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## The Athletic God Complex: The Title IX Lawsuit Against Baylor University and How the Government Responds

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THE ATHLETIC GOD COMPLEX: THE TITLE IX LAWSUIT  
AGAINST BAYLOR UNIVERSITY AND HOW THE  
GOVERNMENT RESPONDS

I. INTRODUCTION

On February 11, 2012, Jane Doe and a group of friends went to an off-campus party hosted by several Baylor University (“Baylor,” or, “the University”) football players.<sup>1</sup> She had a few drinks but became severely intoxicated and could not remember parts of the night.<sup>2</sup> According to witnesses in the Complaint, which Jane Doe filed in response to the events of the night, football players at the party drugged her.<sup>3</sup> According to the Complaint, one football player, who Jane Doe had rejected in the past, kept “grabbing” at her and following her through the party.<sup>4</sup> Once Doe was alone, a group of football players allegedly put her in a car and took her to another location, where she was gang raped by at least four football players.<sup>5</sup> The Complaint alleged the players scurried to delete their information from her phone, and the next morning she woke up in

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1. See Plaintiff’s Original Complaint and Jury Demand at 24, *Doe v. Baylor Univ.*, 313 F. Supp. 3d 786 (W.D. Tex. 2017) (No. 6:17-cv-125) (describing how night in question started).

2. See *id.* (discussing Jane Doe’s intoxication on night she was allegedly sexually assaulted).

3. See *id.* (stating that Plaintiff thought she had been drugged by players at party and that witnesses also believed players had drugged her); see also Olivia Messer, *Baylor Athletes Used Gang-Rapes as ‘Bonding’ Experience: Lawsuit*, THE DAILY BEAST (May 18, 2017, 1:00 AM), <https://www.thedailybeast.com/baylor-athletes-used-gang-rapes-as-bonding-experience-lawsuit> [<https://perma.cc/2VC5-9ETJ>] (stating freshman recruits to football team allegedly had to lure girls to parties where they would be drugged and raped).

4. See Plaintiff’s Original Complaint and Jury Demand, *supra* note 1, at 24 (describing events leading up to alleged sexual assault). According to the Complaint, one player who wanted to “hook up” with her a few days earlier kept following her, and another player allegedly tried to pull her into the bathroom during the party more than once. See *id.* (“Plaintiff recalls that another Baylor football player kept grabbing at her throughout the night, and that she repeatedly told him “no.”).

5. See *id.* (noting that Doe remembers being taken by vehicle somewhere else once her friends left, and describing how she was unable to move as football players raped her); see also Camila Domonoske, *New LawsUIT Alleges Baylor Players Gang-Raped Women as ‘Bonding Experience’*, NPR (May 17, 2017, 4:13 PM), <https://www.npr.org/sections/thetwo-way/2017/05/17/528804172/new-lawsuit-alleges-baylor-players-gang-raped-women-as-bonding-experience> [<https://perma.cc/3C7H-9RUY>] (adding that anywhere from four to eight football players allegedly may have participated in raping victim).

her friend's apartment and came to the painful realization that she had been raped.<sup>6</sup>

Doe's Complaint alleged that her nightmare continued as she faced unrelenting harassment on campus from the Baylor football team.<sup>7</sup> Allegedly, the players texted her and tried to convince her that what happened that night was not rape.<sup>8</sup> They allegedly spread rumors and threatened her with pictures of the night.<sup>9</sup> After Doe told her mother that she was raped, her mother reported it to an assistant coach.<sup>10</sup> She allegedly gave the coach a list of players involved in the rape, but she never heard from him again.<sup>11</sup> The central issue in the case that arose out of these alleged events was whether anyone in the University's athletic department knew of the rape allegations and whether they appropriately acted on that information.<sup>12</sup> Doe's Complaint claimed that the Baylor Board of Regents recognized that her mother met with the assistant coach and that he spoke to two players involved in the rape.<sup>13</sup> The Complaint further stated that although the players admitted to having "a little bit of playtime" with Jane Doe, when the assistant coach spoke to the other Baylor football coaches, they blamed Doe for the night's

6. See Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 25 (describing events following the attack). The Complaint detailed how Jane Doe woke up and received texts from her friends asking her what happened that night and she looked through her phone to put together what happened the night before. See *id.*

7. See *id.* (stating she suffered "verbal abuse and public humiliation" by other football players).

8. See *id.* (describing football players' reactions in days following incident).

9. See *id.* (detailing how football players allegedly tortured her and bragged about what they had done).

10. See *id.* at 26 (claiming school officials were aware sexual assault had occurred); see also Chip Patterson, *Docs: Art Briles, Baylor Officials Actively Involved in Covering Up Player Incidents*, CBS SPORTS (Feb. 3, 2017, 3:14 PM), <https://www.cbssports.com/college-football/news/docs-reveal-art-briles-baylor-coaches-actively-involved-in-covering-up-player-incidents/> [<https://perma.cc/QG48-UTAQ?type=image>] (stating coach and other assistant coaches exchanged emails and texts that showed they knew of wrongdoing by players and attempted to cover it up).

11. See Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 26 (discussing how Baylor failed to react to allegations of gang rape by football team).

12. See Paula Lavigne, *Baylor University Settles Title IX Lawsuit in Which Gang Rape by up to 8 Football Players Was Alleged*, ESPN (July 13, 2018), [http://www.espn.com/college-football/story/\\_/id/24090683/baylor-university-settles-title-ix-lawsuit-which-gang-rape-8-football-players-was-alleged](http://www.espn.com/college-football/story/_/id/24090683/baylor-university-settles-title-ix-lawsuit-which-gang-rape-8-football-players-was-alleged) [<https://perma.cc/HN8M-U24N>] (discussing focus of case and Pepper Hamilton investigation that followed).

13. See Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 26 (discussing what officials knew of alleged sexual assault and what actions they took).

events.<sup>14</sup> The Complaint alleges that the football players then started harassing Jane Doe and her family until she dropped out of Baylor in 2013.<sup>15</sup> The case settled in 2018 for an undisclosed amount and, in response to the lawsuit, Baylor made 105 changes to its Title IX policy.<sup>16</sup>

Section II of this Comment discusses several sexual assault cases at different institutions, how each institution handled the situation, and the guidelines and policies in place across the country that universities are meant to follow.<sup>17</sup> Section III of this Comment examines what policies should be in place in order to protect students from sexual assault on campus and then evaluates Title IX directives during the Obama Administration.<sup>18</sup> Further, it explores how the policies have changed under the Trump Administration and what that means for students across the country.<sup>19</sup> Section IV of this Comment concludes the discussion of Title IX on college campuses and emphasizes the dangers of implementing the new policies.<sup>20</sup>

## II. BACKGROUND

The situation at Baylor is not unique and several other universities have run into similar problems with athletes and sexual assault

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14. *See id.* (stating coaches were “victim blaming”); *see also* Kayleigh Roberts, *The Psychology of Victim-Blaming*, THE ATLANTIC (Oct. 5, 2016), <https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/> [<https://perma.cc/3WPC-ET86>] (defining victim-blaming as “[h]olding victims responsible for their misfortune”).

15. *See id.* at 27 (describing that players allegedly got fake phone numbers to harass Jane Doe by text, in addition to harassing her in person, and how harassment stopped when she left Baylor).

16. *See* Jim Hice, *Baylor Settles Lawsuit with Former Student Who Claimed She Was Gang Raped*, KCEN-TV (July 13, 2018, 6:15 PM), <https://www.kcentv.com/article/sports/ncaaf/baylor-fallout/baylor-settles-lawsuit-with-former-student-who-claimed-she-was-gang-raped/500-573688200> [<https://perma.cc/WZQ7-CEBW>] (summarizing what steps Baylor took during public fallout). After the case settled out of court, head football coach, Art Briles, the University President, and the Athletic Director were fired. *See id.*

17. For further discussion of the universities that have had Title IX problems, the different policies in place that universities have to follow, how Baylor failed to follow these policies and is now trying to amend their policies to comply with the law, *see infra* notes 29–142 and accompanying text.

18. For further discussion of policies that would be most beneficial to students in college, *see infra* notes 153–223 and accompanying text.

19. For further discussion of the dangers of rescinding Obama-era policies on sexual assault, *see infra* notes 200–241 and accompanying text.

20. For further discussion and summary of the dangers of the new Trump Administration policies, *see infra* notes 224–241 and accompanying text.

on their campuses.<sup>21</sup> Universities have confronted a lack of reporting, an administrative trend of ignoring guidelines, a pervasive tendency of protecting the accused over the victims, and an overall failure in effective responses to sexual assault.<sup>22</sup> Part A of this Section explores how widespread the issue of sexual assault is by looking at Baylor's and other universities' incidents and responses.<sup>23</sup> Part B of this Section examines the policies in place that purport to protect students, hones in on how Baylor failed to use these policies in the past, and explores how Baylor has had to come into compliance amid recent scandal.<sup>24</sup>

### A. Problems at Universities

Baylor, Stanford University, Florida State University ("FSU"), and the University of Richmond have all had difficulties with sexual assault on their campuses.<sup>25</sup> At Stanford, a student athlete was convicted of sexually assaulting an unconscious student, but only received a sentence of six months of jail time.<sup>26</sup> At FSU, university officials may have interfered with a sexual assault investigation that involved one of the team's players and delayed the investigation for nearly two years.<sup>27</sup> At the University of Richmond, a rape victim published a letter claiming that when she alleged that a student athlete raped her, the University was more worried about protecting him and the athletic program than it was about protecting her.<sup>28</sup>

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21. For further discussion of other universities that have had sexual assault issues, see *infra* notes 25–77 and accompanying text.

22. For further discussion of Baylor, Stanford, and FSU and the various issues they have had on their campuses in connection with sexual assault, see *infra* notes 29–82 and accompanying text.

23. For further discussion of Baylor, Stanford, and FSU scandals on campus involving sexual assault and how each university failed to protect the victim, see *infra* notes 29–82 and accompanying text.

