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## Title IX and the Dear Colleague Letter: An Ounce of Prevention is Worth a Pound of Cure

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# TITLE IX AND THE DEAR COLLEAGUE LETTER: AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE

## I. INTRODUCTION

College athletics in America enjoys a rich tradition, a tradition so embedded in our culture that it has been referred to as the “true religion of America.”<sup>1</sup> What began as a celebration of the best in amateur sports has become big business, with revenues and television contracts surpassing untold billions. A university’s athletic program, especially its football program, is often regarded as fundamental to the success of a university because of its potential for national prominence, name recognition, and loyalty to the institution and its brand. That loyalty is often expressed with generous donations from smitten alums. But with the unparalleled growth in college athletics has followed a host of misfortunes and tragedy, illustrated most poignantly by the Penn State scandal and the long shadow it cast.

There is growing public frustration over the state of college athletics, especially college football. Of particular concern is the growing epidemic of sexual violence where male college athletes are the perpetrators. One study found that although male student athletes comprise only 3.3 percent of the collegiate population, they accounted for 19 percent of sexual assault perpetrators.<sup>2</sup> A cursory glance through mainstream media attests to this fact, but even the casual sports fan can reel off a number of scandals that have rocked college athletics. Indeed, some scandals have loomed so large that the university or its team becomes the moniker representing the specific

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<sup>1</sup> Margaret Wentz, *College football is America’s true religion*, The Globe and Mail (Toronto), November 12, 2011 available at <http://www.theglobeandmail.com/commentary/college-football-is-americas-true-religion/article4200405/>.

<sup>2</sup> Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 J. SPORT AND SOC. ISSUES 126, 132 (1995).

scandal at issue. Due to the prominence of major college football, sex crimes involving student athletes are particularly troublesome, presenting a significant threat to the institution's reputation and legal liability depending on the adequacy of its response.

In light of the Penn State scandal, universities nationwide are now scrambling to ensure that they have policies and procedures in place to guard against such tragedies.<sup>3</sup> As will be discussed below, litigation involving college athletes reveals that many universities have failed to respond appropriately to allegations, reports, and prevalent cultures of sexual violence within their respective programs, and adverse judgments or large out-of-court settlements have often followed. Importantly, Title IX of the Education Amendments of 1972 (Title IX), its regulations, and the administrative guidance from the Department of Education's Office of Civil Rights (OCR) contain sufficient guidance to avoid much of the tragedy and resulting liability that have flowed from these horrific sexual violence scandals. Specifically, OCR's "Dear Colleague Letter" (DCL) issued in 2011,<sup>4</sup> clarifies the role of universities in responding to allegations of discrimination based on sex and provides guidance and practical suggestions for universities to prevent, remedy, and correct the negative effects of such discrimination.<sup>5</sup> This note highlights some of the intricacies from the DCL that, when implemented correctly, should assist universities in their efforts to guard against specific acts of discrimination that have been perpetuated under the watch of administrators nationwide, and may help universities avoid costly Title IX litigation.

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<sup>3</sup> See Jeffrey Tobin, *Former Penn State President Graham Spanier Speaks*, The New Yorker (Aug. 22, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/08/graham-spanier-interview-on-sandusky-scandal.html> (Dr. Graham Spanier, former Penn State President, speaking of the Sandusky scandal, said that "this is now a lesson for every university—I can't tell you how many university presidents more recently have been in touch with me saying, 'We have completely reviewed how we deal with such things on our campus.' Every university president in the country is now paranoid that something like this could be happening.").

<sup>4</sup> Dear Colleague Letter from Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) [hereinafter DCL] *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>5</sup> *Id.* at 2.

## II. TITLE IX INTRODUCTION AND UNIVERSITY FAILURES

Title IX prohibits discrimination on the basis of sex in education programs and activities operated by universities that receive Federal financial assistance.<sup>6</sup> Sexual harassment, which includes acts of sexual violence, is one category of prohibited discrimination under Title IX.<sup>7</sup> If a university becomes aware of an incident of sexual harassment within its campus community or involving its students, Title IX requires that the university take immediate “affirmative action to overcome the effects of conditions which resulted” from the act(s) of discrimination.<sup>8</sup> The Department of Education and its Office for Civil Rights are responsible for enforcing Title IX. However, Title IX is also enforceable through a private right of action,<sup>9</sup> and courts have provided some guidance in recent years on the applicable standards for Title IX litigation.

