

NCAA Sexual Misconduct Policy

Kasey Nielsen and Melissa Carleton
Attorneys
Higher Education Team at Bricker & Eckler LLP



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- We are not giving legal advice today.
- Please consult with your legal counsel regarding specific situations.
- Use chat function to ask general questions and hypotheticals. We encourage questions!
- Yes, we will send out the slides. If you used your email to register, look for a “Thank You For Attending!” email.

Background



The NCAA's Efforts

- Started in 2010
- August 2017 - Board of Governors passed the Policy on Campus Sexual Violence



Background



The NCAA's Efforts

- August 2017 - Board of Governors passed the Policy on Campus Sexual Violence
 - Adopted Aug. 8, 2017
 - Updated Aug. 7, 2018
 - Revised April 30, 2020 to expand the policy to include additional measures (Policy Items 4 – 6)
 - Revised April 27, 2021
 - Delayed the timeline because of the new Title IX regulations implemented by the Department of Education in August and the evolving impact of the Covid-19 pandemic for campuses

The Issue



[USA TODAY Network Investigation \(December 2019\)](#)

- Identified at least 28 current and former athletes since 2014 who **transferred** to NCAA schools despite being administratively disciplined for a sexual offense at another college.
- It found an additional five who continued playing after being convicted or disciplined for such offenses through the courts.
- The concept is not entirely new – schools had “transfer tracers” and student-athlete signing a NCAA compliance form to go into the Transfer Portal

Policy Items 1-3



Since 2017, attest annually

1. The athletics department is informed on, integrated in, and compliant with institutional policies and processes regarding sexual violence prevention and proper adjudication and resolution of acts of sexual and interpersonal violence.
2. The institutional policies and processes regarding sexual violence prevention and adjudication, and the name and contact information for the campus Title IX coordinator*, are readily available within the department of athletics, and are provided to student-athletes.
3. All student-athletes, coaches and staff have been educated each year on sexual violence prevention, intervention and response, to the extent allowable by state law and collective bargaining agreements.

Policy Items 4-6



Attestation begins in the 2022-2023 academic year (by the May 15, 2023 deadline)

4. All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.
6. An institution choosing to recruit an incoming student-athlete or accept a transfer student- athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have it written and to gather information consistent with that procedure could result in penalties.

Annual student-athlete disclosure/questionnaire

Institution takes reasonable steps to confirm student-athlete is being truthful

Written policy about collecting information from other schools

NCAA
MEMBERSHIP

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GOVERNANCE

NCAA Board of Governors Policy on Campus Sexual Violence

Adopted Aug. 8, 2017, Updated Aug. 7, 2018, Revised April 30, 2020, Revised April 27, 2021

The NCAA is a voluntary membership organization dedicated to promoting and developing its core values of academics, well-being and fairness among the 1,100 member schools and more than 450,000 student-athletes who participate in college sports. Sexual discrimination, sexual harassment and sexual and interpersonal violence violate human decency and the Association's core values.

The NCAA Board of Governors passed the Policy on Campus Sexual Violence (NCAA policy) in August 2017. Beginning in the 2017-18 academic year, NCAA schools have attested their compliance with the NCAA policy.

The annual attestation period runs from March 1 to May 15. If a school is not able to attest their compliance with the NCAA policy, it will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.

Download the full Policy on Campus Sexual Violence [here](#) (PDF).

Policy Implementation Resources

- [NCAA Board of Governors Campus Sexual Violence Policy Implementation Task Force](#)
- [NCAA Sexual Violence Prevention Tool Kit](#)
- [Task Force Recommended Timeline \(PDF\)](#) (PDF)
- [Task Force Recommended Checklist \(PDF\)](#) (PDF)
- [Administrator FAQ](#)
- [Student-Athlete FAQ](#)
- [Access Sample Policies and Procedures:](#)
 - Select the "Membership" tab on ncaa.org.
 - Select "My Apps" from the dropdown menu and log in using your affiliated credentials.
 - a. *Note: If you do not have access to MyApps please contact your NCAA Applications Administrator at your school or conference to gain access.*
 - Select the "Membership Secure Resources" icon.
 - Review the legal disclaimer and view the current sample policies and procedures documents that are available.