24. For further discussion of policies put in place by the NCAA, Title IX, the Obama Administration, and how Baylor was forced to respond, see *infra* notes 83–142 and accompanying text.

25. For further discussion of Baylor, Stanford, and FSU scandals on campus, see *infra* notes 29–82 and accompanying text.

26. For further discussion of the case at Stanford and how the public responded, see *infra* notes 61–70 and accompanying text.

27. For further discussion of the case at FSU and how the university allegedly impeded the investigation, see *infra* notes 70–77 and accompanying text.

28. For further discussion of the allegations at University of Richmond and how the university responded to the victim's published letter, see *infra* notes 78–82 and accompanying text.

### 1. *The Case of Baylor*

Beginning with Baylor as the paradigm for a structurally deficient system of handling sexual misconduct, Baylor's policies and procedures may have effectively shrouded football players from liability, thereby arguably enabling, and even promoting, a maligned culture.<sup>29</sup> Jane Doe's Complaint featured a section titled "The Culture of Sexual Violence at Baylor" detailing how Baylor allegedly used sex to entice football recruits to come to Baylor.<sup>30</sup> According to the Complaint, Baylor's football team was almost always the lowest ranked team in the Big 12 Conference, so they used women, alcohol, drugs, and strip clubs to get higher rated recruits to join the team.<sup>31</sup> According to the Complaint, Baylor football took over the campus as the team became more successful under new head coach, Art Briles.<sup>32</sup> The players were larger than life with their faces plastered across campus as part of the school's attempt to build up the program.<sup>33</sup> The Complaint went further and claimed that the program paid for football parties which "repeatedly resulted in gang rape of women by the football players."<sup>34</sup> The Complaint also alleged the team had the "Baylor Bruin" program that took on various different names over the years, but essentially used "attractive female students" to tour the prospective football players' families around campus and unofficially engage in "sexual acts" in order to further convince the players to attend Baylor.<sup>35</sup>

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29. See Lavigne, *supra* note 12 (describing importance of Baylor's policies in allegedly allowing sexual assault to occur).

30. See Plaintiff's Original Complaint and Jury Demand at 5, Doe v. Baylor Univ., 313 F. Supp. 3d 786 (W.D. Tex. 2017) (No. 6:17-cv-125) (describing tactics used to recruit football players to Baylor).

31. See *id.* at 4–5 (describing why Baylor chose certain tactics to support football team).

32. See *id.* (stating how football team's fast success turned players into celebrities on campus); see also Marc Tracy and Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES, (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html> [<https://perma.cc/3KHK-7324>] (discussing how football team's success transformed campus and changed status of football players).

33. See Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 4 (discussing how football players' celebrity status took over campus).

34. *Id.* at 5 (discussing how football parties were allegedly used to lure girls).

35. See *id.* at 5–6 (discussing how escort program worked and detailing how girls drew players to school). The Complaint alleged how the girls would sometimes use sexual acts to get the players to commit to the team and they were used to assure that the players liked the campus. See *id.*; see also Will Hobson, *Baylor Rape Scandal Involves Recruiting 'Hostess' Program. These Things Still Exist?*, WASH. POST (Feb. 2, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/02/02/baylor-rape-scandal-involves-recruiting-hostess-program-these-things-still-exist/>

Once at Baylor, the situation only worsened as the players allegedly continued to commit sexual assault and other crimes while coaches did nothing.<sup>36</sup> For example:

Players were being hyped as celebrities on campus and around Waco, behind the scenes the players engaged in more than just sports. From 2009–2015, Baylor football players were responsible for numerous crimes involving violent physical assault, armed robbery, burglary, drugs, guns, and, notably, the most widespread culture of sexual violence and abuse of women ever reported in a collegiate athletic program.<sup>37</sup>

The Complaint also alleged that the coaches protected the football players from punishment and often failed to report known crimes, which allowed the players to believe they were “above the law.”<sup>38</sup> According to the Complaint, coaches even went so far as to try to stop victims from reporting.<sup>39</sup> The Complaint further stated that the team “bonding” experiences consisted of drugging and gang raping girls at parties and sharing videos of their crimes amongst the players.<sup>40</sup> According to Pepper Hamilton’s findings included in the Complaint, there were “at least 52 acts of rape, including five gang rapes, by not less than 31 different football players.”<sup>41</sup> During this time, only two football players were ever told to leave Baylor.<sup>42</sup>

The Complaint further detailed Baylor’s specific policies that allegedly allowed these acts of violence to go unreported.<sup>43</sup> It claimed that the football program had its own disciplinary system separate from the University that allowed coaches to make disciplinary decisions that protected the players and not the student body

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?utm\_term=.6969e8230341 (discussing hostess programs’ histories on college campuses and why they continue to be used despite scandals).

36. See Plaintiff’s Original Complaint and Jury Demand, *supra* note 1, at 6 (stating Bruins program allowed players to expect sex when they got to campus and continue pattern of sexual assault).

37. *Id.* at 7.

38. See *id.* (alleging how coaches at Baylor created culture permitting sexual assault).

39. See *id.* (discussing how school allegedly protected football players).

40. See *id.* at 8 (detailing other accusations of gang rape).

41. *Id.* at 9.

42. See *id.* at 10 (stating that after several accusations of rape and gang rape, only two players ever had to leave Baylor).

43. See *id.* at 20–21 (describing Baylor’s sexual assault policies and alleging history of protecting football players).

as a whole.<sup>44</sup> Incidents went unreported and the informal system “reinforce[d] the perception that rules applicable to other students [were] not applicable to football players, improperly insulate[d] football players from appropriate disciplinary consequences, and put [ ] students, the program, and the institution at risk of future misconduct.”<sup>45</sup> Additionally, Jane Doe claimed that Baylor had a history of disregarding the violent past of its football recruits.<sup>46</sup>

Jane Doe sued Baylor under Title IX of the Education Amendment Act of 1972 (“Title IX”).<sup>47</sup> Title IX explicitly states the following:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.<sup>48</sup>

A challenger typically uses Title IX to sue a school when the school is ineffective in responding to sexual assault claims when it had actual knowledge of the incident.<sup>49</sup> Title IX provides that sexual harassment qualifies as discrimination on the basis of sex when it denies the victim educational opportunities or benefits.<sup>50</sup> Jane Doe sought to prove that Baylor condoned a hostile and discriminating environment by being indifferent to sexual assault.<sup>51</sup> However, by the time Jane Doe’s case went to District Court, the judge found that the statute of limitations had run out.<sup>52</sup>

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44. *See id.* (alleging University had different disciplinary system for players that protected them).

45. *Id.* at 21.

46. *See id.* at 22 (stating team allegedly did not check whether players had criminal backgrounds and did not follow set protocols for doing so).

47. *See Doe v. Baylor Univ.*, 313 F. Supp. 3d 786, 789 (W.D. Tex. 2018) (stating how Jane Doe would move forward with her case, including that she sought to hold Baylor liable under Title IX).

48. 20 U.S.C. § 1681(a) (2018).

49. *See Baylor Univ.*, 313 F. Supp. 3d at 789 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)) (explaining how sexual assault and Title IX claims play out on university campuses).

50. *See id.* (explaining what qualifies as discrimination on basis of sex under Title IX).

51. *See id.* (providing plaintiff’s allegations under Title IX, and mainly that “[s]he allege[d] that she was gang-raped at an off-campus location by between four and eight Baylor football players on February 11, 2012”).

52. *See id.* at 793 (holding that Doe’s claims must be dismissed because too much time had passed); *see also* Statute of Limitations, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/statute\\_of\\_limitations](https://www.law.cornell.edu/wex/statute_of_limitations) [<https://perma.cc/8DTW-EGFA>] (last visited Mar. 12, 2019) (defining statute of limitations as “any law that bars claims after a certain period of time passes after an injury”).



Although the statute of limitations expired the parties settled out of court, and Baylor made a number of changes following the settlement.<sup>53</sup> The University fired Briles as well as the school's athletic director and the school's president.<sup>54</sup> The University also released a statement that said it was looking into its reports of sexual assault and updating its Title IX procedures.<sup>55</sup> Ultimately, the University made 105 changes to its Title IX policy.<sup>56</sup>

Sexual assault by college athletes is not an issue unique to Baylor, and it has been infiltrating college campuses across the country, which is one reason why strong policies should be put in place to protect students.<sup>57</sup> One study found that more than half of college males who admitted to engaging in "sexually coercive behaviors" were student athletes.<sup>58</sup> An older report found that college athletes accounted for nineteen percent of sexual violence on campus despite only representing three percent of the population.<sup>59</sup> Baylor is not the only school to have a hostess program where female students tour potential recruits around the school: University of Louisville and Oklahoma State University have also been accused of having similar systems of their own.<sup>60</sup>

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53. See Lavigne, *supra* note 12 (stating case settled out of court).

54. See *id.* (describing staffing changes made by University after Doe's case settled).

55. See *id.* (detailing how University responded after public found out about gang rape allegations).

56. See *id.* (describing changes University made to its policies in aftermath of gang rape allegations).

57. See generally Lorin Mordecai, *Sexual Violence in College Sports*, NE. UNIV. CTR. FOR THE STUDY OF SPORT IN SOC'Y (Sept. 12, 2016), <https://www.northeastern.edu/sportinsociety/sexual-violence-in-college-sports/> [<https://perma.cc/26XZ-DQWV>] (discussing variety of sexual assault cases that have occurred at college campuses across country involving student athletes, and that "[t]he time is now . . . intercollegiate athletic programs need to stop protecting their players and the reputation of their program[s], and start putting an end to sexual violence").

58. Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduat Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, 23 VIOLENCE AGAINST WOMEN 795, 804 (2017) (stating results of study on sexual assault and college athletes).

59. See Ed Cara, *Half of Male College Athletes Admit History of 'Sexually Coercive' Behavior Such as Sexual Assault, Rape*, MED. DAILY (June 2, 2016, 8:59 PM), <https://www.medicaldaily.com/college-athletes-sexual-assault-rape-myths-388585> [<https://perma.cc/HFF4-H2WP>] (discussing study from Desmarais and adding little research has been done in twenty-three years since Desmarais report came out).