As a general rule, a university may be held liable for money damages in a Title IX suit when it (1) has adequate<sup>10</sup> notice of discrimination in its programs or activities;<sup>11</sup> (2) that discrimination is “so severe, pervasive, and objectively offensive” that it deprives the victim access to the educational opportunities or somehow limits the victim’s educational experience;<sup>12</sup> and (3) the university fails to remedy the situation because of its “deliberate indifference” to the discrimination.<sup>13</sup> These standards have been fleshed out in subsequent cases, some of which are discussed below, and it appears that these standards define the “minimal contours of Title IX litigation, rather than the outer limits.”<sup>14</sup>

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<sup>6</sup> 20 U.S.C. § 1681 (2013).

<sup>7</sup> The OCR defines sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to an intellectual or other disability. . . . [and includes] rape, sexual assault, sexual battery, and sexual coercion.” *See* DCL, *supra* note 4, at 1.

<sup>8</sup> 34 C.F.R. § 106.3(b) (2013).

<sup>9</sup> *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992).

<sup>10</sup> *Under Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), “actual notice” was the standard for money damages, but the Court in *Davis v. Monroe County Bd. of Educ.* used the term “adequate notice,” an arguably softer standard that lower courts have followed. 526 U.S. 629, 640 (1999).

<sup>11</sup> *Gebser*, 524 U.S. at 290.

<sup>12</sup> *Davis*, 526 U.S. at 650.

<sup>13</sup> *Id.* at 645.

<sup>14</sup> W. Scott Lewis et al., *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*, The NCHERM 10<sup>th</sup> Anniversary Whitepaper (Nat’l Ctr. for Higher Educ. Risk Mgmt., Malvern, Pa.), 2010, at 5, available at

In the pages to follow, three cases will be reviewed that illustrate specific areas of concern—all covered under the DCL—that have plagued universities in their response to allegations of sexual discrimination and violence implicating their athletic programs. Following each case, recommendations from the DCL that can remedy and more importantly help prevent these mistakes will be identified. Finally, some overarching practical suggestions will be provided, which will help universities protect themselves and their students from the threatening effects that follow acts of sexual discrimination and violence.

A. *Simpson v. University of Colorado*<sup>15</sup>

1. *Case Summary*

Anne Gilmore and Lisa Simpson, students at the University of Colorado (CU), sued CU under Title IX, alleging they were victims of sexual assault by CU football players and recruits.<sup>16</sup> Gilmore and Simpson claimed that CU knew of the risk of sexual harassment of female students in connection with the football recruiting program and failed to take any action to eliminate such harassment.<sup>17</sup> At the time, CU had a recruiting program in place that paired visiting football recruits with female “ambassadors” who were instructed to tour recruits around campus.<sup>18</sup> The recruits were also paired with current players, who were in charge of entertaining the recruits in connection with CU’s efforts to show the recruits a “good time.”<sup>19</sup> On December 7, 2001, Gilmore and Simpson agreed to allow an ambassador and four football players to come over for the evening, but twenty football players and recruits arrived.<sup>20</sup> Some of the players arrived at the home with the understanding that they were visiting the apartment in order to have sex, and when one recruit started to leave he was told to stay “because it was about to go down.”<sup>21</sup> Simpson was

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<http://www.ncherp.org/documents/2010NCHEMWhitepaperFinal.pdf>.

<sup>15</sup> *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007).

<sup>16</sup> *Id.* at 1172.

<sup>17</sup> *Id.* at 1174.

<sup>18</sup> *Id.* at 1173.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1180.

