Why the NCAA Should Enact Legislation Making Sexual Assault a Violation

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Setting the Stage: NCAA is no Stranger to Controversy

Aggressive enforcement tactics with Cam Newton being “shopped around” during recruiting and Johnny Manziel receiving payment for autographs.

Federal government playing a role in the NCAA infractions process with college basketball shoe scandal and college admissions scandal.

Many state government passing NIL legislation while the U.S. Senate has put NIL on the congressional agenda.

Supreme Court in Alston ruling that NCAA was subject to full of reason analysis and amateurism was not a valid defense when evaluating the restriction of academically-related benefits being provided to student-athletes.
The Bottom Line

➢ Controversies revolved around tangible benefits being provided to student-athletes.
➢ Controversies resulted in impactful reform or punitive action.

NCAA historically prioritized corrective action related to money and amateurism, but not its own student-athletes raping women.

Worst result?
- Exchange of money
- Risk of Student-Athlete’s amateurism
- No physical harm occurred
Sexual Assault is a Problem Among Student Athletes

- Quantitative evidence

- Qualitative evidence

  - High-profile collegiate athletics sexual assault cases in last decade:
    - Norte Dame 2010
    - University of Montana 2012
    - LSU 2015-2019
    - Baylor 2016
    - University of Wisconsin 2019
Governments Have Not Solved the Issue

▪ Starting point: understanding Title IX, the federal legislation that guides the government mechanism responsible for solving sexual assault issues on college campuses, has never used most punitive action: loss of federal funding

▪ The federal government has never sanctioned a single college for failing to comply with this legislation

▪ State governments have also failed to provide any recourse to victims on college campuses

▪ No serious legislation has been introduced at the federal or state level which would make it illegal for a university to allow a student-athlete responsible for a Title IX sexual assault to participate in the athletics program. Other issues, like NIL, seem to be the pressing priority.
NCAA Policy on Sexual Assault Falls Short of Achieving its Purpose

- All of the NCAA actions have been couched in membership pledges, guidance, resources for combatting sexual assault on campus, and a general policy.
- There has never been an NCAA rule legislated within the Association’s operating bylaws addressing sexual assault.
- With the Association historically only enforcing operating bylaws, any sort of written governance not existing within the bounds of the Manual Operating Bylaws does not have an enforcement mechanism tied to it.
NCAA Policy on Sexual Assault Falls Short of Achieving its Purpose Cont’d

The NCAA Policy on Campus Sexual Violence (2021) is one of those unenforceable writings

Takeaways:

1) The process for implementing sexual assault prevention is left to individual member schools, where such schools only need a plan in place for addressing the issues, which leads to lack of direction and uniformity.

2) Non-compliance with the Policy by student-athletes is left to the discretion determined by the individual school.
Legal Underpinnings of the NCAA as a Private Association

- Courts have held NCAA is not a state actor.
- The NCAA is a private association with wide latitude in managing its own internal affairs.
- When enforcing its own rules, the NCAA must meet these minimum thresholds as a private association: (1) the Association must follow its own rules and procedures when enforcing its bylaws, and (2) the penalty imposed by the Association cannot be arbitrary or capricious.
- Courts have held that student-athletes do not have a legal right to athletics participation.
- The legal system has distinguished participation in college athletics as a privilege rather than a legal right.
- NCAA’s main concerns is fulfilling mission of competitive equity and education of its student-athletes. Thus, the NCAA should ground its operating bylaws within the athletics competition context.
The Proposed Legislation

“Any enrolled student-athlete who has been found responsible for sexual assault, based upon a ‘preponderance of the evidence’ evidentiary standard, shall be declared permanently ineligible from athletics participation in the NCAA. The student-athlete shall become ineligible beginning on the date they committed the sexual assault.”
Concerns with the Proposed Legislation

Doesn’t solve problem of schools botching a Title IX sexual assault investigation or intentionally delaying the investigation so that the student-athlete can continue to participate in collegiate athletics
  - However, legislated expectation for member school to actively monitor rules compliance, this issue would be no exception.

Situations where athlete is wrongfully accused of sexual assault and member institution withholds from athletics competition.
  - Making tough calls to withhold a player from competition during a potential NCAA issue is nothing new for institutions. With other eligibility inquiries, member schools must investigate the matter to determine athlete’s eligibility status, or run the risk of playing an ineligible player which historically has had significant penalties

Qualifications of NCAA enforcement staff members investigation sexual assault investigations
  - NCAA is no stranger to sexual assault and interviewing victims. Campus personnel hardly uniquely qualified. Independent body reviewing these investigations is the better alternative.

Not punitive enough as it only renders the student-athlete ineligible.
  - No mention of student-athlete’s scholarship, continued enrollment, involvement with team, or NIL benefits. Student-Athletes prioritize playing time over anything else in their athletics experience.

NCAA should focus on its core governance responsibility: athletic competition. Rendering student-athlete ineligible for sexual assault is well within its mission as a governing athletics body.
Legal Challenges for the NCAA

(1) equal protection and due process claims; (2) heightened duty of care owed to other students by member institutions because of the more rigorous approach to sexual assault through background checks of student-athletes; (3) gender and racial discrimination claims; (4) privacy claims; and (5) partiality in a Title IX investigation

- These issues are distinguishable for the proposed legislation for two reasons (1) because of its status as a private association, the governance of NCAA regulating athletics participation and eligibility is generally given deference by courts (2) the only interest impacted by the rule is not rooted in a right, but rather the privilege of athletics participation

The proposed legislation does not impact property rights and stays squarely within the mission of the private Association executing and enforcing its eligibility rules, with a focus on governance of athletics competition

However, a student-athlete could challenge NCAA ruling if NCAA inquiry conflicts with the institutions’ own Title IX sexual assault investigative results.

- The student-athlete would have to show (1) NCAA did not follow its own procedures; and (2) its ruling was arbitrary and capricious
Legal Challenges Cont’d

If a school declared a student-athlete eligible following a Title IX inquiry, it could challenge the NCAA finding the same athlete ineligible if the Association did not follow its own rules or it acted arbitrarily in its ruling.

- The student-athlete/school would have to clearly show that the NCAA did not follow its own infractions process procedures/protocols.

Courts have held students at public institutions generally have a liberty interest in their reputations when facing school discipline. Student-Athletes could challenge an NCAA rulings on their sexual assault findings based on this protected interest.

- However, the proposed legislation is part of an entirely separate and private infractions process where the ultimate punitive action is the loss of a privilege, athletics eligibility—a privilege where the student-athlete possesses no property, equal protection or due process rights.
Why is This Important?
Questions and Contact Information

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