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ARTICLE

TACKLING ABUSE IN SPORT THROUGH DISPUTE SYSTEM DESIGN

MAUREEN A. WESTON*

“There is a special relationship between a coach and an athlete . . . [t]he coach is very important to the success of the athlete, and there are no other places to find that support, or at least that’s what the athlete believes, usually because the coach has taught the athlete that message: ‘Without me, you wouldn’t be able to do this.’”¹

An athlete reports inappropriate behavior by the coach. What (sh)(c)(w)ould you do?

I. INTRODUCTION

Competitive sport participation can provide lifelong skills as well as physical, social, emotional, and cognitive benefits.² Physical activity helps promote healthful living, sportsmanship, and confidence.³ Sport provides the opportunity to experience the joys of competition, the discipline of teamwork, and the rewards of personal development.⁴ While sport can be a uniting force, at times the rewards, the pressure to win, and the reverence

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1. Anna North, *Olympic Coach Accused of Sexually Abusing Teen Gymnasts*, JEZEBEL (Sept. 26, 2011, 2:40 PM), <http://jezebel.com/5843873/olympic-coach-accused-of-sexually-abusing-teen-gymnasts>.

2. Kathi E. Hanna, *True Sport: What We Stand to Lose in Our Obsession to Win*, U.S. ANTI-DOPING AGENCY, 8 (2012), http://www.truesport.org/library/documents/about/true_sport_report/True-Sport-Report.pdf.

3. Alice Lee, *7 Charts That Show the State of Youth Sports and Why It Matters*, THE ASPEN INST. (Feb. 24, 2015), <http://www.aspeninstitute.org/about/blog/7-charts-that-show-the-state-of-youth-sports-in-the-us-and-why-it-matters> (noting that children who enter sport at an early age are less likely to become obese and more likely to go to college and to be productive adults than children who do not play sport).

4. *Id.*

given to powerful coaches in youth sport can lead to circumstances that can undermine these values and cause psychological and physical damage and lasting trauma.

Competitive, and even recreational, youth sport competition would not be possible without the team of dedicated parents, coaches, trainers, facility personnel, teachers, and organizations that support young athletes and make it possible for them to achieve excellence. It generally does take a village to administer a youth sport program, and even more effort is required to develop an Olympic or elite athlete. Coaches, in particular, spend a significant amount of time with young athletes and are entrusted with training, coaching, and mentoring young athletes through the intense experience of competitive sport. Not surprisingly, unique bonds can develop between coaches and athletes.

Coaches can make a difference in the life of an athlete—this impact is usually positive. The relationships forged between athletes and coaches are often imbued with trust, reverence, and authority. Unfortunately, the close and trusting nature of this relationship can result in a disturbing opportunity for exploitation and abuse. Those who abuse their power can cause unspeakable and lasting physical and psychological trauma.⁵ Child sexual abuse is a problem in all levels of society, including extended families, schools, colleges, camps, and churches, but also in sport.⁶ Estimates suggest that *one in four* girls and *one in eight* boys are sexually abused by age eighteen.⁷ Young athletes who compete at elite levels of sport are at high risk, as they spend significant time training and traveling with a coach.⁸ In recent years, athletes in the individual competitive sports of swimming and gymnastics, in particular, have come forward with frightening reports of sexual abuse by coaches in USA Swimming and Gymnastics.⁹ Reports of

5. See, e.g., Kristen W. Springer et al., *The Long Term Health Outcomes of Childhood Abuse*, 10 J. GEN. INT. MED. 364 (2003), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1494926/>.

6. Margo Mountjoy et al., *The IOC Consensus Statement: Harassment and Abuse (Non-Accidental Violence) in Sport*, BRIT. J. SPORTS MED. 1 (2016), <http://bjsm.bmj.com/content/early/2016/04/26/bjsports-2016-096121.full.pdf+html>.

7. *Who's Protecting Our Children – An NCYS Child Safety Initiative*, NAT'L COUNCIL OF YOUTH SPORTS, <http://www.ncys.org/childsafety.html>.

8. *Id.*; see also Mountjoy et al., *supra* note 6, at 5 (noting that elite, disabled, child, and LGBT athletes are at highest risk); Press Release, Int'l Olympic Comm., IOC Adopts Consensus Statement on Sexual Harassment and Abuse in Sport (Feb. 8, 2007), <https://www.olympic.org/news/ioc-adopts-consensus-statement-on-sexual-harassment-and-abuse-in-sport> (stating that the prevalence of sexual abuse is higher in elite sport); U.S. Olympic Committee, SAFESPORT, <http://safesport.org/what-is-safesport/elite-athletes/>.

9. See, e.g., Vicki Michaelis, *Abuse Allegations Against USA Coaches Rock the Swim World*, USA TODAY (Aug. 11, 2010), http://usatoday30.usatoday.com/sports/olympics/2010-08-11-allegations-rock-swim-world_N.htm. See also Megan Chuchmach & Avni Patel, *ABC News Investigation: USA Swimming Coaches Molested, Secretly Taped Dozens of Teen Swimmers*, ABC NEWS (Apr. 9, 2010), <http://abcnews.go.com/Blotter/abc-news-investigation-usa-swimming-coaches-raped-molested/story?id=10322469>; *Jane Doe v. United States Swimming, Inc.*, No. 1-09-CV149813 (Cal. App. Dep't Super. Ct. Nov. 21, 2011), <http://caselaw.lp.findlaw.com/data2/>

sexual assault by and among athletes and other athletic personnel in powerhouse collegiate athletic programs have also captured national attention with findings that the athletic program was protected, rather than the victim.¹⁰ The “Spotlight” on institutional failure to combat child sexual abuse is a sobering call to action.¹¹ Notwithstanding, false allegations against a coach can destroy careers and reputations and cause disrepute to an entire athletic program.¹² A competent, comprehensive, and accessible process for

californiastatecases/H036240.pdf; Scott M. Reid, *Settlements Reached in Schubert, Havercroft Cases*, ORANGE COUNTY REG. (Nov. 18, 2014, 9:36 PM), <http://www.ocregister.com/articles/jewell-642609-swimming-schubert.html>; *Gymnastics Coach Accused of Raping Teenage Student*, FOX NEWS (Nov. 22, 2007), <http://www.foxnews.com/story/2007/11/22/gymnastics-coach-accused-raping-teenage-student.html>; Jared S. Hopkins, *2nd Sexual Misconduct Allegation Made Against Gabel*, CHI. TRIB. (Mar. 8, 2013), [http://www.wthr.com/story/30072506/gymnastics-coach-marvin-sharp-found-dead-in-jail-cell](http://articles.chicagotribune.com/2013-03-08/sports/ct-spt-0309-speedskating-scandal—20130309_1_three-time-olympic-speedskater-andy-gabel-allegation; Proposal from Members of USS on Member Recusal to USS Cong. (May 15–17, 2015) (on file with USS Cong.); Gymnastics Coach Marvin Sharp Found Dead in Jail Cell</i>, WTHR CHANNEL 13 (Sept. 21, 2015, 12:04 PM), <a href=); North, *supra* note 1; Nancy Loo & Erik Runge, *Schaumburg Gym Coach Charged with Sexual Battery*, WGN TV (Oct. 26, 2015, 4:33 PM), <http://wgntv.com/2015/10/26/coach-charged-accused-of-sexually-abusing-special-need-athletes/>.

10. Baylor University has been criticized for failing to investigate rape claims and for sheltering a star football player accused of rape in order to protect the powerful and lucrative football program. Joe Nocera, *Baylor, Football and the Rape Case of Sam Ukwuachu*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/01/opinion/joe-nocera-baylor-football-and-rape.html>. See also Paula Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (Feb. 2, 2016), http://espn.go.com/espn/otl/story/_id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims. An external investigation largely confirmed these accusations and found that university administrators discouraged and retaliated against sexual assault complainants. See Pepper Hamilton LLP, *Baylor University: Finding of Facts*, (May 26, 2015), <https://www.baylor.edu/rtsv/doc.php/266596.pdf>. In another case, former Stanford University swimmer Brock Turner was convicted of rape but served only three months in prison. Two of the letters sent to the judge about showing leniency were from his former swim coaches. Sam Levin, *Dozens of Letters Urge Lenience for Brock Turner in Stanford Sexual Assault Case*, THE GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/07/stanford-sexual-assault-letters-brock-turner-judge>. The NFL was dogged with similar accusations in its initial lenient sanction against Ray Rice until a video of the domestic violence involving his then girlfriend being dragged outside an elevator went viral. In response to public outrage, the NFL indefinitely suspended Rice, but the penalty was overturned in arbitration due to the NFL’s imposition of a second suspension under a new conduct policy, which could not be retroactive. Hon. Barbara S. Jones, *In the Matter of Ray Rice, Arbitration Decision* (Nov. 28, 2014), http://espn.go.com/pdf/2014/1128/141128_rice-summary.pdf.