<sup>21</sup> *Id.*

intoxicated and had gone to her bedroom to sleep.<sup>22</sup> She awoke later to find two naked men removing her clothes and was sexually assaulted while recruits and players surrounded her bed.<sup>23</sup> Gilmore was assaulted by players and recruits in the same room at the same time as Simpson, and another female student had nonconsensual sex with two players after they left the apartment.<sup>24</sup>

The central issue in the case was whether the risk of such an assault during recruiting visits was obvious to CU.<sup>25</sup> The court found sufficient evidence in the record to determine that the risk was obvious.<sup>26</sup> The court found that such unlawful conduct within CU's athletic department had been going on for more than a decade, and pointed initially to a 1989 Sports Illustrated article that reported on a number of cases of sexual assault by CU football players.<sup>27</sup> The court also found evidence that CU was aware of sexual assaults that had occurred during prior recruiting visits and cited an email from CU's Chancellor to the Athletic Director voicing concern about the oversight of recruits while "they are in our charge."<sup>28</sup> Additionally, following a 1997 incident where a local high school student was sexually assaulted by two football recruits and a current player<sup>29</sup> at a CU event, the court found that the local district attorney met with CU officials in response to the assault.<sup>30</sup> During that meeting, the district attorney recommended that CU be tougher with their athletes and that they "adopt a policy of zero tolerance for alcohol and sex in the recruiting program, develop written policies and procedures for supervising recruits, and offer football players annual training . . . on sexual assault."<sup>31</sup>

The court also premised CU's potential for liability on the facts that CU's football coach had some knowledge of the grave risk of sexual assault during recruiting visits; knew that sexual

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1180–81.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1181.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1181–82. The two recruits were not admitted at CU, and the current player was suspended for one semester.

<sup>30</sup> *Id.* at 1182.

<sup>31</sup> *Id.* (finding no evidence that changes were apparent in CU's policy and procedures following their meeting with the district attorney).

assaults had occurred during previous recruit visits to CU; sustained a player-host program, which was unsupervised, in order to show potential recruits a “good time”; and knew that there had been no change in the culture of the recruiting program since prior incidents came to his attention, due in large part to his “unsupportive attitude.”<sup>32</sup> The court held that it was “obvious” that a jury could infer that the alleged assaults were caused by CU’s failure to provide adequate supervision and guidance in their recruiting program, and their failure to do so could “reasonably be said to have been deliberately indifferent to the need.”<sup>33</sup> CU subsequently settled the case.<sup>34</sup>

## 2. Title IX Analysis

This case highlights important areas that have been problematic for dozens of universities dealing with allegations of sexual discrimination. First, the court found it significant that CU had prior notice of sexual discrimination in their recruiting program.<sup>35</sup> It is important to consider the sources of that notice: a Sports Illustrated article; knowledge of prior sexual assaults within the recruiting program; discussion with local law enforcement and the district attorney; and an apparent culture of sexually discriminatory practice within its programs.<sup>36</sup> It is clear that notice can come from many sources, even anecdotally. The important takeaway here is that once aware of sexual discrimination or the potential for such, a university must thoroughly investigate the allegations. The DCL recommends that the university take immediate action and investigate the allegation to “determine what occurred and then take appropriate steps to resolve the situation.”<sup>37</sup> Although the standard in private lawsuits for monetary damages is “actual knowledge” of discrimination, under OCR’s

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<sup>32</sup> *Id.* at 1184.

<sup>33</sup> *Id.* at 1184–85 (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989)).

<sup>34</sup> W. Scott Lewis et al., *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*, The NCHERM 10<sup>th</sup> Anniversary Whitepaper (Nat’l Ctr. for Higher Educ. Risk Mgmt., Malvern, Pa.), 2010, at 9, available at <http://www.ncher.org/documents/2010NCHERMWhitepaperFinal.pdf> (following the Tenth Circuit’s reversal and remand, CU chose to settle the lawsuit, paying \$2.5 million to Simpson and \$350,000 to Gilmore).

<sup>35</sup> *Simpson*, 500 F.3d at 1184.

<sup>36</sup> *Id.* at 1181.

<sup>37</sup> DCL, *supra* note 4, at 4.

administrative enforcement, a university is liable if it “knows or reasonably should know about . . . harassment that creates a hostile environment.”<sup>38</sup> It will serve a university well to respond immediately at the first report of sexual discrimination, and such action is consistent with the DCL.