Annual Attestation Process Resources

- In the fourth year of the policy, the [following schools](#) attested that they have followed the policy requirements.
- [Attestation Process FAQ](#)

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As for Policy Items 1-3....



NCAA's Research on Sexual Violence Prevention Efforts (January 2020)

- Over 70% of responding athletics departments have a designated individual who oversees sexual violence prevention efforts.
- Over three-quarters (77%) of responding athletics departments have an action plan that follows campus protocol for response to a report of a sexual assault.
- One-quarter (24%) of responding schools have a code of conduct policy specific to their athletics department, while most other responding athletics departments defer to their institutional policy (71%).

Stakeholders



Cross-campus collaboration

- Over 70% of responding schools have a cross-campus collaboration team in place working toward sexual violence prevention efforts.

Critical	Others to Consider
<ul style="list-style-type: none"> • General counsel • Title IX coordinator • Athletic administrator (AD, SWA) • Admissions officers 	<ul style="list-style-type: none"> • Dean of students office • Student conduct office • President/chancellor • Student-athlete representatives • Compliance officers • Coaches

Who will have the primary responsibility of overseeing the policy implementation?

What Misconduct is Covered?

****A person who has been disciplined through a Title IX proceeding or criminally convicted, regardless of the degree, and whether the result of a plea or court determination, of either of the following:**

Interpersonal Violence: Violence that is predominantly caused due to the relationship between the victim and the perpetrator, including dating and domestic violence.

Sexual Violence: A term used to include both forcible and nonforcible sex offenses, ranging from sexual battery to rape.

Other Acts of Violence: Crimes including murder, manslaughter, aggravated assault or any assault that employs the use of a deadly weapon or causes serious bodily injury.



Policy Items 4-6



What is the **?

4. All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.
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6. An institution choosing to recruit an incoming student-athlete or accept a transfer student-athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have it written and to gather information consistent with that procedure could result in penalties.

What Misconduct is Covered?



Two buckets

Resulted in discipline through a Title IX proceeding

1

Resulted in criminal conviction for sexual, interpersonal or other acts of violence

2

What Misconduct is Covered? Bucket 1



“Discipline through a Title IX proceeding”

- Only Title IX proceedings?
 - No. Also includes similar campus proceedings related to sexual misconduct.
- What is “discipline”?
- Remember your Title IX definitions →

- Sexual Harassment
 - Quid pro quo
 - Hostile environment
- Sexual Assault
 - Rape
 - Sodomy
 - Sexual assault with an object
 - Fondling
 - Incest
 - Statutory rape
- Stalking

What Misconduct is Covered? Bucket 2



“Criminal conviction for sexual, interpersonal or other acts of violence”

- Regardless of the degree
- Regardless of whether the result was a plea or court determination
- Of either of the following:

Interpersonal violence

- Dating violence
- Domestic violence

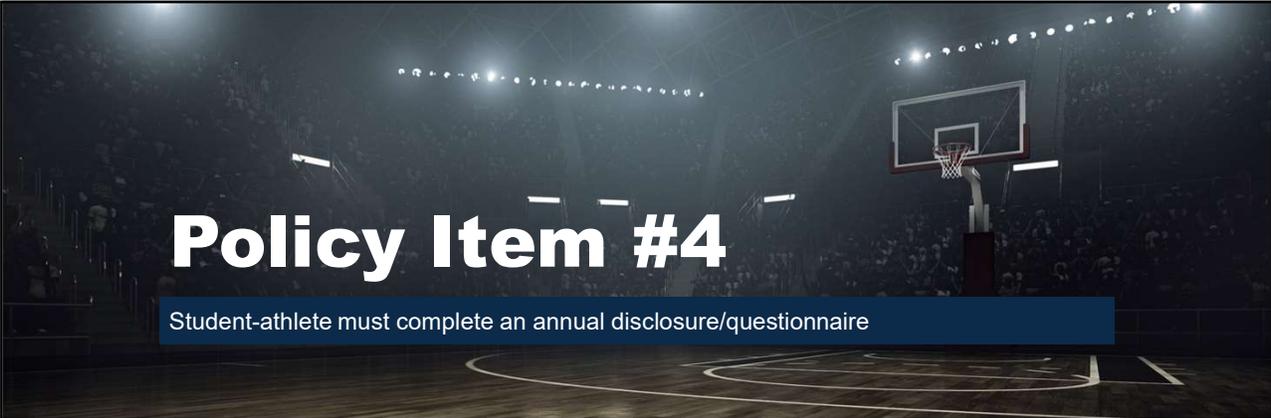
Sexual Violence

- Both forcible and nonforcible sex offenses ranging from sexual battery to rape

Other Acts of Violence

- Murder
- Manslaughter
- Aggravated assault
- Any assault that employs the use of a deadly weapon or causes serious bodily injury

These definitions will be heavily dependent on **STATE LAWS**.
Review state laws to determine what questions need to be asked on your disclosure.



Policy Item #4

Student-athlete must complete an annual disclosure/questionnaire

4. All incoming, continuing and transfer student-athletes have completed an annual disclosure related to their conduct that resulted in discipline through a Title IX proceeding or in a criminal conviction for sexual, interpersonal or other acts of violence.** Transfer student-athletes also must disclose whether a Title IX proceeding was incomplete at the time of transfer. Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution.



Policy Item #4 – Key questions



Student-athlete must complete an annual disclosure/questionnaire

- Who is required to complete the questionnaire?
- When should the student-athlete complete the questionnaire?
- What should the questionnaire include?
- Penalties for failing to make full and accurate disclosure?

Student-athlete questionnaire



Who must fill it out?

- NCAA requirements
 -  Incoming (freshman or prospective)
 -  Continuing (returning)
 -  Transfers
- Other Considerations
 - Not just student-athletes, but the whole campus?

When should the student-athlete complete the questionnaire?



Factors to consider

- **Incoming** and **transfer** students
 - During recruitment?
 - When a student-athlete has committed?
 - Before signing of NLI or financial aid agreement?
 - During admissions process?
- **Continuing** or **returning** students
 - During beginning of the year compliance forms?
 - Before their first practice?



Student-athlete questionnaire



What should the questionnaire include?

- Separate questionnaire for **incoming**/continuing student-athletes and for **transfers**?
 - **Transfers** – must ask whether they have an incomplete Title IX proceeding at the time of transfer
 - Different questionnaire for continuing student-athletes?
- Actual questions largely depends on how your institution is going to interpret the NCAA definitions we just went over
- Approach to asking questions
 - Generally
 - More specific (list conduct, define terms)

Student-athlete questionnaire



What should the questionnaire include? Continued

Will your school ask about...

- Named in civil proceedings?
- Student conduct discipline?
- Academic discipline?
- Team discipline?
- Been investigated at previous institutions?
- Temporary disciplinary action during an investigation?
- Been a suspect in a criminal investigation?

Student-athlete questionnaire



What should the questionnaire include? Continued

- Statement that every student-athlete (or student) must complete this disclosure
- Leave a text box for student-athletes to explain their circumstances if they answer yes to any question
- A contact person so the student-athlete can ask questions about the process
- Statement on how this information will be stored
- Student-athlete signature or parent/guardian if under the age of 18

Student-athlete questionnaire



Penalties for failing to make full and accurate disclosure

- Statement about failing to disclose/withholding information or inaccurate disclosure
 - NCAA states that includes “Failure to make a full and accurate disclosure could result in penalties, including loss of eligibility to participate in athletics as determined by the member institution”
- Do not need to share your institution’s questionnaire with the NCAA

Policy Item #5

Institution takes reasonable steps to confirm student-athlete’s disclosure is truthful

5. Institutions have taken reasonable steps to confirm whether incoming, continuing and transfer student-athletes have been disciplined through a Title IX proceeding or criminally convicted of sexual, interpersonal or other acts of violence.** In a manner consistent with federal and state law, all NCAA member institutions must share relevant discipline information and incomplete Title IX proceedings as a result of transfer with other member institutions when a student-athlete attempts to enroll in a new college or university.



Reasonable steps to confirm



Do your due diligence!