11. The movie “Spotlight,” which portrayed journalists from the Boston Globe’s investigative findings that aspects of the Catholic Church acquiesced in a shocking conspiracy to cover up scores of pedophile priests, won the Oscar’s Best Picture award in 2015. Ty Burr, *Spotlight Triumphs with Best Picture Oscar*, BOS. GLOBE (Feb. 29, 2016), <http://www.bostonglobe.com/arts/movies/2016/02/28/oscarsawards/laA2QbfA2rTnWWk7qhp4yM/story.html>; see also Jim Davis, *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2012), <http://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGk-TlrAT25qKGvBuDNM/story.html>.

12. Rolling Stone Magazine retracted its publication of Sabrina Erdely, *A Rape on Campus? A Brutal Assault and Struggle for Justice at UVA*, upon admitting that the person who was allegedly gang raped by a fraternity at the University of Virginia had fabricated the claim. Sheila Coronel et al., *‘A Rape on Campus’: What Went Wrong?*, ROLLING STONE (Apr. 5, 2015), <http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405?page=3>.

reporting, investigating, resolving, and preventing sexual abuse in sport is essential to protect athletes and their right to a safe training environment.

Reports of sexual abuse in the youth sport community requires attention at every level of sport to ensure the emotional and physical safety of athletes.¹³ In 2007, the International Olympic Committee (IOC) adopted a Consensus Statement on Sexual Harassment and Abuse in Sport, which acknowledges the prevalence and debilitating impact of sexual harassment and abuse in sport.¹⁴ The IOC does not have a centralized process or agency commissioned to regulate safety from abuse for international and Olympic athletes; rather, it recommends that sport governing bodies develop policies and procedures to protect athletes from abuse.¹⁵ In the United States, the U.S. Olympic Committee (USOC) is responsible for supporting U.S. athletes “[i]n achieving sustained competitive excellence while demonstrating the values of the Olympic Movement, thereby inspiring all Americans.”¹⁶ Established as a federally-chartered non-profit corporation to serve as the exclusive governing body for U.S. Olympic Sport,¹⁷ the USOC is empowered to recognize National Governing Bodies (NGBs) that administer individual sport in the training, competition, and nomination of athletes for Olympic competition.¹⁸ The USOC is entrusted to support these athletes on and off the field and to provide a safe training environment. According to

The 2006 case of false allegations of rape against Duke University’s men’s lacrosse team is the subject of a 2016 documentary *FANTASTIC LIES* (ESPN 2016). *See also*, William D. Cohen, *Remembering (and Misremembering) the Duke Lacrosse Case*, *VANITY FAIR* (Mar. 10, 2016, 5:18 PM), <http://www.vanityfair.com/news/2016/03/duke-lacrosse-case-fantastic-lies-documentary>; Title IX Lawsuits, *SAVE OUR SONS*, <http://helpsaveoursons.com/category/fighting-back/>.

13. Financial abuse and embezzlement in youth sport is also an increasing concern. *See* Bill Pennington, *The Trusted Grown-Ups Who Steal Millions from Youth Sports*, *N.Y. TIMES* (July 7, 2016), <http://www.nytimes.com/2016/07/10/sports/youth-sports-embezzlement-by-adults.html>.

14. Int’l Olympic Comm., *supra* note 8 (stating that the prevalence of sexual abuse is higher in elite sport and recognizing the serious and negative impact on athletes’ physical and psychological health exploitation). *See also* U.N. Entity for Gender Equality and the Empowerment of Women, *Sexual Harassment in Sport* (2012), <http://www.endvawnow.org/en/articles/30-sexual-harassment-in-sport.html> (citing UNESCO Code of Sport Ethics obligating sport organizations to ensure safeguards to protect athletes from exploitation).

15. Int’l Olympic Comm., *supra* note 8 (stating that the prevalence of sexual abuse is higher in elite sport and recognizing the serious and negative impact on athletes’ physical and psychological health). *See also* *Sexual Harassment in Sport*, U.N. WOMEN, <http://www.endvawnow.org/en/articles/30-sexual-harassment-in-sport.html> (citing UNESCO Code of Sport Ethics obligating sport organizations to ensure safeguards from exploitation).

16. *About the USOC*, *TEAM USA*, <http://www.teamusa.org/about-the-usoc>.

17. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2006).

18. 36 U.S.C. § 220501 (2006). *See also* U.S. GOV’T ACCOUNTABILITY OFFICE, *GAO-15-418, YOUTH ATHLETES: SPORTS PROGRAMS’ GUIDANCE, POLICIES TO HELP PREVENT AND RESPOND TO SEXUAL ABUSE 5* (2015), <http://gao.gov/assets/680/670543.pdf> (noting that as of 2014, the USOC recognizes forty-seven NGOs).

USOC Chief Executive Officer Scott Blackman, preventing sexual abuse among athletes is the agency's most important role.¹⁹

To address the problem of sexual abuse in sport, the USOC commissioned a Working Group on Safe Training Environments (Working Group). The Working Group engaged in a process aligned with a Dispute System Design (DSD) approach to undertake its study on the issue of abuse in sport and how to provide a safe training athletic environment for athletes that is free of abuse, which the Group described as "SafeSport."²⁰ The process of DSD provides an analytical framework to address conflict and to develop a process for preventing, managing, and resolving recurring problems in a variety of contexts.²¹ DSD can assist organizations seeking to address conflict by providing a systematic approach to help identify the program's goals and objectives, inform its stakeholders, create a system structure in terms of process options and incentives for use, and locate resource support.²² The Working Group's recommendations were the precursor to the USOC formal adoption of a SafeSport Policy and the commission of a new agency, the U.S. Center for SafeSport, to address the issues concerning sexual abuse and misconduct in sport.²³

Through the construct of DSD, this article examines sexual abuse in youth sport, focusing on USOC efforts to address the detection, prevention, and adjudication of sexual abuse in sport. Section II considers obstacles to prevent and redress sexual abuse in sport, such as difficulties in identifying and defining unacceptable conduct in the context of a close, trusted relationship between athlete and coach, varied and limited judicial recourse, and potential bias with internal reporting systems. Section III discusses the process the USOC Working Group on Safe Training Environments employed to formulate its recommendations for SafeSport policy and implementation. Section IV critiques the proposed Center for SafeSport, including the contemplated systems for reporting, investigating, and sanctioning misconduct. The article concludes by advising a DSD systems

19. Wesley G. Pippert, *Olympic Committee President Calls Preventing Sexual Abuse Most Important Role*, THE NAT'L PRESS CLUB (Oct. 21, 2014), <https://www.press.org/news-multimedial/news/olympic-committee-president-calls-preventing-sexual-abuse-most-important-role>.

20. U.S. Olympic Committee Working Group for Safe Training Environment, *Recommendations to the USOC Board of Directors*, U.S. OLYMPIC COMMITTEE 5–6 (Sept. 28, 2010), http://www.teamusa.org/~media/TeamUSA/Documents/Legal/Other-Documents/092810_USOC-Working-Group-Final-Recommendations-to-the-Board-of-Directors.pdf? Mountjoy et al., *supra* note 6, at 1 (defining safe sport).

21. See, e.g., Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEG. L. REV. 123, 125 (2014).

22. *Id.* at 129.

23. See generally U.S. Olympic Committee, *SAFE SPORT POLICIES*, http://assets.ngin.com/attachments/document/0104/7769/090712_USOC_Safe_Sport_Policy_FINAL.pdf; See also <http://www.teamusa.org/Media/News/USOC/USOC-announces-formation-of-US-Center-for-Safe-Sport-Advisory-Council>; <http://safesport.org>.

check on SafeSport to ensure effectiveness of the policies and process intended to ensure safety for athletes in sport.

II. THE PROBLEM OF SEXUAL ABUSE IN SPORT

Situations are not always as pristine as they might seem. The Penn State University football scandal is perhaps a prime illustration. For years, Penn State Football was praised for its winning program, legendary head coach Joe Paterno, and seemingly unimpeachable reputation.²⁴ Former Assistant Coach Jerry Sandusky had been an integral part of the Penn State program. He was lauded for founding Second Mile, a charity dedicated to helping dysfunctional families, and for years invited children to the Penn State athletic facilities. The world was shocked upon learning the horrific news that Sandusky had serially sexually abused young boys on the campus and in athletic facilities at the university.²⁵ Sandusky “[e]xploited his status as . . . a member of the Penn State football staff to further his grooming and assaults on young boys.”²⁶ Reportedly, other athletic department coaches and members knew or had reason to suspect this abuse but did nothing to report or to stop it.²⁷ The Penn State scandal is an example of the dangers of institutional reverence given to coaches of winning athletic programs and of the potential for an institution or sport governing body to protect a coach over a victim to safeguard reputation and limit liability.²⁸

A. *Sexual Abuse in Youth Sport*

Child sexual abuse plagues society at large. According to U.S. Department of Justice statistics, “[A] child in America is sexually assaulted every

24. Until the Sandusky scandal, Penn State had been one of only four major athletic programs without NCAA major rules violations. Darren Everson & Hannah Karp, *The NCAA's Last Innocents*, WALL ST. J. (June 22, 2011), <http://www.wsj.com/articles/SB10001424052702303936704576400052122863390>.