Second, the court was concerned with CU’s knowledge of prior sexual discrimination within its recruiting program.<sup>39</sup> Knowledge about the magnitude of the problems within CU’s recruiting program seemed to remain contained to communications between CU’s Chancellor and Athletic Director.<sup>40</sup> Without proper policies and procedures in place, universities may unknowingly allow allegations of sexual discrimination to remain contained within respective departments and programs, instead of permitting investigations at a campus-wide level. Title IX requires that a university designate an employee to coordinate its efforts to comply with Title IX.<sup>41</sup> That employee, commonly referred to as a Title IX coordinator, is responsible for “any investigation of any complaint communicated . . . alleging [the university’s] noncompliance” with Title IX requirements.<sup>42</sup> The DCL expands on this requirement and suggests that the Title IX coordinator should have “ultimate oversight responsibility” to handle all Title IX complaints.<sup>43</sup> A properly positioned Title IX coordinator will help universities avoid problems like those encountered by CU and increase transparency on campus.

Third, CU’s actions established deliberate indifference in part because of its inability (or unwillingness) to train, supervise, and develop policies and procedures to oversee the actions of its student athletes and recruits. The DCL recommends that universities take proactive measures to prevent sexual discrimination on their campuses and identifies elements of an adequate preventative education program to ensure that appropriate persons are aware of campus policies and procedures.<sup>44</sup> Such education and training should include materials specifically targeting sexual discrimination and

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<sup>38</sup> *Id.*

<sup>39</sup> *Simpson*, 500 F.3d at 1184.

<sup>40</sup> *See generally id.* at 1181–82.

<sup>41</sup> 34 C.F.R. § 106.8(a) (2013).

<sup>42</sup> *Id.*

<sup>43</sup> DCL, *supra* note 4, at 7.

<sup>44</sup> *Id.* at 14.

should address university policy, rules, and available resources.<sup>45</sup> Student athletes and coaches are among those that OCR specifically recommends to receive this education and training.<sup>46</sup> The DCL also encourages schools to regularly assess whether the practices and behaviors of its students and employees violate the university's policy prohibiting sexual discrimination.<sup>47</sup>

Finally, CU's actions established deliberate indifference because of a widespread culture within its athletic department that turned a blind eye to a known discriminatory risk and a recruiting program plagued by a proclivity towards acts of sexual violence. The DCL charges the Title IX coordinator with the responsibility to identify and address any "patterns or systemic problems that arise" on campus.<sup>48</sup> CU was aware of the risks of sexual discrimination within its recruiting program and failed to take appropriate measures to mitigate those risks. Again, a properly positioned Title IX coordinator who oversees the entire Title IX operation, including a regular climate-check within campus departments to ensure that its students and employees are not victims of sexual discrimination, will do much to prevent a culture of tolerance for prohibited conduct.

## B. *Williams v. Board of Regents*<sup>49</sup>

### 1. *Case summary*

Tiffany Williams was a student at the University of Georgia (UGA).<sup>50</sup> On January 14, 2002, she engaged in consensual sex with Tony Cole, a basketball player at UGA.<sup>51</sup> Unbeknownst to Williams, Cole had previously agreed with a teammate and a UGA football player that they could also have sex with Williams after Cole and Williams had intercourse.<sup>52</sup> When Cole went to the bathroom, the football player emerged from the closet naked and sexually assaulted Williams, followed by a

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<sup>45</sup> *Id.* at 15.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007).

<sup>50</sup> *Id.* at 1288.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

teammate of Cole's who raped Williams with Cole's encouragement.<sup>53</sup>

Following the incident, Williams brought suit against UGA under Title IX, alleging that UGA's actions established deliberate indifference, resulting in Williams' sexual assault.<sup>54</sup> The case centered on a troubling history of disciplinary and legal proceedings against Cole for prior incidents of sexual violence at other colleges. Williams offered evidence that UGA's basketball coach, athletic director, and president were personally involved in recruiting and admitting Cole,<sup>55</sup> despite their awareness of Cole's troubling history of sexual violence against women.<sup>56</sup> Williams alleged that even with UGA's knowledge of Cole's past, placing him in an unsupervised student dorm, without properly training him on UGA's policy against sexual harassment, "substantially increased the risk (of sexual assault) faced by female students at UGA." Such actions by UGA established the deliberate indifference required for Williams to prevail at trial.<sup>57</sup> Williams also alleged that UGA's actions established deliberate indifference because they had received numerous reports of an increasing need to train student-athletes about UGA's sexual harassment policy, but had failed to ensure that their student-athletes received such training and education about UGA's policies.<sup>58</sup>