60. See Mordecai, *supra* 57 (questioning whether hostess programs play into sexual assault or perpetuate culture that allows women to be objectified).

## 2. *Stanford University*

Baylor is not alone in having difficulty handling sexual assault; several other universities have come under fire for protecting the alleged attackers instead of the alleged victims.<sup>61</sup> Like Baylor, Stanford University made headlines in 2016 when swimmer Brock Turner sexually assaulted a fellow student.<sup>62</sup> After meeting at a party, the two walked outside, and Turner assaulted the victim while she laid unconscious on the ground.<sup>63</sup> The victim only remembered being at the party and then waking up at the hospital, despite only having a few drinks.<sup>64</sup> Police reports and other accounts of the incident heavily focused on the victim's level of intoxication, and Turner's attorney attempted to blame alcohol for the incident instead of his client.<sup>65</sup> Turner's father also famously wrote a letter to the court arguing that he should only receive probation or his son's life "will never be the one that he dreamed about and worked so hard to achieve. . . . That is a steep price to pay for 20 minutes of action out of his 20 plus years of life."<sup>66</sup> At the end of the trial, Turner was convicted of sexual assault, a sentence that carried a potential fourteen-year prison sentence.<sup>67</sup> Despite the severity of the conviction, Turner only received six months in jail.<sup>68</sup> Many have since speculated that the judge feared jail time would ruin Turner's life, as indicated by the judge's statement that "a prison sentence would

61. *See id.* ("The time is now for intercollegiate athletic programs need to stop protecting their players and the reputation of their program, and start putting an end to sexual violence.")

62. *See* Thomas Fuller, *Court Papers Give Insight into Stanford Sexual Assault*, N.Y. TIMES (June 12, 2016) <https://www.nytimes.com/2016/06/13/us/brock-turner-stanford-rape.html?action=click&module=relatedCoverage&pgtype=article&region=footer> [<https://perma.cc/2J5Z-MTX9>] (describing sexual assault case at Stanford University that involved student athlete).

63. *See id.* (detailing events leading up to assault).

64. *See id.* (explaining victim's mental state in sexual assault case).

65. *See id.* (detailing how Brock Turner's attorney focused on intoxication during trial); *see also* Tyler Kingkade, *Brock Turner Repeatedly Used Alcohol as an Excuse for the Sexual Assault He Committed*, HUFFINGTON POST (Jun. 8, 2016, 12:12 PM), [https://www.huffingtonpost.com/entry/brock-turner-drinking-party-culture\\_us\\_5758259be4b0e39a28ac015c](https://www.huffingtonpost.com/entry/brock-turner-drinking-party-culture_us_5758259be4b0e39a28ac015c) [<https://perma.cc/635X-Z36X>] (showing how Turner used his intoxication as excuse for his actions).

66. Michael E. Miller, 'A Steep Price to Pay for 20 Minutes of Action': Dad Defends Stanford Sex Offender, WASH. POST (June 6, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?noredirect=on&utm\\_term=.2b9b9c3f7111](https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?noredirect=on&utm_term=.2b9b9c3f7111) [<https://perma.cc/4RCV-7N4D>].

67. *See id.* (explaining standard sentence for sexual assault).

68. *See* Kate Samuelson, *Brock Turner Released After Serving 3 Months for Sexual Assault*, TIME (Sept. 6, 2016 2:31 PM), <http://time.com/4477395/stanford-swimmer-brock-turner-released-jail-today/> [<https://perma.cc/84L4-USCS>] (stating Turner was sentenced to six months in jail and served three months).

have a severe impact on [Turner].”<sup>69</sup> Turner appealed the case and claimed that he should not have been convicted of sexual assault to commit rape because he only wanted “outercourse.”<sup>70</sup>

### 3. *Florida State University*

As another example of the far-reaching issue of how universities handle allegations of sexual abuse by their athletes, a student at FSU brought rape allegations against the quarterback of the football team stemming from a 2012 incident.<sup>71</sup> The student also alleged that FSU interfered with the subsequent investigation.<sup>72</sup> The student claimed that although she made the accusation in 2012, the school did not look into the allegations until almost two years later.<sup>73</sup> Although charges were never brought against the quarterback, the case finally settled in 2016 between the alleged victim and the school.<sup>74</sup> After the parties reached a settlement, FSU “announced that it agreed to pay the student, Erica Kinsman, and her lawyers \$950,000, as well as to commit to a five-year plan for sexual assault awareness, prevention and training programs.”<sup>75</sup> Despite the accusation that FSU and local police interfered with the criminal investigation and FSU’s five-year plan for sexual assault awareness, prevention and training programs, the school has not taken any responsibility and claimed it settled to avoid the cost of

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69. See Miller, *supra* note 66 (discussing Guardian’s report of judge’s statements during sentencing).

70. See Daniel Victor, *Brock Turner Wanted Only ‘Outercourse,’ Lawyer Argues in Appeal*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/us/brock-turner-victim-outercourse-appeal.html> [<https://perma.cc/44P8-YGKK>] (discussing Turner’s new argument on appeal and defining outercourse as “sexual activity other than vaginal sex”).

71. See Marc Tracy, *Jameis Winston and Woman Who Accused Him of Rape Settle Lawsuits*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/sports/football/jameis-winston-erica-kinsman-lawsuit.html> [<https://perma.cc/6QGQ-AYEE>] (stating victim claimed Jameis Winston raped her in 2012, but Winston was never questioned by police).

72. See *generally id.* (detailing how FSU interfered with investigation and delayed justice for victim).

73. See *id.* (detailing how University failed to seriously respond to rape allegations on campus).

74. See Jake New, *Florida State Settles with Student in Sexual Assault Case*, INSIDE HIGHER EDUC. (Jan. 26, 2016), <https://www.insidehighered.com/quicktakes/2016/01/26/florida-state-settles-student-sexual-assault-case> [<https://perma.cc/QVD3-SUCB>] (discussing sexual assault case that occurred at FSU involving college athlete).

75. *Id.*

litigation.<sup>76</sup> However, the school is still under investigation for potential Title IX violations.<sup>77</sup>

#### 4. *University of Richmond*

The University of Richmond also allegedly mishandled a rape case when a student athlete raped Cecilia Carreras, serving as yet another example of the widespread issue of schools' handling of sexual assault allegations.<sup>78</sup> Carreras published a letter detailing the events of the night of her sexual assault and claimed that the school was more worried about the athletic program than her safety.<sup>79</sup> She alleged that her attacker was never punished and he remained on the team after she reported the incident.<sup>80</sup> In her letter she stated the following:

No one denied, however, that he penetrated me without my consent. But for Richmond, their Brock Turner having an orgasm was of utmost importance. I was told that it was reasonable for him to penetrate me for a few more minutes if he was going to finish.<sup>81</sup>

After the victim published her letter, the University released a statement that claimed the letter was false and that the University would not handle sexual assault allegations in the way that she stated in her letter.<sup>82</sup>

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76. *See id.* (discussing how FSU did not respond to allegations and only settled to avoid high price of litigation). It is also of note that FSU's president did believe the school would have a successful case if it did not settle, and was quoted saying "[w]ith all the economic demands we face, at some point it doesn't make sense to continue even though we are convinced we would have prevailed." *Id.* (maintaining that FSU did not admit to any wrongdoing).

77. *See id.* (noting that FSU settled with victim but is still under federal investigation for potential Title IX violations).

78. *See* Jake New, 'You Called Me a Liar', INSIDE HIGHER EDUC. (Sept. 9, 2016), <https://www.insidehighered.com/news/2016/09/09/student-writes-online-essay-accusing-u-richmond-mishandling-her-sexual-assault> [<https://perma.cc/F9FF-ZABM>] (discussing rape allegations on University of Richmond's campus and how University responded when learning alleged assailant was student athlete).

79. *See id.* (summarizing contents of victim's letter).

80. *See id.* (stating victim claimed University mishandled her alleged rape).

81. CC Carreras, *There's a Brock Turner in all o(UR) lives*, HUFFINGTON POST (Sept. 6, 2016, 10:11 AM), [https://www.huffingtonpost.com/entry/theres-a-brock-turner-in-all-our-lives\\_us\\_57ceca16e4b0b9c5b73a3c65](https://www.huffingtonpost.com/entry/theres-a-brock-turner-in-all-our-lives_us_57ceca16e4b0b9c5b73a3c65) [<https://perma.cc/9LXP-S5RL>] (discussing how victim alleged University of Richmond mishandled her case and counselor told her it was reasonable for the alleged attacker to "finish").

82. *See* New, *supra* note 78 (detailing University's response to victim's sexual assault allegations in letter and showing University denied allegations, but did not specify which allegations it believed untrue).

## B. The Policies in Place and Baylor's Implementation

Prior to 2014, The National Collegiate Athletic Association ("NCAA") did not have any policies in place that governed student athlete behavior in regard to sexual assault.<sup>83</sup> However, in 2014 the NCAA released a new handbook on how to prevent and respond to sexual assault.<sup>84</sup> Additionally, the government released the 2011 "Dear Colleague Letter" that outlined guidelines that universities should follow in order to protect students and show that sexual assault would not be tolerated on college campuses.<sup>85</sup> This Part explores the policies in place, Baylor's efforts to comply in the face of scandal, and the importance of uniform sexual assault policies.<sup>86</sup>

### 1. NCAA Guidelines

The NCAA did not have any rules on sexual assault, but in light of several incidents, in 2014, it released a new handbook for colleges instructing them how to handle sexual assault.<sup>87</sup> Notably, the handbook does not contain any enforceable rules; rather, it only contains guidelines.<sup>88</sup> Many advocates are displeased with the Dear Colleague Letter and feel that the NCAA took the minimal amount

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83. See Jake New, *The 'Black Hole' of College Sports*, INSIDE HIGHER EDUC. (Feb. 9, 2017), <https://www.insidehighered.com/news/2017/02/09/baylor-not-alone-shielding-athletes-accused-misconduct-punishment> [<https://perma.cc/8LYZ-DEDF>] (stating NCAA's policies before 2014).