25. See, e.g., *Doe v. Pa. State Univ.*, 982 F. Supp. 2d 437, 444 (E.D. Pa. 2013) (dismissing vicarious liability claims against the university on the grounds that Sandusky's sexual abuse of the plaintiff was outrageous and outside the scope of his employment). Sandusky abused over fifty boys over a period of fifteen years. Rachel Sturtz, *Unprotected*, OUTSIDE, <http://www.outsideonline.com/o/outdoor-adventure/water-activities/swimming/The-Sex-Abuse-Scandal-Plaguing-USA-Swimming.html>.

26. *Doe*, 982 F. Supp. 2d at 438 (noting allegations that Sandusky took Doe 6, then eleven years old, to the PSU football facility, “wrestled” with him, forced him to shower with him and committed sexual abuse).

27. See Marc Tracy, *Joe Paterno Knew of Sandusky Abuse in 1976, According to Testimony*, N.Y. TIMES, (July 12, 2016), <http://www.nytimes.com/2016/07/13/sports/ncaafotball/joe-paterno-jerry-sandusky-sex-abuse-penn-state-1976-court-documents.html> (reporting on victim testimony of alleged abuse at age 14 while attending football camp on campus).

28. See Joe Nocera, *supra* note 10 (describing institutional response to rape claims by students against athletes at Baylor). See also Scott Davis, *Bombshell Lawsuit Accuses Baylor Football Program of 52 Acts of Rape and of Paying Student's Tuition in Exchange for Silence*, BUSINESS INSIDER, (Jan. 27, 2017), <http://uk.businessinsider.com/lawsuit-accuses-baylor-football-program-rape-2017-1?r=US&IR=T>.

two minutes. Unfortunately the majority of incidents are not reported because children are afraid to tell anyone what has happened, and the legal procedure for validating an episode is difficult.”²⁹ Statistics on sexual abuse in youth sport indicate a two to five percent rate of abuse—that percentage, considering the four million youth that participate in sport, involves 800,000 children per year.³⁰

The culture and unique environment in competitive youth sport involves a close and trusted relationship between coach and athlete, often supported by the parents, and a constant focus on the athletes’ bodies. These conditions may provide risks for sexual exploitation.³¹ Sexual abuse often goes unreported, as athletes suffer trauma, fear retaliation, and lose confidence in a grievance structure that may protect a powerful coach.

Despite underreporting, a number of cases of abuse have garnered media attention as well as scrutiny by the courts, legislature, and sport governing bodies.³² *Outside Magazine* recently profiled the problem of sexual abuse in youth sport. In the article “Unprotected,” Rachel Sturtz documented the case of a young female swimmer, aspiring to make the Olympic Trials, who had been emotionally and sexually abused by her coach. Sturtz asserted that the athlete was also legally abused by the system in which the accused coach was allowed to go without discipline and to continue coaching for years.³³ According to Sturtz, “There’s a horror in the shadows of American competitive swimming: a continuing legacy of sexual abuse, usually involving male coaches who prey on young women—and a governing body that looks the other way.”³⁴ Citing other athlete abuse reports, Sturtz notes that this was not an isolated incident.³⁵ ABC’s *20/20* and ESPN’s *Outside the Lines* also featured an expose of USA Swimming’s mishandling of sex abuse claims against a swim coach who secretly videotaped athletes

29. *Who’s Protecting Our Children – An NCYS Child Safety Initiative*, *supra* note 7.

30. *Preventing Sexual Abuse in Sport*, THE FOUND. FOR GLOBAL SPORTS DEV. (Apr. 29, 2014), <http://globalsportsdevelopment.org/sexual-abuse-sport-prevention/>.

31. Int’l Olympic Comm., *supra* note 8; Sexual Harassment in Sport, *supra* note 14.

32. See, e.g., Chuchmach & Patel, *supra* note 9. See also T.J. Quinn & Greg Amante, *Sex Abuse Pervasive in USA Swimming*, ESPN (Apr. 27, 2010) (citing inadequate oversight by sport governing bodies, failure by parents and officials to report inappropriate behavior, and zeal to win overtaking seeing red flags of sexual abuse and molestation), <http://espn.go.com/espn/otl/news/story?id=5071820>; David Laviere, *Long-Term Sexual Abuse By USA Swimming Coaches Documented In New Article*, FORBES (Nov. 14, 2014), <http://www.forbes.com/sites/davidlaviere/2014/11/14/long-term-sexual-abuse-by-usa-swimming-coaches-documented-in-new-article/#613c35cd40c3>.

33. *Id.*

34. Sturtz, *supra* note 25.

35. *Id.* (noting a petition signed by twenty female swimmers who have reported sexual abuse, protesting USA Swimming’s executive director’s failure to protect victims). See also Larry Cohen, *Lifting the Veil of Secrecy: Stopping Sexual Abuse in Sport and Every Institution*, HUFFPOST SPORTS (Dec. 6, 2011, 3:00 PM), http://www.huffingtonpost.com/larry/why-are-we-surprised-stop_b_1130690.html.

in locker rooms.³⁶ Gymnastics athletes have similar claims.³⁷ Sexual abuse in sport is a global problem. In December 2016, a scandal engulfing English youth football clubs emerged when nearly 350 people, including six professional players, revealed that they had been groomed and sexually molested by coaches in English youth football programs dating from the 1970's to current investigations.³⁸

B. Limited Legal Remedies

Athletes sexually abused in a sport context have encountered substantial obstacles in obtaining redress in the public justice system and within sport governance. The prosecution of child abuse claims in courts involves formidable evidentiary and procedural protections.

1. Criminal Prosecution

Child sexual abuse is a crime, and federal and state laws establish mandatory reporting of suspected child abuse.³⁹ However, the definition of sexual abuse can vary among state statutes, and sexual abuse of minors may involve a range of misconduct, or “grooming,” not itself subject to criminal prosecution, although inappropriate and warranting discipline in sport governance.⁴⁰ In the criminal justice system, constitutional protections require that an accused is legally presumed innocent and impose an evidentiary burden to prove sexual abuse beyond a reasonable doubt.⁴¹ This level of proof may be difficult to establish when reports are delayed and involve trauma and allegations of abuse that took place in private. They ultimately

36. Chuchmach & Patel, *supra* note 9 (reporting that USA Swimming had banned 36 swimming coaches for allegations of sexual misconduct, including molestation and hidden videotaping of children in locker rooms). See *USA Swimming to Review Sexual Misconduct Prevention Program*, MINN. PUB. RADIO (Aug. 27, 2013, 5:02 AM), <http://www.npr.org/2013/08/27/215972814/usa-swimming-to-review-sexual-misconduct-prevention-program>.

37. North, *supra* note 1.

38. Kimiko DeFreytas-Tamura, *Claims of Child Sexual Abuse in English Soccer Grow*, N.Y. TIMES, (Dec. 1, 2016), <https://www.nytimes.com/2016/12/01/sports/soccer/england-child-sexual-abuse-scandal.html>.

39. The Child Abuse Prevention and Treatment Act (CAPTA) requires states to establish mandatory reporting laws as a condition of receiving federal funding. 42 U.S.C. § 05106a(b)(2) (2015). See also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 18. Sexual abuse is a crime and involves conduct such as rape, molestation, or any sexual activity involving a child. Sexual misconduct can involve sexualized verbal or physical activity toward a child and may not necessarily rise to the level of a criminal act, but it could violate other laws, regulations, or conduct rules. *Id.* at 2.

40. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 18, at 1, n.1 (noting varied definitions of sexual abuse and sexual misconduct).

41. *In re Winship*, 397 U.S. 358, 372 (1970) (noting the standard of proof in criminal trial is based upon the due process protections under U.S. Const. Amend. V. and grounded upon “a fundamental value determination in our society that it is far worse to convict an innocent man than it is to let a guilty man go free.”).

become cases of “he said, she said,” which make them very difficult to prove.⁴² Final adjudication can take months, even years, to resolve.

2. *Civil Lawsuits*

Victims can fight abusers in ways other than the criminal justice system. A private civil action against an offending coach under tort law, for example, generally involves the lower preponderance of evidence standard, and a victim may seek financial compensation for physical, emotional, or financial damages suffered by abuse.⁴³ Yet, this process requires substantial time and resources to prosecute correctly, and a monetary judgment against the accused coach is often uncollectible due to lack of resources or insurance coverage for such conduct.