The court found that the Title IX liability test was satisfied and that Williams could prevail in a Title IX action against UGA.<sup>59</sup> The outcome of the case turned on whether UGA's actions satisfied the deliberate indifference standard required to prevail in a Title IX suit. The court agreed with Williams that UGA's basketball coach, athletic director, and president all had actual knowledge of the potential for discrimination based on sex within their program, because of Cole's known deviant sexual history. The court agreed that UGA's failure to take immediate "corrective measures" to prevent that

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1296.

<sup>55</sup> *Id.* at 1289–90. Cole did not meet UGA's standards for admission, but at the coach's request Cole was admitted through a "special admissions policy" where the President was the sole decision maker and offered Cole a full scholarship.

<sup>56</sup> *Id.* at 1290.

<sup>57</sup> *Id.* at 1296.

<sup>58</sup> *Id.* at 1290.

<sup>59</sup> *Id.* at 1303.

discrimination was an act of deliberate indifference.<sup>60</sup> The court found that UGA's actions were clearly unreasonable in light of the circumstances. UGA had not educated its athletes about its sexual harassment policy, inadequately supervised Cole in light of UGA's knowledge about his sexual violence history, and failed to mitigate such risks by placing Cole in a student dormitory. Also, the court found UGA's response inadequate once it learned of William's allegation that she was sexually assaulted.<sup>61</sup> The court also had no problem finding the discrimination to be severe, pervasive, and objectively offensive because of the heinous facts Williams presented and her subsequent decision not to return to UGA due to the incident and UGA's response.<sup>62</sup> The case was remanded back to the district court and, facing liability, UGA quickly settled with Williams for an undisclosed amount.<sup>63</sup>

## 2. *Title IX analysis*

This case highlights three additional elements for a university to consider in its efforts to comply with Title IX. First, UGA was exposed to liability due in part to its failure to take corrective measures to guard against potential sexual discrimination by having Cole on campus.<sup>64</sup> Title IX requires that a university take "affirmative action to overcome the effects of conditions" which may result in discriminatory conduct,<sup>65</sup> and the court found that such affirmative action was reasonably expected given the circumstances surrounding Cole. As mentioned previously, the DCL goes to great lengths in describing adequate education and training programs to prevent sexual discrimination, but UGA failed to take appropriate preventative measures.

Second, UGA had received numerous reports of a growing need to train its student athletes on the policy prohibiting sexual discrimination, but these reports were ignored or

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<sup>60</sup> *Id.* at 1294–95.

<sup>61</sup> *Id.* at 1297.

<sup>62</sup> *Id.* at 1298.

<sup>63</sup> W. Scott Lewis et al., *Gamechangers: Reshaping Campus Sexual Misconduct Through Litigation*, The NCHERM 10<sup>th</sup> Anniversary Whitepaper (Nat'l Ctr. for Higher Educ. Risk Mgmt., Malvern, Pa.), 2010, at 12, available at <http://www.ncher.org/documents/2010NCHERMWhitepaperFinal.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> 34 C.F.R. § 106.3(b) (2013).

inadequately responded to. With a Title IX coordinator that oversees all Title IX compliance issues and training, it is unlikely that a university will allow requests for training to go unheeded. Additionally, although not required under the DCL, it is sensible for a university to pay special attention to the training and education of male student athletes in this regard, given the increased likelihood that they are involved in sexual assaults.<sup>66</sup>

Third, the court extended traditional Title IX jurisprudence by adopting language from *Davis*—that a university acts in deliberate indifference “only where . . . [its] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>67</sup> This balancing test is consistent with the expansive language in the DCL, which would extend liability when a university knows or “reasonably should know” about discriminatory conduct on its campus.<sup>68</sup> Universities should err on the side of caution and investigate all allegations of sexual discrimination to avoid an institutional response that is unreasonable given the totality of the circumstances existing within their respective campuses.