84. See Deborah Wilson, *Addressing Sexual Assault and Interpersonal Violence: Athletics' Role in Support of Healthy and Safe Campuses*, NCAA (Sept. 2014), <http://www.ncaa.org/sites/default/files/Sexual-Violence-Prevention.pdf> [<https://perma.cc/8QY4-YRSZ>] (providing new handbook for colleges and universities to use to address sexual assault and interpersonal violence on campus); see also New, *supra* note 83 (describing efforts that went into creating new policies for NCAA and how policies will be enforced).

85. See generally Russlynn Ali, *Dear Colleague Letter*, U.S. DEPT. OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/5HNN-QRWT>] (stating new sexual assault guidelines for universities).

86. For further discussion of Baylor's historical application of Title IX and how the University's policies have evolved over time, see *infra* notes 136–164 and accompanying text.

87. See Wilson, *supra* note 84, at 5 ("This guide is a general introduction to the problems that result from sexual assault and interpersonal violence and how they are affecting college students and student-athletes. It is meant to assist intercollegiate athletics administrators and those who provide educational programming for student-athletes in developing their own approaches to preventing or reducing the incidents of sexual assault and other acts of interpersonal violence on their campuses."); see also New, *supra* note 83 (detailing NCAA's response to sexual response allegations and showing their current policies).

88. See New, *supra* note 83 ("The NCAA recently formed a new committee to explore the possibility of creating rules that would allow the association to punish colleges that do not follow the 2014 resolution.").

of action in response to multiple sexual assault scandals.<sup>89</sup> The founder of the National Coalition Against Violent Athletes has said that these efforts are not enough, and that many players know the system works in their favor.<sup>90</sup> Because the NCAA does not have a precise set of rules, the individual universities are free to respond to sexual assault allegations in any manner that they see fit.<sup>91</sup> This means that universities can choose how much or how little they punish their players, if they elect to do anything at all.<sup>92</sup>

The NCAA's 2014 handbook laid out why universities should have sexual assault policies, how often these crimes occur, and why it believes these crimes occur.<sup>93</sup> The "Compliance" section describes the "general legal requirements," and details strategies for student athletes to change rape culture on campus.<sup>94</sup> However, the Compliance section fails to specify punishments for when an athlete commits an offense.<sup>95</sup> Rather, it merely goes on to set up some educational programs, and instructs how the programs should apply specifically to athletes and what topics should specifically be addressed.<sup>96</sup>

## 2. Title IX

Congress enacted Title IX to protect individuals from discrimination based on sex, and it applies to all colleges and universities that receive financial assistance from the government.<sup>97</sup> Discrimination on the basis of sex includes sexual harassment, rape, and

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89. See Ralph D. Russo, *Commentary: Why NCAA Sexual Assault Policy Stops Short of Punishment*, CHI. TRIB. (Mar. 30, 2018, 9:30 AM), <http://www.chicagotribune.com/sports/college/ct-spt-ncaa-sexual-assault-policy-punishment-20180330-story.html> [<https://perma.cc/BLQ8-NH8X?type=image>] (discussing how others have responded to NCAA's policies on sexual assault and what their inaction means for students and athletes).

90. See *id.* (discussing how athletes understand lack of action taken by NCAA and how they react knowing they will likely go unpunished).

91. See *id.* (discussing how universities act in response to NCAA not having set rules).

92. See *id.* (discussing that universities have freedom to punish athletes any way they deem appropriate in light of NCAA not having strict rules).

93. See Wilson, *supra* note 84, at 7–9 (laying out NCAA's reason for creating this policy, its purpose, and how universities could react to sexual assault on college campuses).

94. See *id.* at 13–15 (detailing how students are expected to follow new guidelines).

95. See *generally id.* (outlining and reviewing overall policies of guidelines).

96. See *id.* at 27–30 (showing education policies are suggested for student athletes that specifically target their needs and situation).

97. See *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Apr. 2015), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [<https://perma.cc/R89S-2CMN>] (discussing Title IX's scope and purpose).

sexual assault.<sup>98</sup> Students are protected from discrimination under Title IX as they cannot be “denied access to educational benefits and opportunities on the basis of gender.”<sup>99</sup> Sexual harassment qualifies as discrimination because it can stop the victim from accessing school resources, and a school administrator ignoring requests for help frustrates the purpose of the law.<sup>100</sup> According to Title IX, schools involve children and young adults who are still discovering the world and demonstrating immature behavior, so the school cannot be responsible for all kinds of harassment.<sup>101</sup> The harassing behavior must be “so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”<sup>102</sup>

If a victim wants to hold a university legally responsible as a result of sexual harassment, rape, or sexual assault, the victim must prove that the school’s response was “clearly unreasonable in light of the known circumstances.”<sup>103</sup> For a school to be held liable, the accusing party must show that the school acted with “deliberate indifference to known acts of harassment in its programs or activities.”<sup>104</sup> The indifference must, at a minimum, make students “liable or vulnerable” to harassment.<sup>105</sup> Schools are not forced to adopt any specific policies under Title IX and they can discipline their student body however they deem necessary, but they cannot be “deliberately indifferent.”<sup>106</sup> Additionally, the sexual harassment must take place in a context over which the university has

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98. See *Know Your Rights: Title IX and Sexual Assault*, AM. C.L. UNION, <https://www.aclu.org/know-your-rights/title-ix-and-sexual-assault> [<https://perma.cc/AMS6-7CPE>] (last visited Oct. 26, 2018) (stating Title IX’s scope); see also *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 633, 650 (1999) (interpreting Title IX from statute and Circuit Court cases).

99. *Davis*, 526 U.S. at 650.

100. See *id.* at 650–51 (discussing reasoning behind qualifying sexual assault as sex discrimination under Title IX).

101. See *id.* at 651–52 (explaining why Title IX must be limited). Without limiting Title IX’s application, it would be too difficult for the school to monitor and control every kind of bullying that happens in a school setting. See *id.* (explaining how schools are different from adult workplaces and how that has to be taken into consideration).

102. *Id.* at 652.

103. *Id.* at 648 (stating standard at which school will be held responsible if student wants to hold university responsible, not just attacker).

104. *Id.* at 633.

105. See *id.* at 645 (discussing definition of indifference to known harassment on campus in scenarios where school has control and must react).

106. See *id.* at 648 (explaining universities do not have explicit guidelines that need to be put into place, but need to have policies or systems in place so they are not deliberately indifferent).

control.<sup>107</sup> Under these circumstances, a victim can sue the university for damages.<sup>108</sup>

### 3. *The “Dear Colleague Letter” and Obama-era Guidelines*

In 2011, the Department of Education released a letter to all universities called the “Dear Colleague Letter,” which was a set of guidelines that the Obama Administration encouraged universities to follow in sexual assault cases.<sup>109</sup> Baylor was aware of these guidelines and knew that Title IX was evolving, but was slow to implement the policies because it did not have the appropriate infrastructure to do so.<sup>110</sup> For example:

The administrators tasked with implementing Title IX prior to November of 2014 had a limited understanding of the dynamics of sexual violence and existing barriers to reporting on Baylor’s campus, including the impact of other campus policies regarding the prohibition of alcohol and extra-marital sexual intercourse.<sup>111</sup>

Students were often unaware of the relevant policies and the process for reporting.<sup>112</sup> If a student did figure out how to report, administrators were often inconsistent when taking action because the University did not provide adequate training, and if Judicial Affairs did investigate the case, the staff was not “trauma informed.”<sup>113</sup>

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107. *See id.* at 645 (discussing locations in which university has responsibility to act). If the university does not have control over the location in which the assault occurred, they do not have responsibility. *See id.*

108. *See id.* at 636 (detailing when universities can be held liable).

109. *See Sexual Discrimination*, U.S. DEP’T OF EDUC. (last visited Jan. 17, 2019), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> [<https://perma.cc/NRG7-6M6L>] (showing timeline of Dear Colleague Letter). The original Dear Colleague Letter was released in 2011, and a follow up “Questions and Answers about Title IX and Sexual Violence” was released in 2014. *See id.* (stating order in which policies were released); *see generally* KC Johnson & Stuart Taylor, *The Path to Obama’s ‘Dear Colleague’ Letter*, WASH. POST (Jan. 31, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm\\_term=.2e714fb0ff6dc](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.2e714fb0ff6dc) (laying out goals and new expectations for Title IX under President Obama); *see also* Ali, *supra* note 85 (explaining proposed policies).

110. *See Baylor Univ. Board of Regents Findings of Fact*, BAYLOR UNIV., 1, 4 (May 26, 2016), <https://www.baylor.edu/thefacts/doc.php/266596.pdf> [<https://perma.cc/C63A-SC57>] (providing details of Pepper Hamilton’s investigation into Baylor’s Title IX policies and finding policies were inadequate).

111. *Id.*

112. *See id.* at 8 (showing that victims who wanted to report did not know how to do so, and that once they did report, report would be mishandled).

113. *See id.* at 7 (discussing how investigation process was not conducive to helping victims tell their stories). “Trauma informed” is being “trained in the dynamics of sexual and gender-based harassment and violence, dating violence, do-



Occasionally, responses by administrators created an even more hostile environment for the victims.<sup>114</sup>

#### 4. *Baylor's Historical Implementation of Title IX*

Baylor University had Title IX policies on paper, but, in practice, the University did not comply with these policies.<sup>115</sup> Further, Baylor did not have a full-time Title IX coordinator until November 18, 2014, over two years after the Jane Doe incident occurred.<sup>116</sup> Baylor's investigation, launched in response to Doe's assault, uncovered that the students were not educated on the protections afforded under Title IX, nor were they instructed on the procedure to report sexual harassment.<sup>117</sup> Additionally, if a student managed to file a report, there was still a chance that the report would not make it to the Title IX coordinator.<sup>118</sup> Specifically, with respect to Jane Doe's experience with Baylor, she was never informed of her rights under Title IX.<sup>119</sup> According to her Complaint, Doe was never told that her rape had not been reported to Judicial Affairs, and she was treated poorly when she tried to report it to school

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mestic violence, stalking, the neurobiological impacts of trauma, the evaluation of credibility, consent and the role of alcohol as it relates to consent and alcohol-facilitated sexual assault." *Id.*

114. *See id.* at 9 (discussing how administrators were improperly trained and did not know how to properly communicate with sexual assault victims).