Attempts to hold an athletic governing body vicariously responsible for coach assault may fail when a coach’s conduct is deemed outrageous and outside the scope of employment. For example, *McCoy v. American Athletic Union* involved a high school track athlete who was sexually molested by a coach of a member track club.⁴⁴ The coach was convicted in the Maryland criminal courts for sexual abuse of a minor.⁴⁵ In a civil case, the athlete was awarded a, likely uncollectable, \$1.8 million default judgment against the coach. The athlete also sought to hold the sport governing body, Amateur Athletic Union (AAU), “one of the largest, non-profit, volunteer, sports organizations in the United States . . . dedicated exclusively to the promotion and development of amateur sports and physical fitness programs[,]”⁴⁶ vicariously liable for the assault. The athlete alleged that the AAU negligently supervised and vetted the coach and provided him with

42. *Accused of Abuse, Coach Proclaims Innocence*, N.Y. TIMES (Sept. 16, 2012), <http://www.nytimes.com/2012/09/17/sports/accused-of-abuse-coach-proclaims-innocence.html>. See also Casey D. Schwab, *Position of Authority Statutes in Athletic Programs, A Proposed Roadmap for the Model Penal Code Revisions in Response to Jerry Sandusky*, 31 ENT. & SPORTS LAW 19 (2015).

43. Michael Gibbons & Dana Campbell, *Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers*, 13 J. LEGAL ASPECTS SPORT 185 (2003); Nancy Gertner, *Complicated Process*, 125 YALE L.J.F. 442, 444 (2016) <http://www.yalelawjournal.org/forum/complicated-process> (describing rationale for preponderance standard in university disciplinary hearings).

44. *McCoy v. Amateur Athletic Union of the U.S., Inc.*, No. MJG-13-3744, 2015 WL 302770 (D. Md. Jan. 22, 2015) (“[The coach’s] conduct had no relation to the business of a youth sports organization. Nor was his conduct an integral part of the AAU’s activities, interests, or objectives. Rather, an alleged sexual assault of a student athlete by a coach appears to be ‘quite outrageous’ conduct that indicates ‘the motive was a purely personal one.’ The Court disagrees . . . that because Newmuis’ responsibilities purportedly ‘involved significant hands on contact . . . [i]t was absolutely foreseeable that sexual, inappropriate contact would be made.’” *Id.* at *7 [internal citations omitted]), *aff’d*, 621 Fed. Appx. 182, 185 (4th Cir. 2015).

45. *Id.* The coach’s job included providing athletes with physical conditioning and transportation to and from practice. The athlete alleged that when the coach drove the athlete home and the athlete had complained of leg pain, the coach proceeded to massage and molest him continuing this type of abuse at other times.

46. *Id.* at *2 (citation omitted).

the environment in which the assault was committed; however, the court dismissed the case on the grounds that the coach's "outrageous" sexual assault of the athlete was well outside of the scope of agency relationship with AAU.⁴⁷ Penn State similarly evaded vicarious liability for Coach Sandusky's molestation of boys on its campus.⁴⁸ Although Sandusky was convicted of forty-five counts of criminal sexual assault, the university was not held civilly responsible to the abused victims for vicarious liability because the court deemed the abuse to be outside the scope of Sandusky's employment with the university.⁴⁹ Other tort claims, such as negligent hiring of a coach, are similarly difficult to prove against a sport governing body.⁵⁰

3. Federal Regulatory Enforcement

Title IX of the Education Act of 1972 prohibits sexual discrimination, including harassment and abuse.⁵¹ The Act obligates educational institutions and programs receiving federal funds to take measures to protect against sexual harassment and abuse.⁵² The Department of Education's Office of Civil Rights (OCR), which enforces Title IX, has intensified its scrutiny of sexual assault on collegiate campuses.⁵³ Institutions also face Title

47. *McCoy v. Amateur Athletic Union of the U.S., Inc.*, 621 F. App'x. 182, 184 (4th Cir. 2015) ("[W]here an [agent]'s actions are personal, or where they represent a departure from the purpose of furthering the [principal]'s business . . . even if during normal duty hours and at an authorized locality, the [agent]'s actions are outside the scope of his [agency] . . . [W]here the conduct of the [agent] is unprovoked, highly unusual, and quite outrageous, courts tend to hold that this in itself is sufficient to indicate that the motive was a purely personal one and the is conduct outside the scope of [the agency]").

48. *Doe*, 982 F. Supp. 2d at 446 (dismissing vicarious liability claims against the University on the grounds Sandusky's sexual abuse of plaintiff was outrageous and outside the scope of his employment).

49. *Id.*

50. *See* Gibbons & Campbell, *supra* note 43.

51. 20 U.S.C. § 1681 (1986). The Clery Act also requires educational institutions to report criminal incidents, including sexual assaults. The Violence Against Women Act, amending the Clery Act, defines sexual assault to include fondling, incest, rape, and other (ill-defined) sex offenses. *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 893–94 (2016) Gertner, *supra* note 43, at 442 (explaining Harvard Law School's changes in its sexual assault disciplinary procedures in response to faculty protest), <http://www.yalelawjournal.org/forum/complicated-process>.

52. 20 U.S.C. § 1681, *supra* note 51. *See also* *Franklin v. Gwinnet Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (holding Title IX provided a remedy for a student claiming coach abuse and alleging school officials knew of but failed to take action against the coach).

53. *See* Russlynn Ali, U.S. Dep't of Educ., O.C.R., *Dear Colleague Letter Re: Sexual Violence 2* (Apr. 4, 2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewj5t4G8trfPAhUCqh4KHX3cCF8QFggcMAA&url=http%3A%2F%2Fwww2.ed.gov%2Focr%2Fletters%2Fcolleague-201104.pdf&usq=AFQjCNHNo_MCNUgIXZI9THansWxvfw61FQ&sig2=fuZNOHlyZaun8Kc4vGp1Ew&bvm=bv.134495766,d.dmo&cad=rja. As of January 2016, over 200 colleges, not then including Baylor, were under investigation for Title IX violations involving campus sexual assaults. Kathryn Mangan, *As Sexual Assault Investigations Multiply, Resolutions Remain Elusive*, CHRON. HIGHER ED. (Jan. 10, 2016), <http://chronicle.com/article/As-Federal-Sex-Assault/234858>.

IX civil liability for failure to address sexual assault issues on campus.⁵⁴ This increased attention to the problem of sexual assault on campuses has prompted more educational institutions to institute stricter policies and internal “bureaucracies” to regulate the reporting and discipline of sexual assault.⁵⁵ University policies, as well as state and federal laws, are trending toward an affirmative consent standard.⁵⁶ Some have criticized the stricter policies as lacking “basic elements of fairness and due process” and posing unwarranted risks of wrongful conviction with respect to the accused.⁵⁷

4. *Private Sport Self-Policing and the Deficiencies of Internal Reporting Systems*

Sport governing bodies are typically private associations and, absent receipt of federal financial assistance, not subject to Title IX regulation or, arguably, constitutional due process obligations.⁵⁸ Responsibility for inves-

54. See, e.g., Tim Kephart, *Ex-Student Files Title IX Lawsuit Against Baylor over Alleged Assault*, USA TODAY COLL. (Mar. 31, 2016, 5:00 PM), <http://college.usatoday.com/2016/03/31/ex-student-files-title-ix-lawsuit-against-baylor-over-alleged-sexual-assault/>. See also Edwin Rios & Madison Pauly, *This Explosive Case Could Change How Colleges Deal with Athletes Accused of Sexual Assault*, MOTHER JONES (March 3, 2016), <http://www.motherjones.com/politics/2016/03/sexual-assault-case-against-university-tennessee-explained>.

55. See, e.g., Gersen & Suk, *supra* note 51, at 883–84 (noting the burgeoning of “mini [or sometimes not so mini] bureaucracies within non-governmental institutions. . .” who administer sexual violence investigations and discipline and focus on regulation by college campuses).

56. State laws may also require that youth sport organizations conduct criminal background checks on employees and volunteers working with children. See, e.g., Cal. Penal Code § 11105.3, Colo. Rev. Stat. § 26-6-103.8, http://www.leg.state.co.us/clics/clics2015a/csl.nsf/fsbillcont/BAD7E4C902B71E1287257DA200618C8F?Open&file=048_01.pdf. See also Christine Chambers Goodman, *Protecting the Party Girl: A New Approach for Evaluating Intoxicated Consent*, 2009 BYU L. REV. 57 (2009).

57. A group of twenty-eight Harvard Law School faculty lodged such criticisms against the university’s proposed sexual violence policy instituted in response to an OCR investigation. Michael Fein, *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFD-DiZN7nU2UwuUuWMnqbM/story.html>). See also Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 594 (2013); *Concerns About the ALI Project to Revise the Sexual Assault Provisions of the Model Penal Code*, CENT. FOR PROSECUTOR INTEGRITY (last visited Mar. 7, 2015), <http://www.prosecutorintegrity.org/overcriminalization/sexual-assault/> (arguing that the mandates from the Department of Education’s Office of Civil Rights and the proposals by the American Law Institute (ALI) Model Penal Code for Sexual Assault and Related Offences conflate sexual harassment and sexual assault and inappropriately deem the accused as criminal offenders absent “affirmative consent” and provide fewer due process protections); Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of “Affirmative Consent” in the ALI’s Draft Sexual Assault Provisions*, 9 San Diego Legal Studies, Paper No. 15-197 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670419## (critiquing the ALI’s proposed “affirmative consent” standard requiring willingness, enthusiasm, and certainty).