- Should have something in place to confirm whether the disclosure is accurate....
 - Background check? Not required.
 - Internet search
 - Accessing publicly available information
 - Review of digital footprint (social media)
 - Coaches and/or administrators – talk to student-athletes, teachers, coaches, administrators, teammates, family members, etc.
- Who should conduct the due diligence?
- Who should the due diligence be conducted on?
- When should this due diligence take place?



Must share!

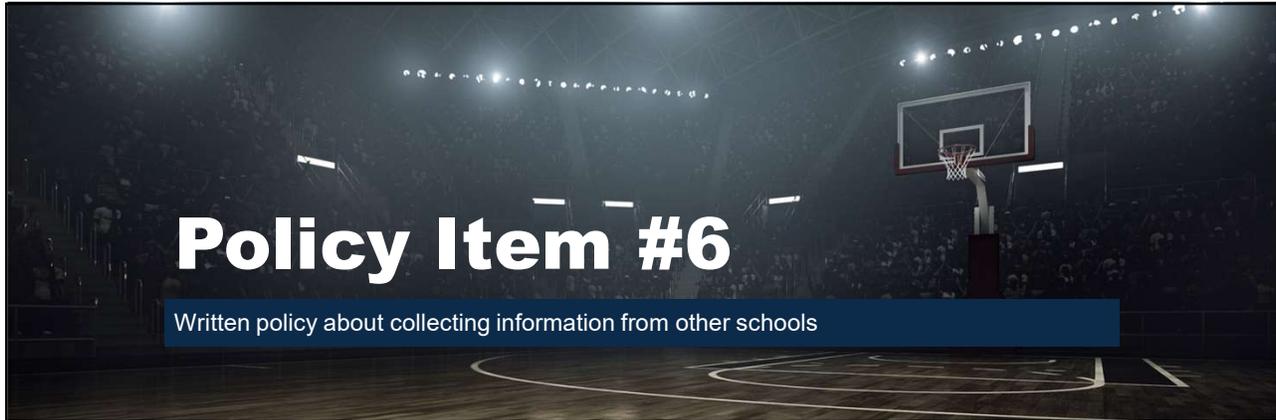


(In a manner consistent with federal and state law)



- Must share:
 - (1) Relevant discipline information and
 - (2) Incomplete Title IX proceedings as a result of transfer
- with other member institutions
- when a student-athlete attempts to enroll in a new college or university.





Policy Item #6

Written policy about collecting information from other schools

- 6. An institution choosing to recruit an incoming student-athlete or accept a transfer student-athlete must have a written procedure that directs its staff to gather information that reasonably yields information from the former institution(s) to put the recruiting institutional leadership on notice that the student left the institution with an incomplete Title IX proceeding, was disciplined through a Title IX proceeding or has a criminal conviction for sexual, interpersonal or other acts of violence.** Failure to have it written and to gather information consistent with that procedure could result in penalties.

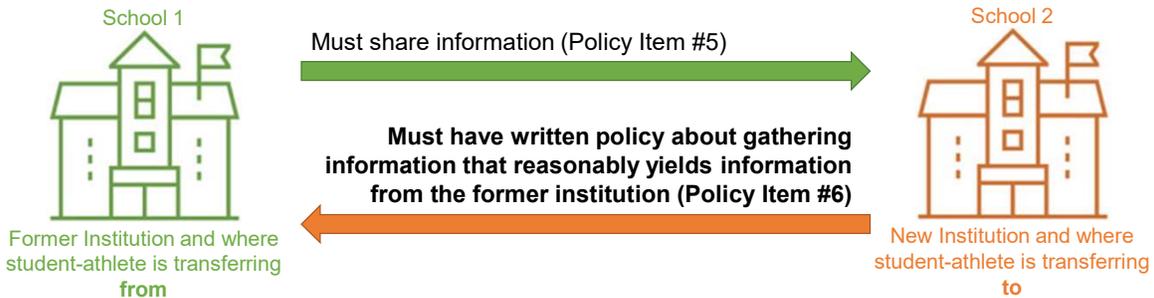


Policy Item #6



Written policy about collecting information from other schools

- Must be written and must follow the procedure, or else it could result in “penalties”



Reasonably yield information from the former institution



How will your institution do this?