115. *See* Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 22 (describing Pepper Hamilton's research). The investigation found that Baylor did have Title IX policies in place, but the university did not follow them and did not follow them when investigating Jane Doe's assault. *See id.* (stating how Title IX policies were not followed).

116. *See id.* at 14 (detailing Pepper Hamilton research). The investigation put together a timeline of the events in Jane Doe's case and the different policies that Baylor had in place throughout the process. *See id.* (outlining how the case unfolded); *see also* Jake New, *Title IX Coordinators Required*, INSIDE HIGHER EDUC. (Apr. 27, 2015) <https://www.insidehighered.com/news/2015/04/27/education-department-reminds-colleges-hire-title-ix-coordinators> [<https://perma.cc/87SU-EDP8>] (stating all universities need Title IX Coordinators). A letter was sent out in 2015 to remind universities that they need Title IX Coordinators in order to comply with Title IX. *See id.*

117. *See* Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 22 (describing Pepper Hamilton research that found very few people at Baylor were enforcing, following, or teaching Title IX).

118. *See id.* (describing how reports were mishandled).

119. *See id.* at 32 (stating Jane Doe was unaware of her options for reporting her assault to officials at Baylor); *see also* Paula Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (July 13, 2017) [http://www.espn.com/espn/otl/story/\\_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims](http://www.espn.com/espn/otl/story/_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims) [<https://perma.cc/FY65-U46L>] (showing Baylor had history of not helping sexual assault victims and often discouraged them from reporting).

administrators.<sup>120</sup> Further, Doe was repeatedly lied to about her reporting options, she was not informed that an investigation could take place, and she was stopped from exercising her rights under Title IX.<sup>121</sup>

### 5. *Baylor's Current Title IX Policies*

In light of Jane Doe's widely publicized rape case and several other high profile cases, Baylor finally amended its Title IX policies in 2018.<sup>122</sup> The University now makes reporting a priority and makes it clear that victims and witnesses will not be punished for alcohol consumption or drug use if they were consuming alcohol or using drugs at the time of the incident.<sup>123</sup> "Confidential Resources" are available if students would like to speak to a professional for support, regardless of whether they want to make an official report.<sup>124</sup> The Title IX coordinator's purpose and responsibilities are clearly laid out, along with their contact information.<sup>125</sup> The updated policy also lists the locations and situations in which Baylor would be responsible for a potential sexual assault.<sup>126</sup> Then, the rules further detail the steps that the Title IX coordinator must take once someone has reported sexual assault that falls under the University's jurisdiction.<sup>127</sup> Furthermore, the University lays out measures to take in the event that the assault does not fall under its jurisdiction.<sup>128</sup>

The University also clearly provides resources for students to further understand the responsibilities of their peers and University

120. See Plaintiff's Original Complaint and Jury Demand, *supra* note 1, at 32 (detailing Doe's reporting process at Baylor and showing how difficult it was for her to get information and learn her options).

121. See *id.* (showing how Baylor did not know how to properly handle sexual assault reports).

122. See generally SEXUAL AND GENDER-BASED HARASSMENT AND INTERPERSONAL VIOLENCE POLICY, 1 (Jan. 8, 2018), available at <https://www.baylor.edu/titleIX/doc.php/249242.pdf> [<https://perma.cc/H77D-XMGK>] (laying out Baylor Universities new sexual assault polices).

123. See *id.* at 2 (updating University policies and focusing on reporting).

124. See *id.* (giving students options if they do not want to report their sexual assault or harassment but still need resources for dealing with situation).

125. See *id.* at 2–3 (laying out explicit rules and roles for Title IX Coordinator and making it full-time position on campus).

126. See *id.* at 3 (detailing where Baylor will take responsibility, including assaults by Baylor students no matter where they occur, not just physically on campus or University property).

127. See *id.* at 4 (giving overview of steps University wants Title IX Coordinator to take after someone reports sexual assault).

128. See *id.* (giving resources for victims who do not fall under University's jurisdiction to help victim find other ways to report what happened).

administrators.<sup>129</sup> There are comprehensive definitions for each illicit act that qualifies as sexual assault or sexual harassment.<sup>130</sup> Further, complicity is also considered prohibited conduct under their new policy.<sup>131</sup> Consent is defined and incapacitation details several different instances rendering a person incapable of providing consent.<sup>132</sup> It also lists questions that can be asked in order to determine if someone is incapacitated and unable to consent to sexual activity.<sup>133</sup> Then, the updated policy explicitly states that intoxication is not a defense for the listed prohibited conduct.<sup>134</sup>

Finally, the updated policy goes into detail about confidentiality, privacy, and reporting.<sup>135</sup> The University must exercise privacy and discretion when investigating or disciplining.<sup>136</sup> Employees may only share information with other employees who need to know the details of the sexual assault in order to resolve the matter.<sup>137</sup> Employees, such as mental health counselors and clergy are expected to maintain confidentiality unless they have obtained written consent to disclose the information or there is a threat that the individual will cause harm to anyone.<sup>138</sup> If an investigation is launched, the steps of how the investigation should take place are laid out, and each party can consult an advisor.<sup>139</sup> The updated policy further provides that in the course of an investigation, the University will never use “sexual history of the complainant or re-

129. *See id.* at 5 (supplying all other policies that University has in place to reference all rules that students and faculty must follow).

130. *See id.* at 6–7 (defining terms laid out in policy). Baylor’s policy defines all relevant terms so students can clearly understand the categories and know what is explicitly not allowed by the policy. *See id.*

131. *See id.* at 9 (adding liability for students who do not actually commit sexual assault or misconduct but permit it to happen).

132. *See id.* at 9–10, (defining consent as: “the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon acts”).

133. *See id.* at 10 (detailing how students can tell if their partner is able to give consent to participate in sexual activity).

134. *See id.* at 11 (stating perpetrator cannot use intoxication to defend his or her actions).

135. *See id.* at 11–12 (detailing distinctions between confidentiality and privacy). Confidentiality protects “information disclosed in legally-protected or privileged relationships” and privacy is “the discretion that will be exercised by the University in the course of any investigation or disciplinary processes . . . .” *Id.*

136. *See id.* at 12 (describing how Baylor takes parties’ privacy seriously and to “extent reasonably possible”).

137. *See id.* (defining confidentiality and how campus administrators must respond to allegations while protecting victim).

138. *See id.* at 12 (explaining when confidentiality can be breached to ensure safety to all parties).

139. *See id.* (stating how investigation should take place).

spondent to prove character or reputation.”<sup>140</sup> Lastly, the University will cooperate with any criminal investigation that may or may not occur simultaneously with the University’s investigation.<sup>141</sup> The University has clearly made progress in handling sexual assault cases and protecting victims, but more can be done to protect students on a larger scale, beyond Baylor.<sup>142</sup>

### III. ANALYSIS

As previously established, Baylor historically lacked Title IX policies and failed to abide by what few policies the University had in place.<sup>143</sup> Since the settlement of this case and several other incidents at Baylor coming to light in recent years, Baylor began implementing a more substantial sexual assault policy with more accountability measures.<sup>144</sup> Even though the University has made some progress toward protecting sexual assault victims, further policies should be put into place across the country to protect students everywhere.<sup>145</sup> No matter how much Baylor, or any other university, changes and improves its policy, there are still a multitude of issues that need to be addressed by society at-large.<sup>146</sup> Part A discusses the reasons male athletes are able to perpetrate sexual crimes and proposes more integration in sports in order to help change men’s attitudes toward women.<sup>147</sup> Part B discusses why a uniform definition of consent could quell the perpetuation of rape on campus and proposes clearly defining the meaning and giving students resources on how to get the help they need if they have

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140. *Id.* at 30–31 (detailing how investigation would take place and support systems in place to help each party navigate process).

141. *See id.* at 31 (stating Baylor will cooperate with law enforcement if criminal investigation takes place).

142. For further discussion of Baylor’s changes to their sexual assault policies, see *supra* notes 122–141 and accompanying text.

143. For further discussion of Baylor University’s failure to implement and follow proper Title IX policies, see *supra* notes 115–121 and accompanying text.

144. For further discussion of Baylor’s new sexual assault policies since several sexual assault cases came to light, see *supra* notes 122–141 and accompanying text; see also Nicole Chavez and Jay Croft, *Ex-Frat Leader’s Plea Deal Is the Latest in a Series of Baylor Sexual Assault Scandals*, CNN (Dec. 12, 2018) <https://www.cnn.com/2018/12/12/us/baylor-sex-assault-cases-timeline/index.html> [<https://perma.cc/P76X-MAM9>] (detailing several instances of sexual assault at Baylor).

145. For further discussion of Baylor’s new policies and how they plan on cooperating during future investigations while taking care of victims, see *supra* notes 122–141 and accompanying text.

146. For further discussion of the issues that need to be addressed that are not policy related, see *infra* notes 153–199 and accompanying text.

147. For further discussion of misogynistic attitudes in sports and how those attitudes can be changed, see *infra* notes 153–167 and accompanying text.

been assaulted.<sup>148</sup> Part C looks at the differences between transparency and confidentiality and posits how universities can make more efficient policies and impose consequences on administrators who do not follow those policies.<sup>149</sup> Part D emphasizes the importance of teaching children about consent and sexual assault at a young age and lays out educational programs that could be expansively employed to promote change.<sup>150</sup> Finally, Part E discusses the varying responses from the government and analyzes which policies are most effective and which policies are most harmful.<sup>151</sup> The following issues contribute to sexual assault on college campuses and cannot be addressed by written policy alone.<sup>152</sup>

### A. Men and Misogyny

One researcher has argued that entitlement in athletes is not an uncommon attitude.<sup>153</sup> Entitlement, the argument goes, is bred in young men getting fame and money, often without any accountability.<sup>154</sup> Some blame this occurrence on sports being deeply gendered.<sup>155</sup> For example, one theory is that sexism and misogyny are often embedded in athletic culture, which is evidenced by athletes commonly using homophobic and misogynistic speech.<sup>156</sup>

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148. For further discussion of the importance of clearly defining consent and other processes on campus so that students understand their rights, see *infra* notes 168–181 and accompanying text.