58. 42 U.S.C. § 1983 (1996) (providing remedy for violation of the constitutional right against a party acting under the color of state law). See *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (recognizing deprivation of liberty right when defendant knew of inappropriate sexual conduct and failed to take remedial action). See also Danielle Deak, Comment, *Out of*

tigating, responding to, and regulating sexual abuse claims has largely resided within the individual national sport governing body and individual clubs.⁵⁹ This approach has proven insufficient at combatting sexual abuse in athletic programs.⁶⁰ Reporting systems directed by powers governing the sport pose at least the appearance of lacking independence, considering the governing body's incentive to protect the sport's image and the winning coach, and to avoid liability and adverse publicity.⁶¹ Moreover, internal investigations are costly, and the sport bodies often lack the expertise and resources needed to handle these investigations. Like many college campuses, private sport struggle with concerns about inadequate expertise, resources, and institutional independence to fairly investigate, adjudicate, and impose discipline of sex abuse claims.⁶²

C. Pressure for SafeSport

Sport governing bodies and organizations are under substantial pressure to act and do face liability—legally, financially, and morally.⁶³ Sport governing bodies have been criticized for failing to protect abused victims and to properly investigate and enforce discipline in these cases.⁶⁴ USA Swimming has a public list, numbering over 100, of coaches banned for sexual misconduct.⁶⁵ In 2010, the USOC convened the Working Group for

Bounds: How Sexual Abuse of Athletes at the Hands of Their Coaches is Costing The World of Sports Millions, 9 SETON HALL J. SPORT L. 171 (1999). See further, DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181, 1192 (D.D.C. 1980) (holding that the USOC, although federally chartered, is not a 'state action').

59. Sarah J. Kropp, Comment, *Solving the Penn State Problem: Holding the Institution Accountable for its Conspiracy of Silence*, 42 CAP. U. L. REV. 167, 201–07 (2014) (arguing that self-policing by institutions, such as educational and religious orders, facilitates efforts to cover up occurrences and to preserve their reputation; discussing direct, strict, and vicarious tort liability theories and the application of a John Doe statute in this context).

60. See Symposium, *Title IX at Forty: Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds*, 22 MARQ. SPORTS L. REV. 395, 409–17 (2012) (arguing that Title IX fails to adequately address the inherently exploitative nature of coach-athlete sexual relationships and calling for policies prohibiting sexual relationships between coaches and athletes, grounded in the ethical responsibility of the coach and the well-being of student-athletes); Symposium, *Warriors, Machismo, and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room*, 35 W. NEW ENG. L. REV. 377, 400–14 (2013) (arguing limitations of Title IX in redressing sexual harassment and hazing in sport and urging proactive approach).

61. Kropp, *supra* note 59.

62. See Judith Shulevitz, *Regulating Sex*, N.Y. TIMES (June 27, 2015), http://www.nytimes.com/2015/06/28/opinion/sunday/judith-shulevitz-regulating-sex.html?_r=0.

63. *Youth Sports Organizations*, DARKNESS TO LIGHT, http://www.d2l.org/site/c.4dICIJOgKcISE/b.8113213/k.A70D/Youth_Sports_Organizations.htm (noting several incidents of coach sexual abuse of young athletes and commenting that these cases “[h]ave the potential to destroy the integrity and financial stability of youth-serving organizations, especially if it appears that no steps were taken for prevention or early identification and correction.”).

64. Sturtz, *supra* note 25 (stating that “[i]ncreasingly competitive youth-sport cultures in the United States, combined with the lack of oversight and outright cover-ups, have created a dangerous environment for young athletes.”).

65. *Id.* at 2. See also *Individuals Suspended or Ineligible – Permanently*, USA SWIMMING (last updated June 6, 2016), <http://www.usaswimming.org/ViewMiscArticle.aspx?TabId>

the purpose of delivering recommendations to ensure safe training environments.⁶⁶

III. APPLYING DISPUTE SYSTEMS DESIGN TO ADDRESS ABUSE IN SPORT

Charged with the task of proposing how to deal with the concerns about abuse in sport, the Working Group engaged in a deliberate process—a DSD approach—to undertake its study and to recommend a formal SafeSport program. Results of this process have led to the establishment of a proposed National Center for SafeSport to lead in the role of educating, preventing, and adjudicating issues concerning abuse in sport.

A. *What is Dispute Systems Design?*

DSD is a systematic approach to manage ongoing disputes within organizations.⁶⁷ Dispute Resolution scholars William Ury, Jeanne Brett, and Stephen Goldberg first proposed the concept of dispute systems design in their work: *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*.⁶⁸ The authors asserted the need for systems and procedures to resolve common and recurring conflicts, stating that: “[d]isputes are inevitable when people with different interests deal with each other regularly,” and so are seen as a normal aspect of any relationship or organization.⁶⁹ This concept emphasizes the effective management of conflict, rather than the avoidance or suppression of it.

DSD involves certain basic strategies to approach a design initiative.⁷⁰ These steps involve: (1) assessing or diagnosing the current situation, (2) identifying stakeholders affected and involved by the conflict and important to the success of a new system, (3) convening processes and systems to permit input by interested parties, and (4) implementing the designed system with feedback loops and responsive consultation.⁷¹ The system should

=1963&mid=10011&ItemId=5107; Chris DeSantis, *Joe Bernal Added to USA Swimming Banned List*, SWIM SWAM (May 2, 2016), <https://swimswam.com/joe-bernal-added-usa-swimmings-banned-list/> (listing also numerous comments debating fairness of governing body’s disciplinary procedures).

66. Lynn Zinser, *USOC to Take Steps to Protect Against Sexual Abuse*, N.Y. TIMES (Sept. 28, 2010), <http://www.nytimes.com/2010/09/29/sports/29usoc.html>.

67. Conflict Research Consortium Staff, Univ. of Colo. Boulder, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, UNIV. OF COLO., http://www.colorado.edu/conflict/full_text_search/AllCRCDocs/urygett.htm, (last visited June 9, 2016) (book summary).

68. NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 4 (2013).

69. WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* xii (1988). See also Hallie Fader, Note, *Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts*, 13 HARV. NEGOT. L. REV. 481, 483 (2008) (defining DSD as “[a]n intervention to help clients – families, organizations, communities, nations—deal systematically with a continuing stream of disputes rather than a single episode.”).

70. ROGERS ET AL., *supra* note 68, at 6.

71. *Id.*

also provide the needed skills, motivation, and resources.⁷² DSD usually involves a spectrum of dispute resolution mechanisms starting with relatively informal processes, which assist parties in negotiating interest-based solutions usually with the help of a third-party mediator, and ending with more complex and formal proceedings to adjudicate rights-based questions.⁷³

The DSD process typically begins with the organizational client identifying its goals, the structure and process it desires to utilize in managing conflicts, the interests of the conflicting parties, the availability of resources that can be contributed to the system's success, and the accountability to ensuring the system works.⁷⁴

DSD may be approached as a seven-step process: (1) self-assessment, (2) getting leadership on board, (3) process design, (4) training and resources, (5) implementation, (6) evaluation, and (7) diffusion.⁷⁵

B. USOC Working Group on Safe Training Environment

The Working Group approached its study in a manner consistent with a DSD approach by convening members with diverse areas of expertise and knowledge, defining its objectives, seeking feedback from multiple stakeholder groups, synthesizing relevant policies, surveying the best practices, providing specific recommendations, identifying areas for further study, and establishing a framework for implementation and diffusion.⁷⁶

1. Approach and Methodology

The USOC commissioned the Working Group to study and provide specific recommendations to promote safe sport training environments.⁷⁷ The Working Group consisted of a group of members from diverse fields of expertise and knowledge, including legal, psychiatry and medicine, specialists in compliance and reporting, insurance, law enforcement, as well as members within the Olympic Movement, including athletes, coaches, and

72. See generally WILLIAM L. URY ET AL., *supra* note 69, at 41–64 (recommending a DSD process: (1) focusing on interests; (2) building in loop-backs to negotiation; (3) including low-cost rights and power approach backups; (4) building in consultation before and feedback after; (5) arranging procedures from low to high cost; and (6) providing the needed skills, motivation, and resources).

