For example, at least two states have enacted state statutes requiring affirmative consent also referred to as “yes means yes” legislation.<sup>239</sup> These laws have required universities in those states to update sexual misconduct policies to include a new definition of affirmative consent.<sup>240</sup> The amount of interest and activity at both the state and federal level has also prompted the American Law Institute (ALI) to begin deliberations to discuss and draft some model statutes, policies, and best practices to aid universities in their compliance efforts and aid state representatives responding to growing demands to address the epidemic of campus sexual violence.<sup>241</sup>

Through examination of the research on sexual assault on campus, the cases and complaints involving student-athletes, and the federal legislation, it is

238. *Id.* at 9.

239. Even though only two states have enacted affirmative consent laws, several proposed bills are pending in numerous states. See *Affirmative Consent Laws (Yes Means Yes) State by State*, AFFIRMATIVE CONSENT, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/> (last visited June 9, 2016).

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Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

*Definition of Affirmative Consent*, SUNY, <http://system.suny.edu/sexual-violence-prevention-workgroup/policies/affirmative-consent/> (last visited June 9, 2016).

241. The ALI is currently revising the sexual violence provisions of the Model Penal Code and has also launched a Campus Rape Project to develop guiding principles for college officials, courts, and legislatures. *Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis*, AM. LAW INST., [https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/#\\_status](https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/#_status) (last visited June 9, 2016). It will seek to outline best practices and bring some clarity to the complex federal regulatory framework. *Id.*; see also Sarah Brown, *How a Prominent Legal Group Could Change the Way Colleges Handle Rape*, CHRON. HIGHER EDUC., (Dec. 4, 2015), [http://chronicle.com/article/How-a-Prominent-LegalGroup/234467?cid=at&utm\\_source=at&utm\\_medium=en&elq=f6e3958c4c3e4d0480b9a6d0cc3a9661&elqCampaignId=1993&elqaid=7104&elqat=1&eqTrackId=1a17955271a34afeb353b653cd18aade](http://chronicle.com/article/How-a-Prominent-LegalGroup/234467?cid=at&utm_source=at&utm_medium=en&elq=f6e3958c4c3e4d0480b9a6d0cc3a9661&elqCampaignId=1993&elqaid=7104&elqat=1&eqTrackId=1a17955271a34afeb353b653cd18aade).

apparent that athletics department policies should be examined through a broader lens. A pervasive sexist culture in some male sports continues to perpetuate an environment that allows student-athletes to feel entitled to sexual intercourse whether the co-participant consents. Sexual violence education that is recommended under Title IX and mandated by the Campus SaVE Act should be specifically tailored for student-athletes and provided before the start of every school year. This education can also be integrated with broader drug and alcohol education programs. Consumption of alcohol, by both the victim and the perpetrator, is a significant factor in reported sexual assaults, so it is unlikely that sexual violence education programs can be successful if alcohol abuse on campus is not curbed or controlled. Similarly, drugs and steroid use by student-athletes can be contributing factors to violent behavior, which must also be addressed in an integrated educational program. Coaches and other athletic department personnel must be held accountable for addressing sexual violence by student-athletes. Coaches and athletic department personnel are much more likely to have written contracts than many university employees. These contracts should contain specific provisions requiring compliance with all university policies and training programs related to sexual violence.

### C. *Recommendations for Athletics Administrators and Coaches*

Athletics administrators also can contribute to addressing sexual violence perpetrated by student-athletes. Both the National Collegiate Athletic Association (NCAA) and the National Association of College and University Attorneys (NACUA) have provided recommendations related to athletics and sexual violence. NACUA's recommendations encompass (1) recruiting; (2) codes of conduct; (3) training on sexual harassment and sexual assault; (4) policies discouraging alcohol and drug use; (5) prompt institutional response; and (6) prompt and effective discipline.<sup>242</sup> The NCAA encourages educational programming, collaboration, and compliance.<sup>243</sup> The NCAA also recommends that athletics department “[c]ooperate with but not manage, direct, control or interfere with college or university investigations into allegations of sexual violence ensuring that investigations involving student-athletes and athletics department staff are managed in the same

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242. Barbara A. Lee, *Liability for Sexual Assault by College Athletes Under Title IX*, 7 NACUANOTES, Nov. 7, 2008, at 6–7, [http://www.nacua.org/nacualert/docs/SexualAssault/Sexual%20Assault%20by%20College%20Athletes\\_110708.pdf](http://www.nacua.org/nacualert/docs/SexualAssault/Sexual%20Assault%20by%20College%20Athletes_110708.pdf).