149. For further discussion of how to balance transparency and confidentiality and how universities have to address this discrepancy, see *infra* notes 182–188 and accompanying text.

150. For further discussion of educating children on sexual assault, see *infra* notes 189–199 and accompanying text.

151. For further discussion of old and new government policies and the issues with the new policies that are being implemented, see *infra* notes 200–241 and accompanying text.

152. For further discussion of misogyny, defining consent, transparency and confidentiality, and educating children, see *infra* notes 153–199 and accompanying text.

153. See Christopher Flores, *When Athletes Are Accused*, 48 CHRON. OF HIGHER EDUC. 32 (2002) (referring to athletes expecting sex).

154. See *id.* (discussing how athletes may become entitled from early age).

155. See Eric Anderson, *"I Used to Think Women Were Weak": Orthodox Masculinity, Gender Segregation*, 23 SPORT SOC. FORUM 2, 260–61 (Jun. 2008) (discussing how men who play traditionally female sports are treated as subordinates by those who play traditionally masculine sports and are victims of "homophobic and misogynistic discourse"); see also Eric Anderson, *Bold and Sometimes Controversial Research*, <http://ericandersonphd.com> [<https://perma.cc/3S7F-LS82>] (last visited Mar. 12, 2019) ("Dr. Eric Anderson is Professor of Sport, Masculinities, and Sexualities at the University of Winchester, England. He holds degrees in health, psychology and sociology and has published seventeen books and 70 peer-reviewed articles.").

156. See Anderson, *supra* note 155, at 261 (discussing how young men may be socialized in team sports).

Sociologists have even found that some male athletes view women “as sexual objects to be conquered” instead of their equals.<sup>157</sup>

Separating sports by gender could partially be to blame.<sup>158</sup> Eric Anderson conducted a study involving sixty-eight heterosexual males that played high school football but became college cheerleaders after being rejected from their universities’ football teams.<sup>159</sup> Anderson found that “all but a handful” of the men in his study who previously harbored sexist and misogynistic views learned to view women as more than sexual objects.<sup>160</sup> Most of the men in the study stated that being able to socialize and work with women in a sports setting helped them to overcome their belief that women were inferior and helped them to view women as equals.<sup>161</sup> Anderson further argued that single-sex sports teams allow athletes to be “socialized into an ethos in which women are valued as sexual objects and devalued as athletes. This is made more possible because there are no women to contest these narrow understandings.”<sup>162</sup> Yet, Anderson’s study suggests that stereotypes and attitudes can be changed by men and women working together in sports or socializing in universities where they may be more likely to have conversations about “sex, gender, sport, and life.”<sup>163</sup>

The study further claims that these conversations are not likely to happen in the current dynamic of gendered sports.<sup>164</sup> Traditionally, men and women have been separated in sports for several reasons, including protecting women from violence and men having a higher level of athleticism, and this has led to the separate worlds in sports.<sup>165</sup> Whether or not these reasons for creating segregated sports teams are valid, allowing men and women to play and com-

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157. *Id.* at 263 (discussing how male athletes in team sports view women when they have not played sports with women).

158. *See id.* at 265 (stating that some men may view women as sexual objects because they have not played sports with them and have been kept on separate athletic teams with no crossover).

159. *See id.* at 259 (describing Anderson’s theory and methods of how study was conducted).

160. *See id.* at 273 (detailing study’s findings).

161. *See id.* at 271 (discussing how men in this study who played sports with women thought of women before they engaged in sports with them).

162. *Id.* at 274.

163. *Id.* (describing how attitudes about women could change by entering into these types of conversations).

164. *See id.* (discussing how changes can be made so that men do not strictly see women as sexual objects).

165. *See id.* at 265 (discussing how both men and women have created divide in sports for various reasons).

pete together can combat entitlement in athletes.<sup>166</sup> Additionally, combining teams can rebut the sexist and misogynistic views that have arguably enabled a culture of sexual assault in the realm of college athletics.<sup>167</sup>

## B. Consent Must be Defined

One sociologist found that college athletes are less likely to understand consent, and they may accept “rape myths” to justify otherwise criminal actions.<sup>168</sup> Further, because athletes are often popular figures on campus, bystanders may be less likely to step in if they witness a scenario that may be sexual assault.<sup>169</sup> Once victims are assaulted, they may face the barrier of reporting because they often fear they will be exposed or that they “could be subject to the wrath of those who liken athletes to gods.”<sup>170</sup> A policy that clearly defines consent and prohibits complicity could make bystanders more likely to report.<sup>171</sup> Defining consent also helps victims.<sup>172</sup> Not only is “consent” an ambiguous term, but other sexual terms have more than one definition, which can lead to miscommunication of sexual interest and consent.<sup>173</sup> Consent education

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166. See *United States v. Virginia*, U.S. 515, 542 (1996) (holding male-only admission policy at Virginia Military Institute (“VMI”) unconstitutional). Justice Ginsburg, writing for the majority, reasoned that while not all women will want to or will be able to meet VMI’s physical demands, those who are qualified should be afforded the option. See *id.* (explaining that women do not have to participate but they should be allowed to if they want opportunity).

167. See Anderson, *supra* note 155, at 265 (June 2008) (explaining benefits of having men and women play sports together).

168. See Lisa Wade, *Rape On Campus; Athletes, Status, and the Sexual Assault Crisis*, THE CONVERSATION (Mar. 6, 2017), <https://theconversation.com/rape-on-campus-athletes-status-and-the-sexual-assault-crisis-72255> [<https://perma.cc/7UQB-756B>] (discussing why athletes commit sexual assault and how they understand this issue from their point of view).

169. See *id.* (discussing why people may be less likely to stop athletes from assaulting someone or potentially assaulting someone).

170. See Wade, *supra* note 168 (discussing barriers to reporting).

171. See Lauren Chief Elk and Shaadi Devereaux, *The Failure of Bystander Intervention*, THE NEW INQUIRY, (Dec. 23, 2014), <https://thenewinquiry.com/failure-of-bystander-intervention/> [<https://perma.cc/6RFU-FZC4>] (arguing bystander intervention has become form of victim blaming when students attempt to find allies to intervene, but allies have different versions of consent and blame victims instead).

172. See *Back to School: Defining Consent in Sexual Relationships*, BREAK THE CYCLE, <https://www.breakthecycle.org/blog/back-school-defining-consent-sexual-relationships> [<https://perma.cc/7ZQY-4FUX>] (last visited Mar. 5, 2019) (stating that asking for consent at every step of sexual activity leads to open communication and assures neither party does something they do not want to do).

173. See Kyana D. Dixie, *Defining Consent as a Factor in Sexual Assault Prevention*, 10 MCNAIR SCHOLARS RES. J. 1, 39–41 (2017) (describing how definitions of sexual acts change depending on age, community, and friends).

has to do more than define the word; it has to provide interactive examples so students can understand how to get consent.<sup>174</sup> A policy that clearly defines consent can help break down these reporting barriers and force universities to act.<sup>175</sup>

The current justice system is not protecting the victims of sexual misconduct.<sup>176</sup> Some victims choose to remain silent about what happened to them, but many tell at least one person in their life, such as a friend or family member.<sup>177</sup> These groups of people need to be aware of the resources available in order to help the victim.<sup>178</sup> Many universities give students and staff information on their policies and access to resources available to them, but they do not explain student needs or the type of resources available.<sup>179</sup> Many students liked the counseling and health resources that their university provided them once they figured out what they were.<sup>180</sup> A major barrier to accessing these resources is that victims do not have specific information on how to access the resources, they just know that the resources exist.<sup>181</sup>

### C. Transparency versus Confidentiality

Additionally, universities may experience problems in balancing both transparency and confidentiality in their reporting process.<sup>182</sup> The difficult balance can be attributed to the fact that the “construct of confidentiality prohibit[s] administrators at the

174. *See id.* at 49 (describing how interactive role play allows students to fully grasp communication strategies and better understand scenario).

175. *See* Ellen Friedrichs, 8 *Societal Barriers That Make it Hard to Report Sexual Assault*, EVERYDAY FEMINISM (Nov. 3, 2014), <https://everydayfeminism.com/2014/11/barriers-report-sexual-assault/> [<https://perma.cc/FAM9-4NGV>] (stating large barrier to reporting is not understanding that what happened is sexual assault).

176. *See* LAUREN GERMAIN, *CAMPUS SEXUAL ASSAULT: COLLEGE WOMEN RESPOND 98* (Johns Hopkins University Press 2016) (showing how justice system failed victims who reported to their universities by leaving them without recourse or justice).

177. *See id.* at 99–100 (demonstrating why several groups of people need training).

178. *See id.* at 100 (stating why victims stay silent). However, when victims come forward, they still need a support system, whether they take legal action or take official action through their university. *See id.*

179. *See id.* (explaining ambiguities in policies on college campuses). Often, universities may seem like they are providing helpful resources, but students do not actually know how to use them in their time of need. *See id.*

180. *See id.* at 100–01 (showing that, once accessed, victims can actually benefit from campus resources).

181. *See id.* 101 (explaining that students are told about resources at orientation but do not know where to find them when they actually need them).

182. *See id.* (stating that both are needed but sometimes officials are too confidential when they actually need to be transparent to assist victims).