73. Conflict Research Consortium Staff, *supra* note 67.

74. Smith & Martinez, *supra* note 21.

75. Fader, *supra* note 69, at 486–88.

76. UNITED STATES OLYMPIC COMMITTEE *supra* note 20, at 5–6. See also *The US Olympic Committee Program: Working Group*, SAFESPORT, <http://safesport.org/what-is-safesport/the-usoc-program/> (last visited June 8, 2016).

77. U.S. Olympic Committee Working Group for Safe Training Environments, *supra* note 20, at 5. See also *The US Olympic Committee Program: Working Group*, *supra* note 76; Press Release, U.S. Olympic Committee, *U.S. Olympic Committee Launches SafeSport Program* (Mar. 16, 2012).

parents.⁷⁸ The rationale for developing a diverse Working Group was to create a team of people who possess a range of expertise and experience and who could provide informed perspectives on sexual and physical misconduct issues.⁷⁹

The Working Group's stated objectives were to:

- Address the level of significance of sexual and physical misconduct in sport;
- Review the guidelines and best practices across sports and other related organizations for promoting safe training environments;
- Assess the needs of athletes, coaches, staff, NGBs, clubs, and other sport organizations in promoting safe training environments; and
- Provide a set of recommendations to promote safe training atmospheres and above all, safe training environments for athletes.⁸⁰

The group's methodology envisioned an inclusive process, seeking input from key stakeholders, reviewing best practice policies and procedures addressing sexual misconduct from the USOC, NGBs, other youth and athletic organizations, insurance companies and relevant research, and considering various models for safe training environments.⁸¹

a. Stakeholder Input Process

The Working Group sought feedback from key stakeholders within the Olympic Movement and with other organizations dealing with sexual misconduct issues.⁸² The Working Group's "input process" included individual meetings, panel discussions, and surveys with athletes, coaches, parents, NGBs, volunteers, security experts, training providers, medical professionals, professional services organizations, and other grassroots organizations.⁸³

b. Defining and Limiting the Scope of Reportable Abuse

A preliminary consideration required defining abuse. Abuse in sport can take various forms, including sexual, emotional, physical, hazing, har-

78. U.S. Olympic Committee Working Group for Safe Training Environments, *supra* note 20, at 8 (noting "[t]he rationale for developing a diverse Working Group was to create a balance between members who had a deep understanding and experience in dealing with these issues within unique USOC-related environments and members that are external experts who could introduce new ways of thinking regarding best practices and innovative perspectives on sexual and physical misconduct topics.").

79. *Id.* at 3.

80. *Id.*

81. *Id.* at 9.

82. *Id.* at 3.

83. *Id.* at 9.

assessment, and bullying (including cyber bullying).⁸⁴ Other forms of misconduct along the spectrum of abuse can include “strict coach discipline” and “grooming,” often the precursor to sexual abuse, yet within the “grey zone” between acceptable and unacceptable conduct.⁸⁵ While abuse is never acceptable, questionable conduct that would trigger disciplinary sanction short of reporting to criminal authorities can sometimes be subtle and develop over time (grooming).

The Working Group limited the scope of its study and recommendations to sexual and physical misconduct that could occur between a coach or authority figure and an athlete, or between athlete peers.⁸⁶ The Working Group was in “unanimous agreement” that sexual misconduct is a critical issue within society and, in particular, in sport because of the inherent focus on physical performance and interaction between coaches and athletes.⁸⁷ It reported that a predominant theme that emerged from discussions with stakeholders was that “[i]ncreasing awareness of sexual and physical abuse in sport was the most meaningful and important action that can be taken in promoting safe training environments.”⁸⁸

c. Gauging Best Practices, Various Delivery Models, and Relevant Research

In assessing safe sport training environments, the Working Group studied best practices in six areas, including: “[b]ackground [c]hecks, [s]creening and [i]nformation [s]haring, [r]eporting [s]ystems and [r]equirements, [c]lubs and [g]rassroots [e]ngagements, [p]ractices, [p]olicies and [a]udits, [b]ehavioral [s]tandards and [d]efinitions of [a]buse, and [t]raining and [e]ducation.”⁸⁹

The Working Group evaluated various models for promoting safe sport training environments.⁹⁰ These models included: (1) “The direct delivery of all policies, practices, programs and services by individual NGBs, clubs and other grass roots organizations, with limited to no involvement by the USOC,” (2) “The USOC, with direct input by NGBs, centralizes the deliv-

84. United States Olympic Committee, *supra* note 23, at ii. See also Paul Greene, *How the USOC's SafeSport Policies Are Tackling Athlete Abuse and Harassment*, LawInSport (Sept. 7, 2015), <http://www.lawinsport.com/articles/item/how-the-usoc-s-safesport-policies-are-tackling-athlete-abuse-and-harassment?highlight=WyJzYWZlc3BvcnQiLCJzYWZlc3BvcnQncyJd>.

85. Celia H. Brackenridge & Kari Fasting, *Grooming Process in Sport: Narratives of Sexual Harassment and Abuse*, 13 AUTO/BIOGRAPHY 33, 33 (stating that “[g]rooming involves slowly gaining trust before systematically breaking down interpersonal barriers. Elite athletes can become trapped into compliance because they trust and like, or even love, their abusers.”).

86. USOC Working Group for Safe Training Environments, *supra* note 76, at 3 (explaining the limited scope was due to the relatively short time frame – five months – in which to conduct the study).

87. *Id.* at 7 (noting that bullying was also cited as a significant threat in sport).

88. *Id.* at 4.

89. *Id.* at 8.

90. *Id.* at 10.

ery of core resources, such as best practice training/education and suggested policies, practices and services,” (3) “The development of a USADA-type model that outsources all centralized services, including resources, programs, services and enforcement to an external provider,” and (4) “[h]ybrids of the above models.”⁹¹

2. USOC Working Group Recommended Actions

The Working Group’s recommendations stressed two primary themes, namely: (1) the increased awareness of sexual misconduct through education and training readily accessible to all stakeholders, and (2) the importance of a centralized initiative, as opposed to individual and disparate handling of abuse investigations.⁹² The Working Group emphasized that the USOC plays a leadership role in ensuring safe sport training environments, advising that “[i]t is critical the USOC holds itself to the highest standard of integrity regarding sexual and physical misconduct.”⁹³ On the education and awareness front, the Working Group recommended that “[t]he USOC develop and provide a centralized set of training and education materials focused on sexual and physical misconduct that can be adopted by NGBs, clubs and grassroots sports organizations.”⁹⁴

The Working Group emphasized that this training should be accessible online and tailored to address relevant topics for different groups (e.g., athletes, parents, coaches, staff, volunteers, and other participants in direct contact with athletes).⁹⁵ The “online toolkit” should provide educational resources and sample templates with model policies regarding codes of conduct and screening procedures for NGBs and sport clubs to adopt.⁹⁶

Perhaps the most significant recommendation set forth by the Working Group was that “[t]he USOC should work with the NGBs to centralize and standardize the delivery of services designed to promote safe training environments.”⁹⁷ It suggested standardizing procedures among the NGBs starting with establishing criminal background checks and “[a] methodology for addressing violations found during the search process across sport organizations.”⁹⁸ It also recommended, as an area for further consideration, an anonymous “centralized hotline” as a support and educational resource to provide advice to individuals with concerns about sexual abuse and to address questions concerning “reporting barriers, reporting to local authori-

91. *Id.*

92. USOC Working Group for Safe Training Environments, *supra* note 76, at 5 (noting that the “recommendations include input from NGBs, athletes, victims, coaches, parents, security experts, training experts and other grassroots organizations.”).

93. *Id.* at 11.

94. *Id.* at 12.

95. *Id.* at 13.

96. *Id.*

97. *Id.* at 16.

98. USOC Working Group for Safe Training Environments, *supra* note 76, at 16.

ties, confronting abuses, discussions with parents, dealing with guilt, [and] education on treatment resources.”⁹⁹ The Working Group report did not explicitly recommend a separate entity to address these concerns but stated that “[t]he USOC has the potential to play an even greater role in raising awareness of sexual and physical misconduct . . . with the potential for the model to evolve into something much broader than just supporting the sports organizations within the Olympic Family. . . .”¹⁰⁰

IV. USOC SAFESPORT POLICIES AND THE U.S. CENTER FOR SAFESPORT

The Working Group’s report and recommendations provided the framework for the USOC to establish a formal policy on SafeSport as well as to commission the creation of a separate agency to serve as the “center” focal point for educating, investigating, and adjudicating all matters relating to sexual misconduct and abuse within the U.S. sporting community.

