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## COMMENTS

# SLEAUX TIGERS: AN ANALYSIS OF TITLE IX DELIBERATE INDIFFERENCE STANDARD AND ITS APPLICATION TO TITLE IX VIOLATIONS AT LOUISIANA STATE UNIVERSITY

PAUL D. KEKICH\*

### INTRODUCTION

America has a special love for college sports, but in recent years the public and fans have been exposed to the stark reality that university athletic departments are violating Title IX to protect high-profile athletes, coaches, and employees to preserve the reputation of their athletic department and university. Recently, universities including Michigan State, Ohio State, University of California at Los Angeles, Arizona, Arizona State, Florida State, Tennessee, Penn State, Baylor, and Michigan have all reached settlements regarding Title IX violations involving sexual assault and sexual harassment claims arising out of the conduct of student-athletes, or employees of the school's athletic department.<sup>1</sup> Louisiana State University (LSU) is the latest

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1. Corey Williams, *University of Michigan Settlement Latest on School Sex Abuse Payouts*, CHRONICLE (Jan. 19, 2022, 8:09 AM), <https://chroniclet.com/news/289157/university-of-michigan-settlement-latest-in-school-sex-abuse-payouts/>; Lester Munson, *Landmark Settlement in ASU Rape Case*, ESPN (Jan. 30, 2009), <https://www.espn.com/espn/otl/news/story?id=3871666>; Marc Tracy, *Florida State Settles Suit Over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html>; Caitlin Schmidt, *UA Paid Student \$1.275 Million In What Expert Calls 'Unprecedented' Title IX Settlement*, TUCSON (Jan. 26, 2022),

school to allegedly have violated Title IX by ignoring reports of sexual assault and harassment committed by its student-athletes and coaches, and allowed their victims abuse to continue.<sup>2</sup> Courts have historically determined, and the Department of Education in 2020 decided, that for a university to be liable for sexual discrimination under Title IX, their response must be “clearly unreasonable in light of the known circumstances” and that it amounted to “deliberate indifference.”<sup>3</sup>

This comment will discuss the deliberate indifference standard and the Department’s 2020 Final Regulations, how the standard and regulations could lead to a continuation of the violations committed by LSU and proposed changes to the standard as it relates to the conduct of student-athletes and employees of universities athletic departments. First, a brief discussion on recent Title IX violations by universities in relation to student-athletes and their conduct, followed by the allegations of Title IX violations committed by LSU. Next, an analysis of Title IX and the deliberate indifference standard and how it was applied to recent Title IX violations at universities. The deliberate indifference standard will then be applied to the alleged actions of LSU and its employees. A predicted outcome and proposed change to the standard will conclude.

## I. RECENT TITLE IX VIOLATIONS

Michigan State recently had to pay over three hundred victims of sexual assault, a settlement of \$500 million for the school’s inactions regarding Larry Nassar.<sup>4</sup> Ohio State in 2020 agreed to pay one-hundred-and-sixty-two male wrestlers nearly \$41 million for sexual abuse stemming from a team doctor.<sup>5</sup> The University of Michigan recently announced a settlement of \$490 million

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[https://tucson.com/sports/arizonawildcats/ua-paid-student-1-275-million-in-what-expert-calls-unprecedented-title-ix-settlement/article\\_96863e23-bf38-597d-abb1-bf81993c9b42.html](https://tucson.com/sports/arizonawildcats/ua-paid-student-1-275-million-in-what-expert-calls-unprecedented-title-ix-settlement/article_96863e23-bf38-597d-abb1-bf81993c9b42.html).

2. Kenny Jacoby et al., *LSU Knew in 2018 That Officials Kept Allegations Against Athletes In-House. It Did Nothing*, USA TODAY (Jan. 28, 2021, 9:20 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/12/15/lsu-knew-officials-skirted-title-ix-policy-failed-to-report-sexual-misconduct-guice-davis-2018/3859884001/>.

3. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,032, 30,128 (Aug. 14, 2020).

4. Eric Levenson, *Michigan State University Reaches \$500 Million Settlement With Larry Nassar Victims*, CNN (May 17, 2018, 12:46 PM), <https://www.cnn.com/2018/05/16/us/larry-nassar-michigan-state-settlement/index.html>.

5. Erik Ortiz, *Lawsuits Against Ohio State Alleging Sex Abuse by Team Doctor Can Move Forward*, NBC NEWS (Sept. 15, 2022, 1:01 PM), <https://www.nbcnews.com/news/us-news/lawsuits-ohio-state-alleging-sex-abuse-team-doctor-can-move-forward-rcna47885>.

with more than a thousand victims of sexual assault by a physician of the athletic department.<sup>6</sup> Penn State had to pay the victims of Jerry Sandusky more than \$100 million.<sup>7</sup> Arizona State reached a \$850,000 settlement with a student to drop her Title IX case after she alleged she was raped by a player on the football team.<sup>8</sup> In 2016, the University of Tennessee paid \$2.48 million to eight female students to drop their Title IX claims alleging the school created an unsafe environment within the athletic department and had unfair disciplinary system to protect athletes.<sup>9</sup> Also in 2016, Florida State had to settle for \$950,000 with a female student who accused Jameis Winston of raping her.<sup>10</sup> This year the University of Arizona announced a \$1.275 million settlement with a female student that was raped by a running back.<sup>11</sup>

Schools are now paying millions, potentially reaching into the billions in settlements that stem from their inaction involving sexual assault and their students, especially assault and harassment committed by student-athletes and employees of athletic departments.<sup>12</sup> Officials at LSU and within the athletic department have recently faced claims that they ignored and mishandled complaints of sexual harassment and assault arising from the actions of notorious student-athletes, and even from the head football coach.<sup>13</sup> Many of the claims state that LSU had actual knowledge of the sexual harassment and ignored the complaints or attempted to cover them up.<sup>14</sup>

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6. Williams, *supra* note 1.