[u]niversity and other campuses from reporting the results of board hearings even to their own students.<sup>183</sup> To protect the students on campus and keep their confidences, administrators do not always share the information with the correct authorities in order to remedy the situation.<sup>184</sup> Penalties should also be strengthened and enforced.<sup>185</sup> Universities that violate Title IX are subject to a loss of federal aid, but no university has ever actually faced this steep penalty.<sup>186</sup> Universities have to understand that there will be a lack of physical evidence of the sexual misconduct, and they cannot rely on it for an investigation.<sup>187</sup> Universities should also involve students and alumni in creating policies because they are the people that have used or will use the policies.<sup>188</sup>

#### D. Teach Them When They Are Young

Prevention is also of the utmost importance.<sup>189</sup> Prevention should happen, not only at the higher education and university level, but also in kindergarten through twelfth grade.<sup>190</sup> Conversations about sex should start early and should be an ongoing process.<sup>191</sup> Families, the media, and social services organizations need to start the conversation because sexual assault does not only happen on college campuses.<sup>192</sup> Universities and places of higher education have a significant impact on society, and if rape culture were

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183. *Id.*

184. *See id.* at 101 (showing need for balance between confidentiality and transparency in order to protect victims).

185. *See id.* at 102 (discussing other aspects of university systems that must be fixed to prevent assault on campus and deal with its aftermath).

186. *See id.* (showing penalties are in place in to deal with universities that do not respond appropriately). However, these penalties are not being enforced by the government. *See id.*

187. *See id.* at 102–03 (discussing that, historically, investigations required physical evidence, which typically is not available in these scenarios).

188. *See id.* at 103 (stating importance of student involvement in creating rules so that they are likely to work and be followed).

189. *See id.* at 103 (discussing most important factor in stopping sexual assault and policies that could be put into place to end rape culture on campuses).

190. *See id.* (stating importance of educating children at young age and starting prevention process before reaching college age).

191. *See* Catherine McCall, *How and When to Talk to Your Child About Sexual Abuse*, *PSYCHOLOGY TODAY* (June 08, 2010), <https://www.psychologytoday.com/us/blog/overcoming-child-abuse/201006/how-and-when-talk-your-child-about-sexual-abuse> [<https://perma.cc/RQE2-H74R>] (discussing how to approach sexual assault with young children).

192. *See* Germain *supra* note 176 (discussing how to address sexual assault outside of university environment). Addressing assault outside of the university context is important because sexual assault does not happen in a vacuum. *See id.*

changed on campus, it could impact the rest of society.<sup>193</sup> In order to change this culture, society has to build “empathy and understanding to increase social disapproval of sexual violence” and enact “policies that punish the crimes” to reduce sexual violence.<sup>194</sup> Teaching kids about sex at a young age can make them more comfortable with talking to their parents about incidences of sexual assault.<sup>195</sup> Having open and honest conversations about sex with children will also make them more aware of when something inappropriate is happening to them.<sup>196</sup>

Successful prevention programs focus on the way men see themselves, because very few men actually see themselves as potential rapists, and focus on high risk populations, such as student athletes and fraternity members.<sup>197</sup> Studies show that all-male rape prevention programs and programs led by their peers are the most successful.<sup>198</sup> Further, teaching men about male-on-male rape may make them less likely to rape women by debunking stereotypes about those involved in sexual assault.<sup>199</sup>

## E. The Dangers of the Government’s Current Response

### 1. *The Obama Administration Policy*

The Obama Administration created a task force to prevent and handle sexual assault on college campuses in an attempt to solve the problem of sexual assault across the country.<sup>200</sup> The task force

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193. *See id.* at 105 (detailing how universities can have larger impact on societal perceptions of sexual assault).

194. *Id.* (stating how universities can change societal perception of sexual assault).

195. *See Leah Rocketto, Why You Should Start Talking Your Kids About Sexual Assault from a Young Age*, INSIDER (Oct. 26, 2017, 5:16 PM), <https://www.thisisinsider.com/how-to-teach-kids-about-sexual-assault-2017-10> [<https://perma.cc/KE5G-SAT2>] (discussing why children should be educated on sex to better understand sexual assault).

196. *See id.* (explaining that children need to know what sexual assault if they are going to report it).

197. *See John D. Foubert, Creating Lasting Attitude and Behavior Change in Fraternity Member and Male Student Athletes: The Qualitative Impact of an Empathy-Based Rape Prevention Program*, 13 VIOLENCE AGAINST WOMEN 70, 71 (2007), available at [https://pdfs.semanticscholar.org/ff17/3c7887382314859e77527e200d5f24d80d47.pdf?\\_ga=2.158630330.1440255832.1551841540-972029550.1551841540](https://pdfs.semanticscholar.org/ff17/3c7887382314859e77527e200d5f24d80d47.pdf?_ga=2.158630330.1440255832.1551841540-972029550.1551841540) [<https://perma.cc/BAJ3-VDUR>] (exploring how prevention programs should be run to be most effective for target audience).

198. *See id.* (showing most effective prevention programs in comparison to programs with both genders in them or programs led by administrators).

199. *See id.* at 71–72 (stating how to make men further understand rape and put it into context they better understand).

200. *See generally Preventing and Addressing Campus Sexual Misconduct: A Guide for University and College Presidents, Chancellors, and Senior Administrators*, THE WHITE

focused on coordinating responses, prevention and education, policy, reporting and support, evaluating the sexual assault climate, and transparency.<sup>201</sup> The purpose of coordinating responses was to provide survivors with resources such as therapy, advocates, and off-campus services in case victims felt unsafe at their own schools.<sup>202</sup> It gave suggestions on how to prevent sexual misconduct and how universities should train their Title IX coordinator so that the coordinator could be available to the students and be used most effectively.<sup>203</sup> The task force recommended that the coordinator be a full-time employee and be qualified to handle the complaints as well as have the authority to address the complaints.<sup>204</sup> Coordinating responses assured that everyone on campus and in the university community was aware of sexual misconduct and knew how to respond.<sup>205</sup>

Prevention focuses on education programs for “all incoming first-year students, transfer students, and graduate students, and [should be held] throughout the course of all students’ education.”<sup>206</sup> The guidelines suggested that these education programs focus on bystander intervention, challenging biases, engaging both sexes in prevention programs, customizing programs for specific student groups like sororities, and considering the needs of diverse groups.<sup>207</sup> Universities were instructed to make information on sexual misconduct widely available and train all administrators

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HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Jan. 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.Guide%20for%20College%20Presidents.pdf> [<https://perma.cc/S5ES-8V7Z>] (laying out guidelines Obama administration wanted universities to follow to prevent sexual misconduct and deal with its aftermath).

201. *See id.* at 4 (stating task force’s goals). The task force set forth these guidelines to prevent and deal with sexual assault specifically on college campuses. *See id.*

202. *See id.* (giving further resources in event that universities fail to provide students with adequate resources to cope with incident).

203. *See id.* at 6 (suggesting Title IX coordinators should be full time employees and other guidelines in order to make the position as effective as possible).

204. *See id.* (demonstrating how to maximize Title IX coordinator’s effectiveness).

205. *See id.* at 1, 7 (discussing guidelines Obama Administration wanted colleges to follow to prevent and deal with sexual misconduct).

206. *Id.* at 8.

207. *See id.* (stating that men and women need to understand prevention). To be most effective, the education needs to be focused on the group to which it is being presented. *See id.*

yearly.<sup>208</sup> The task force designed a comprehensive policy with a clear process for investigating and resolving issues.<sup>209</sup>

The guidelines also included a focus on reporting.<sup>210</sup> The task force suggested that universities encourage reporting through different means such as offices with professionals who would keep the report confidential or an online system.<sup>211</sup> They also suggested having advocates for victims and providing resources to help survivors after they have been assaulted.<sup>212</sup>

## 2. *The Trump and DeVos Policy Changes*

However, this level of progressiveness has started to change under the Trump Administration.<sup>213</sup> The new United States Education Secretary, Betsy DeVos, is making new policies for sexual assault on college campuses that will reduce university liability for incidences that occur off-campus and strengthen the rights of the accused.<sup>214</sup> The Trump Administration has reversed several of the sexual assault reporting guidelines for colleges that were previously put in place, stating that the previous policies “led to too many students being falsely charged or disciplined.”<sup>215</sup> Under the proposed rules, universities would only be responsible for “incidents on campus or in their programs.”<sup>216</sup> Additionally, DeVos’s new rules would not just serve as guidelines like the Obama Administration’s pol-

208. *See id.* at 9 (detailing how information on sexual assault should be spread).

209. *See id.* at 9–10 (stating rules need to be detailed and clear to be most effective in preventing and punishing sexual assault).

210. *See id.* at 10–11 (focusing on rules of reporting and how it can be clearer for victims to navigate system and get justice or resources depending on what they are looking for).

211. *See id.* at 1, 11 (clarifying how reporting should work while protecting victim’s identity and still being effective).

212. *See id.* at 11–12 (discussing how advocates can help both parties navigate difficult and emotional process).

213. *See generally Title IX of the Education Amendments of 1972*, U.S. DEP’T OF EDUC. (last visited Apr. 19, 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf> [<https://perma.cc/V6LZ-P59Q>] (stating proposed laws that have not yet gone into effect); *see also* Dan Whitcomb, *Trump Administration Mulls New College Rules For Sexual Misconduct Cases*, REUTERS (Aug. 29, 2018, 8:48 PM), <https://www.reuters.com/article/us-usa-colleges-sexcrimes/trump-administration-mulls-new-college-rules-for-sexual-misconduct-cases-nyt-idUSKCN1LF01Y> [<https://perma.cc/PB5N-6WL5>] (summarizing United States Education Secretary’s proposed rules regarding sexual harassment and assault occurring off-campus).

214. *See id.* (stating new rules’ goals set out by United States Education Secretary Betsy DeVos).

215. *Id.* (showing what has happened since change in Administrations and how goals have shifted).