A. USOC SafeSport Policies

In 2012, the USOC formally issued its SafeSport Policy (Policy), which applies to all athletes, coaches, USOC employees, and “constituents” connected to Olympic sport programs in the U.S.¹⁰¹ The Policy prohibits six forms of misconduct, citing specifically sexual misconduct regardless of age, but also including child sex abuse, emotional misconduct, physical misconduct, bullying, harassment, and hazing.¹⁰² The Policy states that “all forms of misconduct are intolerable and in direct conflict with Olympic ideals.”¹⁰³ The Policy defines the prohibited conduct and bans all sexual relations between coach and athlete.¹⁰⁴

The Policy details prohibited forms of misconduct, illustrating example situations as well as discerning behaviors, such as “professionally accepted coaching methods for skill enhancement, . . . team building[,] . . . or discipline” that are not considered inappropriate or emotionally abusive.¹⁰⁵ The Policy similarly describes and addresses prohibitions on bullying,¹⁰⁶ harassment, and hazing.¹⁰⁷ SafeSport policies also require criminal

99. *Id.* at 19.

100. *Id.* (emphasis added).

101. U.S. Olympic Committee, *supra* note 23 at 3. All NGBs are required to adopt an athlete safety program in accord with the USOC’s SafeSport minimum standards policy; U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 18, at 7.

102. U.S. Olympic Committee, *supra* note 23, at ii.

103. *Id.*

104. *See* Greene, *supra* note 84.

105. U.S. Olympic Committee, *supra* note 23, at 4.

106. *Id.* at 8 (defining bullying as “(1) [a]n intentional, persistent and repeated pattern of committing, or willfully tolerating by another person, physical and non-physical behaviors that are intended, or have the reasonable potential, to cause fear, humiliation or physical harm in an attempt to socially exclude, diminish or isolate the targeted athlete(s), as a condition of membership; or] (2) [a]ny act or conduct described as bullying under federal or state law.”).

background checks for individuals in frequent contact with athletes, education and training for athlete safety, procedures for reporting misconduct, and a grievance procedure.¹⁰⁸

1. Reporting SafeSport Policy Violations

The USOC SafeSport Policy states that the USOC is not the delivery system for reporting, investigating, or enforcing SafeSport Policy violations.¹⁰⁹ Although the SafeSport Policy prohibits the six forms of misconduct, it specifically requires that “[a]ll suspicions of child physical or sexual abuse will be reported to the appropriate law enforcement authorities.”¹¹⁰ The Policy further states: “As a matter of policy, the USOC does not investigate suspicions or allegations of child physical or sexual abuse, or attempt to evaluate the credibility or validity of such allegations, as a condition of reporting suspicions or allegations to the appropriate law enforcement authorities.”¹¹¹

“Constituents are required to report rumors, suspicions[,] or allegations” of child physical or sexual abuse, including peer-to-peer child sexual abuse, and other misconduct or inappropriate behavior, such as grooming.¹¹² Reports are to be made to “a manager or supervisor[,] Human Resources[,] the Legal Affairs Division[,] the Director of SafeSport[,] or where applicable, appropriate law enforcement authorities.”¹¹³ Despite its stated detachment from the process, the Policy states that the “USOC will take a report in the way that is most comfortable for the person initiating the report including an anonymous, in-person, verbal or written report.”¹¹⁴ The purpose of this flexibility is to encourage reporting and to allow for confidentiality to assuage fears of retaliation. The Policy notes a website link where incident reporting forms may be obtained.¹¹⁵ The Policy also deems false or bad-faith allegations of abuse reports grounds for disciplinary action.¹¹⁶

107. *Id.* at 10 (defining hazing as “[c]oercing, requiring, forcing or willfully tolerating any humiliating, unwelcome or dangerous activity that serves as a condition for (a) joining a group or (b) being socially accepted by a group’s members . . .”).

108. U.S. Gov’t Accountability Off., *supra* note 18, at 7.

109. U.S. Olympic Committee, *supra* note 23, at 12.

110. *Id.*

111. *Id.*

112. *Id.* Mandatory reporting or suspected child abuse laws may also apply. *See, e.g.*, Cal. Penal Code §§ 1165–66 (requiring educators, clergy, law enforcement, and medical health professionals to report child abuse).

113. *Id.* at 13 (emphasis in original).

114. *Id.*

115. U.S. Olympic Committee, *supra* note 23, at 13.

116. *Id.* at 14.

2. USOC SafeSport Investigation and Adjudication

Designated by Congress to exercise exclusive jurisdiction over all matters relating to U.S. participation in the Olympic Games, including NGBs, the USOC is required “[t]o provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition.”¹¹⁷

Under the SafeSport Policy, the USOC, upon receipt of a complaint, may institute a formal investigation and impose preliminary suspension of an accused, upon “reasonable belief” of physical, emotional, or sexual misconduct, before final resolution.¹¹⁸ When an investigation is conducted, the reporting party, victim, and accused are all entitled to written notice of the allegations, to present relevant information, and to an attorney at his or her own expense.¹¹⁹ The Director of SafeSport is to advance credible evidence of misconduct complaints to a review panel (the USOC Panel), consisting of USOC representatives, for preliminary determination to impose sanctions. The individual may request a confidential hearing before the USOC Panel. The USOC Panel determines, under a preponderance of evidence standard, whether emotional, physical, or sexual misconduct was proven, and has discretion to impose “proportionate and reasonable” discipline.¹²⁰ The sanctions may range from warning, reprimand, and suspension to expulsion from the sport.¹²¹ The accused, as an aggrieved party, is entitled to seek review of that in a hearing before a panel of neutral arbitrators at the American Arbitration Association (AAA).¹²² The AAA’s decision is final and binding.¹²³

B. Evaluating SafeSport Reporting and Enforcement Models

While the Working Group’s 2010 report focused on education and leadership in ensuring safe sport training environments, its overall recommendation suggested the need for centralized administration and adjudication by an outside entity, as opposed to other delivery models, such as direct enforcement at the NGB or USOC level.

The existing system is essentially the direct delivery model in which individual NGBs administered, investigated, and enforced policies.¹²⁴ Concerns with that model, as highlighted in the swimming and gymnastics

117. 36 U.S.C. § 220503.

118. U.S. Olympic Committee, *supra* note 23, at 15–16.

119. *Id.* at 16.

120. *Id.* at 17–18.

121. *Id.* at 18.

122. *Id.* at 19.

123. *Id.* at 19.

124. U.S. Olympic Committee, *supra* note 23, at 15–19.

abuse cases, revolve around a structural conflict of interest to favor protecting the sport and accused coach, which also could promote fears in reporting and of retaliation.¹²⁵ Moreover, the individual sport bodies often lack requisite resources or expertise to investigate sexual abuse cases. Having the USOC take on these functions, particularly the investigation and enforcement of SafeSport policies, provides more uniformity but can trigger similar concerns about impartiality because of its inherent interest in protecting the image of the sport and the winning coach, as well as avoiding liability. The procedure used needs to be reliable, competent, and accessible in order to provide fair and just resolution.

C. *The U.S. Center for SafeSport*

In 2014, the USOC approved the creation of a new agency—the U.S. Center for SafeSport (Center).¹²⁶ The Center is “[d]esigned to be an independent entity which will oversee education programs for safe sport, and investigate and adjudicate claims of misconduct in sports that are managed by USOC-sanctioned NGBs.”¹²⁷ Justification for the Center is premised upon the need to provide a centralized and national source of expertise in this area, which individual NGBs handling these matters often lack.¹²⁸ According to Malia Arrington, USOC Senior Director of Ethics and SafeSport,

One of the greatest challenges many NGBs face is limited resources and expertise to investigate claims of misconduct With this independent entity, we have the ability for the first time to provide that resource to them so we can create and sustain safe environments for young athletes.¹²⁹

In January 2016, the USOC announced the Center’s nine board of directors, and an advisory council comprised of industry leaders and experts

125. *See infra* Sec. II.B.4.

126. *See* Press Release, United States Olympic Committee, U.S. Olympic Committee Announces Formation of U.S. Center for Safe Sport Advisory Council (Feb. 9, 2015) <http://www.insidethegames.biz/articles/1033621/usoc-announce-nine-member-united-states-center-for-safe-sport-board> (noting Center focus will be on education and providing resources to assist administrators, athletes, parents and coaches).

127. *Id.*

128. *See* Greene, *supra* note 84 (quoting USOC CEO Scott Blackmun as stating that “[t]here is no national agency today that is responsible for the safety and well-being of young athletes and we’re in position to lead this important effort” [t]he National Center for SafeSport will help fill that vacuum by providing training and resources, promoting open dialogue and conducting investigations on a national level.”).

129. U.S. Olympic Committee, *supra* note 126 (quoting USOC Director of Ethics and SafeSport, Malia Arrington).

in abuse prevention.¹³⁰ Later that year, the Center named Shellie Pfohl as its Chief Executive Officer.¹³¹

1. Funding

The Center, a non-profit corporation, is to be funded by both the USOC, which has invested \$5.2 million for a five-year pilot program, and the NGBs, which are required to participate and to contribute annually to fund the Center.¹³² An additional \$5 million is expected to be invested by the sport NGBs.¹³³ Additional funds of approximately \$15 million are anticipated to fully fund the Center.¹³⁴ Complications in funding for the Center delayed its anticipated 2016 launch and the Center was not operational for the 2016 Summer Olympic Games; however, donations from external sources are expected to contribute to the Center's funding.¹³⁵

2. Education and Resource-Based Focus

The Center is to serve as a "national agency" and assume responsibility for delivery of SafeSport education, training, practices and policies, background checks, and reporting systems, including a confidential hotline. A critical aspect of the Center's jurisdiction is its responsibility and involvement in both the receipt and investigation of sexual abuse complaints as well as in the enforcement and adjudication of SafeSport policies.