- Are you going to do this with every incoming or transfer student-athlete?
- **The most common approach will most likely be contacting the student-athlete's former institution** (either high school or former collegiate institution)



. . . That leads us to FERPA!

FERPA



Family Educational Rights and Privacy Act (FERPA)

- What is FERPA? Protects the privacy of student education records
- Issue with former institution
 - Former institution is going to have to get permission from their former student-athlete so the former institution can talk to the transferring institution
 - Is there an exception where school does not have to get written permission from the student-athlete?
 - Other schools to which a student is transferring – 34 CFR 99.31(a)(2) – must be in Annual Notice



Former Institution and where student-athlete is transferring from

FERPA



Example of FERPA waiver

STATE UNIVERSITY FERPA WAIVER

- What records: *Disciplinary information*
- Records will be released to:
 - Name: *Transferring institution's [Athletic Department and/or Title IX Office]*
 - Address: *Address of transferring institution's [Athletic Department and/or Title IX Office]*
 - Phone number: *Phone number of transferring institution's [Athletic Department and/or Title IX Office]*
- Purpose of the release: *To share relevant information concerning an incomplete Title IX proceeding, discipline received through a Title IX proceeding or knowledge of a criminal conviction for sexual, interpersonal or other acts of violence to the latter institution.*

FERPA



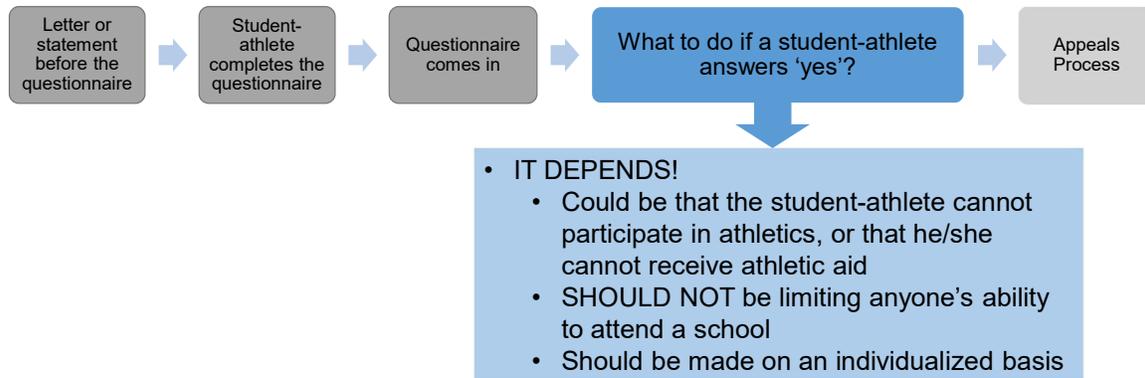
When to have FERPA waiver signed

- Make all student-athletes sign a FERPA waiver for this purpose when they complete their compliance forms?
- Once the student-athlete enters the transfer portal, or indicates they are going to transfer, present the FERPA waiver again.
- What if a student-athlete refuses to sign the FERPA waiver?

Process/Procedure



What if a student-athlete answers “yes” to any of the prohibited conducts?



Closing Thoughts



Start having discussions NOW!



- Work with your cross-campus team to find the best approach to comply with these policy items
- The NCAA gives your institution flexibility – use it to your advantage!

Other Athletic Resources



Have you checked out our Name, Image, and Likeness Resource Center?

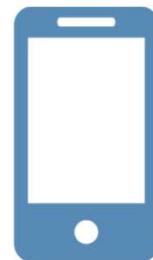
- Six-part checklist articles on developing a Name, Image, and Likeness policy that works for your institution!
- www.bricker.com/nil
- Follow us on Twitter at @BrickerLawNIL or @BrickerHigherEd

Next Events



- Free Webinars (all held at noon EST) – www.bricker.com/events
 - March 24th – Clery Compliance and Enforcement
 - April 20th – Name, Image, and Likeness Update
 - May 12th – Title IX Litigation Update
- Ongoing Title IX Training Program – www.bricker.com/titleix

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