### C. *Penn State*

#### 1. *Case summary*

Much could be written about the scandal unfolding at Penn State, but the situation in its entirety is beyond the scope of this paper.<sup>69</sup> At the center of the scandal is Jerry Sandusky, who was convicted in June 2012 of 45 counts of sexual abuse of young boys over a 15-year period and sentenced to serve 30–60 years in prison.<sup>70</sup> Additionally, these lurid acts of sexual abuse have implicated senior Penn State officials, who now face significant criminal charges of their own for their failure to respond to these acts.

Although specific facts remain contested because

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<sup>66</sup> See *supra* note 2 and accompanying text.

<sup>67</sup> *Davis v. Monroe County*, 526 U.S. 629, 630, 648 (1999).

<sup>68</sup> DCL, *supra* note 4, at 4.

<sup>69</sup> For purposes of this paper, I will briefly highlight specific acts or omissions from senior Penn State officials in their response to allegations of sexual abuse involving Jerry Sandusky.

<sup>70</sup> Joe Drape, *Sandusky Guilty of Sexual Abuse*, N.Y. Times, June 22, 2012, at A1, available at [http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?\\_r=0](http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?_r=0).

Sandusky's case is the only one that has been litigated, it is fairly certain that several events took place over a fifteen-year period.<sup>71</sup> First, four of Penn State's most senior officials (collectively, Administration) failed to protect against a child sexual predator by concealing his activities from the Board of Trustees, law enforcement, and the university community at large.<sup>72</sup> Second, Administration failed to initiate investigative proceedings in accordance with Penn State policy and procedure.<sup>73</sup> Third, although aware of specific acts of sexual abuse by Sandusky, Administration "empowered Sandusky to attract potential victims to the campus and football events by allowing him to have continued, unrestricted and unsupervised access to the University's facilities."<sup>74</sup> Fourth, Administration allowed the football program to opt out of some mandatory university programs, including Clery Act compliance and standard university disciplinary proceedings.<sup>75</sup> Finally, Administration advanced a "culture of reverence for the football program that (was) ingrained at all levels of the campus community."<sup>76</sup>

## 2. Title IX analysis

The ongoing Penn State scandal highlights two weaknesses previously mentioned: (1) improperly containing Title IX investigations to the department in which they occurred,<sup>77</sup> and (2) perpetuating a culture of reverence for a program while

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<sup>71</sup> See generally FREEH, SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012) available at [http://www.thefreehreportonpsu.com/REPORT\\_FINAL\\_071212.pdf](http://www.thefreehreportonpsu.com/REPORT_FINAL_071212.pdf). This comprehensive report lists all of the known Sandusky abuses and various failures of Penn State's administration.

<sup>72</sup> *Id.* at 14.

<sup>73</sup> *Id.* at 130–31.

<sup>74</sup> *Id.* at 15.

<sup>75</sup> *Id.* at 17. See also Mike Jensen, *Vicky Triponey, the Woman Who Took on JoePa*, The Philadelphia Inquirer, July 22, 2012, at D1 (Vicky Triponey, former vice president for student affairs at Penn State, stated that during her tenure at Penn State, there was a continual tension regarding who on campus should be responsible for making disciplinary decisions for Penn State athletes, and that she and her staff felt pressure from senior leadership to treat Penn State's athletes more favorably than other students being disciplined by the university).

<sup>76</sup> FREEH ET AL., *supra* note 71, at 17.

<sup>77</sup> See *supra* notes 4, at 4, and 69.

overlooking and concealing acts of sexual discrimination.<sup>78</sup> However, the scandal also highlights two very important lessons that will help universities avoid a situation similar to the one unfolding at Penn State.