130. See *U.S. Olympic Committee Announces U.S. Center for Safe Sport Board of Directors*, (Jan. 21, 2016), <http://www.teamusa.org/Media/News/USOC/USOC-announces-US-Center-for-Safe-Sport-board-of-directors>. See also Michael Pavitt, *USOC Announce Nine Member United States Center Safe Sport Board*, ASSOCIATION OF NATIONAL OLYMPIC COMMITTEES (Jan. 25, 2016).

131. Pfohl is the former Executive Director of the President's Council on Fitness, Sports, and Nutrition. See Press Release, U.S. Center for Safe Sport, *Shellie Pfohl Named U.S. Center for SafeSport CEO*, (Nov. 2, 2016), <http://www.marketwired.com/press-release/shellie-pfohl-named-us-center-for-safesport-ceo-2172194.htm>. See also Pavitt, *supra* note 130 (noting Center focus will be on education and providing resources to assist administrators, athletes, parents, and coaches).

132. Press Release, United States Olympic Committee, *U.S. Olympic Committee Announces Formation Of U.S. Center For Safe Sport Advisory Council* (Feb. 9, 2015), <http://www.teamusa.org/News/2015/February/09/US-Olympic-Committee-Announces-Formation-Of-US-Center-For-Safe-Sport-Advisory-Council>.

133. *Id.* (noting that NGB's will match the USOC contribution over a five-year period).

134. *Id.*

135. Louise Radnosky, *Slow Going for US Center to Advocate Against Bullying, Sexual Abuse*, (Aug. 5, 2016), <https://www.wsj.com/articles/slow-going-for-usoc-center-to-advocate-against-bullying-sexual-abuse-1470399042>; see also *Soon-to-be-Open Olympic Safesport Center in Denver Hires CEO*, CBS Local (Nov. 11, 2016), <http://denver.cbslocal.com/2016/11/02/soon-to-open-olympic-safesport-center-in-denver-hires-ceo/> (reporting that the USOC "[i]s bankrolling more that \$10 million to fund the Center's first five years, with national governing bodies of Olympic sports combining to provide another \$5 million.").

3. *Role in Investigations, Enforcement, and Sanctions Still Uncertain*

Initial reports indicated that the Center would be modeled along the structure of the U.S. Anti-Doping Agency (USADA).¹³⁶ USADA was created in 2000 on the recommendation of a USOC Task Force to address the needs of executing a credible anti-doping program.¹³⁷ USADA is an independent, non-profit organization, governed by a board of directors, and responsible for testing, adjudication, and research and education.¹³⁸ With USADA, the USOC outsources responsibility for the education, testing, as well as the investigation and prosecution of alleged doping violations committed by U.S. athletes.¹³⁹ According to USADA, “USADA’s process eliminates the . . . [NGBs’] involvement in sanctioning their own athletes.”¹⁴⁰ Accused athletes have a right to a hearing in arbitration, in accordance with the AAA Rules on Olympic Arbitration, with the option for a direct or final decision through the Court of Arbitration for Sport (CAS).¹⁴¹

If the USADA model is fully adopted, the Center would serve as a separate agency responsible for matters related to sexual misconduct and have exclusive jurisdiction to investigate and prosecute alleged sexual abuse cases. As with USADA, the Center could implement a process that would similarly eliminate the NGB involvement from investigating or sanctioning “their own,” be it coach, administrator, or even athlete where peer or peer abuse is at issue. Whether the Center will assume a prosecutorial role in investigating and enforcing SafeSport issues is yet to be resolved, but if not, the structural bias concerns with the NGBs disciplining their own remain. Recent reports indicate that the Center will adopt a unified set of policies dealing with misconduct and act as an “independent auditor” in addition to investigating abuse claims.¹⁴² As a result, the NGBs release

136. *Id.* (describing new Center as an independent entity responsible for education, investigation and adjudication of sexual misconduct claims). *See also* Greene, *supra* note 83.

137. *Independence & History*, USADA, <https://www.usada.org/about/independence-history/> (last visited May 25, 2016).

138. U.S. Anti-Doping Agency (USADA), <http://www.usada.org/> (last visited May 25, 2016). *See* Sarah L. Horvitz, Travis Tygart & Paul A. Turbow, *Symposium: Doping in Sports: Legal and Ethical Issues: Dopers Are Not Duped: USADA’s Assistance to Federal Prosecutions Ultimately Protecting Clean Athletes Is Not State Action*, 19 MARQ. SPORTS L. REV. 39, 44 (2008).

139. U.S. Anti-Doping Agency, *supra* note 138.

140. *Id.*

141. World Anti-Doping Code § 13.2.1, Comment (2015) (“CAS decisions are final and binding except for any review required by law applicable to the annulment or enforcement of arbitral awards.”). *See also* Am. Arb. Ass’n, *Olympic Athlete Eligibility, NGB Determination, and Doping Disputes: An Overview*, AM. ARB. ASS’N 1, 4, https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2034893&RevisionSelectionMethod=LatestReleased (last visited October 1, 2016) (providing overview of AAA arbitration process for Olympic-related disputes).

142. Joseph Kranney, et. al., *U.S. Olympic Committee Announces Change in Abuse Reporting Policy*, (Sept. 23, 2016), <http://www.indystar.com/story/news/investigations/2016/09/22/us-olympic-committee-announce-change-abuse-reporting-policy/90788968/>.

their investigative and disciplinary involvement in these types of cases.¹⁴³ Presumably, accused parties retain the rights to an arbitration hearing in accordance with the Amateur Sport Act.¹⁴⁴

D. *Evaluations Diffusion: The U.S. Center for SafeSport*

The final steps in a DSD process are: (1) program evaluation, and (2) diffusion.¹⁴⁵ In other words, how well will the program satisfy the constituents, if supported by resources, and is there opportunity for program expansion?¹⁴⁶

1. *Program Evaluation*

The intention in creating an independent agency for the education, investigation, and adjudication of sport violations—whether doping or sexual abuse—is to develop a system that promotes a safe training environment for all athletes. This process should encompass education to prevent and identify abuse, a system for confidential and accessible reporting of actual or suspected abuse and that provides counseling and care for victims, an investigatory process that is independent, conducted by individuals with requisite expertise, and a fair adjudication of these difficult matters.¹⁴⁷ The Center launched operations in its new headquarters in Denver, Colorado as of January 2015, and decisions about the Center’s precise role and functions are still in its nascent stage.¹⁴⁸ Examination of the Center’s independence, expertise, procedures and process protections, effectiveness, and financial viability must be ongoing.

2. *Diffusion: A Model for College Campus Disciplinary Hearings?*

Certainly the Center’s work in promoting education, awareness, and prevention must continue and remain vigilant. Perhaps the scope of the Center’s work can expand beyond (wishly eradicated) sexual abuse, to other areas of sport safety such as physical injury protection, safety techniques, and emergency responses. The Center may be able to serve as a resource to assist other sport organizations and institutions confronted with abuse issues and perhaps serve as a model for safe sport governance for

143. See Kelly Whiteside, *USOC Group Looks at Enforcement in Misconduct Cases*, USA Today (July 29, 2013), <http://www.usatoday.com/story/sports/olympics/2013/07/29/usoc-safe-sport-enforcement-group/2598191/>.

144. See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2006); U.S. Olympic Committee Working Group for Safe Training Environments, *supra* note 75; Pavitt, *supra* note 130.

145. See Fader, *supra* note 69, at 507.

146. *Id.*

147. U.S. Anti-Doping Agency, *supra* note 138.

148. Christian Red, *Promises, Promises, USOC’s Plan for ‘Safe’ Center Dragging Heels*, NY DAILY NEWS (May 28, 2016), <http://www.nydailynews.com/sports/i-team/promises-promises-usoc-plan-safe-center-dragging-heels-article-1.2653478>.

international and Olympic sport. If the Center develops the requisite expertise in reporting, investigating, and taking on responsibility for enforcement, it could potentially serve as a model or source for others to ensure a sport environment that protects athletes physically and emotionally and promotes the spirit and integrity of sport for all involved.

V. CONCLUSION

Every athlete has the right to engage in sport free of physical and emotional harassment and abuse. The obligation to ensure a safe training environment is incumbent upon all constituents involved in sport. The focus of SafeSport to provide a forum to educate and train athletes, parents, coaches, and others in preventing, detecting, and reporting violations is an important step in ensuring athlete well-being and attainment of full potential.