243. See generally DEBORAH WILSON, CONNIE KIRKLAND & BRANDI HEPHNER LABANC, ADDRESSING SEXUAL ASSAULT AND INTERPERSONAL VIOLENCE: ATHLETICS' ROLE IN SUPPORT OF HEALTHY AND SAFE CAMPUSES (Karen Morrison & Mary Wilfert eds., 2014), <https://www.ncaa.org/sites/default/files/Sexual-Violence-Prevention.pdf>.

manner as all other students and staff on campus.”<sup>244</sup>

Athletics administrators also can contribute to addressing sexual violence perpetrated by student-athletes. Coaches and athletics personnel should closely examine the character and criminal history of recruits and apply the same admissions standards to student-athletes with prior history as the general student body. For example, the Southeastern Conference (SEC) recently implemented a policy that prohibits member institutions from accepting a transfer student with a prior history of sexual assault. Athletics personnel should also implement a written code of behavior for student-athletes and strictly enforce it. The privilege of participating in athletics can be revoked for any violation of the student-athlete code of conduct. Appropriate interim steps when a student-athlete is involved in a report of sexual violence must include an immediate suspension of playing privileges. It should be applied uniformly across all sports and all athletes. Uniformity creates a culture that establishes a standard for all student-athletes and takes disciplinary measures out of the hands of the coach. Lastly, situations involving student-athlete violence must be immediately referred through the ordinary campus policies and procedures, like any other code infraction by any other student. The athletic department should not be involved in the university investigatory or disciplinary process. When student-athletes are treated like every other student, the culture of entitlement should subside.

## V. CONCLUSION

College administrators are not lacking resources or information regarding Title IX’s mandate related to sexual violence<sup>245</sup>—but what is lacking is

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244. *Executive Committee Statement on Sexual Violence Prevention and Complaint Resolution*, NCAA.ORG, <http://www.ncaa.org/governance/committees/executive-committee-statement-sexual-violence-prevention-and-complaint-resolution> (last visited June 9, 2016).

245. Multiple governmental and non-governmental organizations compile and assemble resources for college administrators responsible for Title IX compliance relative to sexual violence. For example, the Center for Changing Our Campus Culture includes a resource guide and links to resources from the Centers for Disease Control and Prevention, American Civil Liberties Union, Campus Technical Assistance and Resource Project, Texas Council on Family Violence Prevention, The New York City Anti-Violence Project, and dozens of other information and research resources. *Resources*, CHANGING OUR CAMPUS CULTURE, <http://www.changingourcampus.org/resources> (last visited June 9, 2016). See generally NOT ALONE, RESOURCE GUIDE TO PREVENT AND IMPROVE THE RESPONSE TO SEXUAL VIOLENCE AT COLLEGES AND UNIVERSITIES (n.d.), <https://www.notalone.gov/assets/task-force-resource-guide-sep-15.pdf>. Generation Progress has similar resources and information, and these are just two examples of multiple organizations involved in this movement. *Campus Sexual Assault*, GENERATION PROGRESS, <http://genprogress.org/issues/campus-sexual-assault/view/> (last visited June 9, 2016). In addition, the Department of Justice and the Department of Education both provide voluminous information and resources to be digested and interpreted by college administrators.

accessible and consistent best practices for (1) creating a welcoming and safe culture that includes information about sexual violence; (2) establishing mechanisms for identifying and reporting behaviors or conditions that produce sexual violence; and (3) implementing effective prevention programs that include assessments of campus climate, culture, and grievance procedures. The DOE guidance documents are specific in terms of identifying responsibility for campus sexual violence but less than clear at identifying specific practices and policies that will enable universities to meet those responsibilities. This Article identifies the key principles guiding university responsibilities under Title IX and recurring elements that must be considered as part of a university's compliance efforts and provisions specifically impacting college athletics.