First, Penn State's Administration failed to investigate alleged incidents of sexual discrimination according to the policies and procedures they had in place.<sup>79</sup> As illustrated in the previous cases, a university is most vulnerable to Title IX liability when its conduct is in direct conflict with its written policies and procedures. Athletic departments should be particularly proactive and concerned with their efforts to investigate discriminatory allegations in an efficient manner, given the current public concern and mistrust surrounding athletic scandals.<sup>80</sup> The DCL helps universities avoid this pitfall by offering the following recommendation: "If a complaint of sexual violence involves a student athlete, the [university] must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures."<sup>81</sup>

Penn State has also come under extensive criticism for the special treatment afforded to its football program.<sup>82</sup> Again, as this paper discusses, having an adequate Title IX compliance effort in place will at least alleviate the special treatment in the university's efforts to prevent and remedy sexual discrimination.

Second, Penn State faces Title IX liability for allowing Sandusky continued access to university facilities and resources, despite Administration's knowledge of specific allegations of sexual abuse.<sup>83</sup> The DCL warns that once an allegation of sexual discrimination has been made, the university "must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects."<sup>84</sup> The DCL contains dozens of practical suggestions for a university to go about this, and given the facts surrounding the

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<sup>78</sup> See *supra* note 69.

<sup>79</sup> A discussion of Administration's legal obligation to report sexual abuse of minors to law enforcement is beyond the scope of this paper.

<sup>80</sup> See *supra* p.1.

<sup>81</sup> DCL, *supra* note 4, at 8 n.22.

<sup>82</sup> FREEH ET AL., *supra* note 71, at 17.

<sup>83</sup> *Id.* at 15.

<sup>84</sup> *Id.*

Penn State scandal, much heartache and liability could have been prevented if Penn State would have taken immediate action to effectively address the problem.

### III. CONCLUSION

Although it is impossible for universities to shield themselves from all future liability, sound policy and procedure do much to prevent potential litigation and create a culture that encourages sound practices in response to allegations of sexual discrimination, including acts of sexual violence. As highlighted in the cases analyzed above, the DCL clarifies the role of universities in responding to allegations of discrimination based on sex and provides guidance and practical suggestions for universities to prevent, remedy, and correct the negative effects of such discrimination. University administrators should carefully review the guidance provided in the DCL and examine their respective institutions' policies and procedures to ensure that they are consistent with this latest guidance.

Additionally, in response to the DCL and the cases referenced above, university administrators would be well served to remember certain guidelines. First, ensure that the policies and procedures in place at your institution dictate an immediate and consistent response to any notice of the discrimination prohibited by Title IX. A university is most exposed to Title IX liability when its response to an allegation of discrimination is in direct conflict with its written policies and procedures. This is best done by properly positioning a Title IX coordinator with campus-wide oversight. Second, although each institution will have a Title IX reporting structure that is unique to its respective campus, such structure should necessitate that allegations of discrimination based on sex are not contained within departments, colleges, or specific university programs. Third, the Title IX coordinator should be charged with ultimate oversight in the training, supervision, and education related to Title IX. These programs and resources should be available campus-wide, but the coordinator should pay particular attention to the training of advisors in residence halls, student athletes and coaches, and any employee that has frequent personal interaction with students. Fourth, in consultation with legal counsel, university

administration should ensure that annual notice is provided to all students, employees, and campus visitors of the university's Title IX compliance and adopted grievance procedures to resolve complaints of discrimination. Finally, in light of the serious nature of Title IX discrimination, university administrators should be proactive in their efforts to prevent, and remedy the effects of sexual discrimination and work to avoid a campus culture that accepts any behavior inconsistent with Title IX.

Although it is impossible to guard against all liability, much can be done to avoid significant Title IX liability and its lingering effects. By carefully implementing Title IX and its regulations and charging a Title IX coordinator to implement the recommendations contained in the latest "Dear Colleague" guidance from the Office of Civil Rights, universities can shield themselves from much liability and provide their students with an educational environment free of sexual discrimination in all of its forms. The suggestions offered in this note are by no means exhaustive, but a careful implementation of the guidance from the DCL tailored to the specific needs of each university will do much to avoid further discrimination, liability, and litigation.

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