216. *Id.*

icy.<sup>217</sup> For the first time, the rules would legally define sexual harassment and how schools are expected to address sexual assault complaints; additionally, the rule would “establish a higher legal standard to determine whether schools improperly addressed complaints.”<sup>218</sup>

Title IX will remain intact, but this would be the first time the federal government would go beyond guidance.<sup>219</sup> The Trump Administration’s policy responds to criticism that the Obama-era guidelines were not fair to everyone involved.<sup>220</sup> Several men’s rights activists argue that those accused of sexual misconduct did not get enough protection throughout the investigation process.<sup>221</sup> Furthermore, many believe that the Obama-era rules were too administrative and had nothing to do with sexual misconduct.<sup>222</sup> However, victims advocacy groups claim that the new rules would make it easier to commit sexual assault on college campuses.<sup>223</sup>

### 3. *The Dangers of the Change in Policy*

Rollback on the Obama Administration’s policy has taken place since the Trump Administration officially rescinded the Obama-era “Dear Colleague Letter” in 2017.<sup>224</sup> The Trump Administration quashed one of the more prominent features of the Letter: the requirement that universities use a preponderance of the evi-

217. *See id.* (stating another difference between DeVos’s rules and guidelines from Obama Administration).

218. Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html> [<https://perma.cc/U9CH-5Y27>] (detailing Betsy DeVos’s and Trump Administration’s proposed rules).

219. *See id.* (emphasizing importance of new rules and how powerful new policies could be given they will be laws, not guidelines).

220. *See id.* (discussing supposed preferential treatment toward victim over accused).

221. *See* Green, *supra* note 218 (showing some groups were upset with Obama guidelines and believed men needed more protection during investigations).

222. *See id.* (criticizing Obama-era guidelines for not doing enough to help victims); *see also* Abigail Hess, *Betsy DeVos: Obama-Era Sexual Assault Initiative ‘Creates More Victims’*, CNBC (Sept. 7, 2017, 2:47 PM), <https://www.cnbc.com/2017/09/07/devos-obama-era-sexual-assault-initiative-creates-more-victims.html> [<https://perma.cc/R346-7UH3>] (reporting that DeVos believes Obama Administration’s guidelines were not doing enough and worked against those who were falsely accused).

223. *See* Green, *supra* note 218 (stating how advocates are responding to new Trump Administration policies).

224. *See* Lauren Camera, *Trump Administration Rescinds Obama-Era Campus Sexual Assault Guidance*, U.S. NEWS AND WORLD REP. (Sept. 22, 2017, 11:40 AM), <https://www.usnews.com/news/education-news/articles/2017-09-22/trump-administration-rescinds-obama-era-campus-sexual-assault-guidance> (stating Title IX’s legal status under Trump Administration).

dence standard instead of clear and convincing standard when investigating sexual assault.<sup>225</sup> The higher evidentiary standard now gives the accused party in a Title IX case an advantage over the victim.<sup>226</sup> While the Trump Administration drafts new laws and guidelines that will continue to repeal the Obama Administration's policy, it has released interim guidance that retracts many promises made under the Obama Administration.<sup>227</sup>

In addition to rescinding the Dear Colleague Letter, the Trump Administration may also use mediation to reach informal resolutions, a solution which the Obama Administration considered inappropriate.<sup>228</sup> Many fear that universities might coerce victims into mediation instead of conducting an investigation, thus allowing universities to hide sexual assault on their campuses.<sup>229</sup> Another concern regarding mediation is that the victim and the accused assailant are allowed to cross-examine each other.<sup>230</sup> Allowing cross-examination can perpetuate a hostile environment and could retraumatize students.<sup>231</sup> Students who have to be cross-examined by their alleged rapist may be more likely to drop their

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225. *See id.* (summarizing Dear Colleague Letter's purpose from Obama Administration). The Dear Colleague Letter's preponderance of evidence standard is a lower standard than clear and convincing evidence. *See id.* *See generally* Russlynn Ali, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/4RY8-MG6F>] (stating new sexual assault guidelines for universities).

226. *See* Nick Anderson, *Trump Administration Rescinds Obama-Era Guidance on Campus Sexual Assault*, WASH. POST (Sept. 22, 2017), [https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e\\_story.html?utm\\_term=.e9ca0acb0ec](https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e_story.html?utm_term=.e9ca0acb0ec) (claiming new guidance from Trump Administration is dangerous and harms victims).

227. *See* Elizabeth Tang, *Betsy DeVos Just Made It More Confusing for Schools to Address Sexual Assault*, NAT'L WOMEN'S L. CTR. (Sept. 28, 2017), <https://nwlc.org/blog/betsy-devos-just-made-it-more-confusing-for-schools-to-address-sexual-assault/> [<https://perma.cc/HCN7-93FJ>] (discussing how rescission of Obama Administration's guidelines has made it unclear what universities should do because several things have been taken out of previous guidelines).

228. *See* Green, *supra* note 218 (detailing Betsy DeVos' and Trump Administration's proposed rules); *see also* Tang, *supra* note 227 (discussing how policies have changed on mediation). The decision to endorse mediation is controversial because the previous Obama Administration considered it dangerous to allow mediation. *See id.*

229. *See* Tang, *supra* note 227 (discussing danger of allowing mediation between students, even if they both consent to it).

230. *See* Green, *supra* note 218 (criticizing new Trump-era rules for allowing too much interaction between victim and accused).

231. *See* Elizabeth Tang, *Betsy DeVos is Giving Alleged Rapists Special Rights*, NAT'L WOMEN'S L. CTR. (Sept. 28, 2017), <https://nwlc.org/blog/betsy-devos-is-giving-alleged-rapists-special-rights/> [<https://perma.cc/S66C-WHFK>] (claiming that victims may be more likely to drop their case if cross-examined by alleged perpetrator).

cases.<sup>232</sup> Victims who drop their cases may be forced to return to a hostile environment on campus without any justice, and victims who press forward with their cases will most likely subject themselves to even more hostility.<sup>233</sup>

Furthermore, under the Trump Administration, colleges and universities will only be held liable for investigating and responding to formal complaints if school officials had “actual knowledge” of the events.<sup>234</sup> Under the new rules, universities must only respond to events that occurred on campus; assault that occurred off campus would fall outside of this scope.<sup>235</sup> Advocates of DeVos’s policy state that the new rules focus on making the investigations impartial so that both sides are treated equally.<sup>236</sup> For instance, “for the first time, the administration explicitly says that just as an institution’s treatment of a complainant could constitute sex discrimination, so would the treatment of the accused.”<sup>237</sup> Currently, these policies have not been put into place and they are only proposed.<sup>238</sup> However, the Trump Administration released these proposed rules on the heels of several massive scandals at major universities.<sup>239</sup> While some believe that the new rules will bring due process to college campuses, others fear it will be easier than ever to get away with sexual assault.<sup>240</sup> Universities may keep the same Title IX policies they had during the Obama Administration, but many feel it is likely that either the enforcement or the policies themselves will

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232. *See id.* (arguing that Trump Administration guidelines are dangerous to survivors). Further, mediation is not helpful for victims because they are less likely to get justice in a safe way. *See id.*

233. *See id.* (showing hostile environment on campus and between peers is more likely to continue because mediation is not safe option).

234. *See Green, supra* note 218 (showing another way in which universities would have less responsibility under new rules). Under the proposed rules, universities would only have to get involved in sexual assault investigations if they had actual knowledge of events. *See id.*

235. *See id.* (narrowing scope of university responsibility).

236. *See id.* (showing new rules emphasize support for both sides during investigation instead of just victim).

237. *Id.*

238. *See id.* (emphasizing rules are not officially in place and are only proposals at this time).

239. *See Green, supra* note 218 (referring to Ohio State University, University of Southern California, and Michigan State University scandals where faculty and staff members committed sexual misconduct).

240. *See id.* (quoting Jess Davidson, executive director of End Rape on Campus, who said proposals are “a tacit endorsement of making campuses a safer place to commit sexual assault, rather than a safer place to learn free from violence”).

relax over time, and universities can do so without fear of recourse from the government.<sup>241</sup>

#### IV. CONCLUSION

Overall, universities like Baylor have historically done a poor job of protecting students from sexual assault, specifically with respect to athletes, and the universities should strive to do more than just implement Title IX policies.<sup>242</sup> It is extremely important that universities implement and follow these policies, but more should be done.<sup>243</sup> Entitlement in college athletics is a deeply rooted issue.<sup>244</sup> Universities should address misogynistic attitudes, clearly define consent to ensure that all parties are aware of what it means, and avoid sacrificing transparency for confidentiality.<sup>245</sup> Society at large must address these issues with children from a young age in order to get ahead of the problem.<sup>246</sup> The government response to this issue needs to be stronger, but recently it has represented a retreat from the more victim protective guidelines of the Obama Administration.<sup>247</sup> The Trump Administration's interim policies and proposed rules are dangerous and harmful to students.<sup>248</sup>

*Alexa Terribilini\**

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241. See Caroline Kitchener and Adam Harris, *A Step-By-Step Guide to Trump's New College Sexual-Assault Policy*, THE ATLANTIC (Aug. 30, 2018), <https://www.theatlantic.com/education/archive/2018/08/a-guide-to-how-the-new-rules-on-campus-sexual-assault-could-work/569035/> [https://perma.cc/CL8D-QZTK] (detailing how sexual assault cases will occur under new sexual assault policies and speculating that enforcement will grow more lax with lack of accountability).

242. For further discussion of several universities that failed to protect their students who were sexually assaulted on campus, see *supra* notes 25–82 and accompanying text.

243. For further policies that should be put into place in order to protect students, see *supra* notes 153–199 and accompanying text.

244. For further discussion of entitlement in college athletes, see *supra* notes 153–167 and accompanying text.

245. For further discussion of misogyny, and defining consent, see *supra* notes 143–181 and accompanying text.

246. For further discussion of educating children about sexual assault from a young age, see *supra* notes 189–199 and accompanying text.

247. For further discussion of the government's past and present response to sexual assault and the policies that have been in place during the Obama and Trump Administrations, see *supra* notes 200–223 and accompanying text.

248. For further discussion of the failures of current and proposed policies, see *supra* notes 225–241 and accompanying text.

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