7. *Id.*

8. Munson, *supra* note 1.

9. Anita Wadhvani, *Settling Sex Assault Lawsuits Costs Universities Millions*, TENNESSEAN (July 6, 2016, 4:32 PM), <https://www.tennessean.com/story/news/2016/07/06/settling-sex-assault-lawsuits-costs-universities-millions/86756078/>.

10. Tracy, *supra* note 1.

11. Schmidt, *supra* note 1.

12. *See, e.g.*, Williams, *supra* note 1.

13. *See* Kenny Jacoby & Nancy Armour, *Two Women Say Ex-Washington RB Derrius Guice Raped Them at LSU When He Was a Freshman*, USA TODAY (Jan. 28, 2021, 10:20 AM), <https://www.usatoday.com/story/sports/ncaaf/sec/2020/08/19/ex-washington-nfl-player-derrius-guice-accused-rape-while-lsu/3391053001/>; Kenny Jacoby et al., *Former LSU Football Coach Les Miles Was Investigated For Sexual Harassment in 2013*, USA TODAY (Feb. 24, 2021, 7:52 PM), <https://www.usatoday.com/story/news/investigations/2021/02/24/former-lsu-coach-les-miles-investigated-sexual-harassment/4575888001/>.

14. *See* Kenny Jacoby et al., *LSU Mishandled Sexual Misconduct Complaints Against Students, Including Top Athletes*, USA TODAY (Jan. 28, 2021, 9:20 AM), <https://www.usatoday.com/in-depth/sports/ncaaf/2020/11/16/lsu-ignored-campus-sexual-assault-allegations-against-derrius-guice-drake-davis-other-students/6056388002/>; Kenny Jacoby & Nancy Armour, *LSU Conspired to Cover Up Reports of Sexual Misconduct and Dating Violence, New LawsUIT Claims*, USA TODAY (Apr. 26, 2021, 6:39 PM), <https://www.usatoday.com/story/news/investigations/2021/04/26/lsu-conspired-cover-up-sexual-misconduct-seven-women-claim-suit/7381875002/>.

## II. CLAIMED VIOLATIONS AT LSU

In April of 2021, the Department of Education announced they would be launching two investigations into LSU's handling of sexual assault cases; the first investigation being done under the Clery Act, and the second under Title IX.<sup>15</sup> If found liable, LSU could lose millions in federal funding and be forced to pay millions in fines.<sup>16</sup> The investigations stem from years of sexual assault claims made by students against predominantly male student-athletes.<sup>17</sup> The investigation into LSU's handling of sexual assault cases will look at allegations from 2016-2020, but LSU's problems stem all the way back to 2013.<sup>18</sup>

In 2013, LSU, through an outside law firm, investigated then-head football coach Les Miles for a complaint of sexual misconduct with a female student-worker.<sup>19</sup> Miles was accused of "texting multiple female students, taking them to his condo alone, making them feel uncomfortable," and making unwanted advances.<sup>20</sup> The investigation of the complaint eventually concluded that although Miles's actions did not violate any laws, his behavior was inappropriate.<sup>21</sup> Miles was "ordered to stop hiring student employees to babysit, cease being alone with student employees, and to attend eight one-hour sessions with an attorney."<sup>22</sup> Joe Alleva, LSU's athletic director at the time, barred Miles from texting and calling students as well.<sup>23</sup>

In response to the incident involving Miles, LSU's athletic department implemented new policies and procedures for reporting incidents.<sup>24</sup> Incidents,

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15. Madelyn Cutrone, *Department of Education Opens Two Investigations Into LSU's Title IX Procedures*, REVELLE (Apr. 15, 2021), [https://www.lsureveille.com/news/department-of-education-opens-two-investigations-into-lsus-title-ix-procedures/article\\_a00c53a2-9d73-11eb-b64e-d3ff80dd59ba.html](https://www.lsureveille.com/news/department-of-education-opens-two-investigations-into-lsus-title-ix-procedures/article_a00c53a2-9d73-11eb-b64e-d3ff80dd59ba.html).

16. *Id.*; see, e.g., Jeremy Bauer-Wolf, *A Record Fine For Underreporting Sex Crimes*, INSIDE HIGHER ED (Sept. 6, 2019), <https://www.insidehighered.com/news/2019/09/06/education-department-fines-michigan-state-45-million-not-reporting-nassar-crimes> (reporting that, in 2019, Michigan State University was forced to pay \$4.5 million for failing to report sexual assault cases properly).

17. Katherine Manuel, *Timeline: LSU's Alleged Mishandling of Sexual Assault Cases*, REVELLE (Mar. 3, 2021), [https://www.lsureveille.com/news/timeline-lsus-alleged-mishandling-of-sexual-assault-cases/article\\_c5bc3000-7c89-11eb-bf5d-b3cfaf23cb7a.html](https://www.lsureveille.com/news/timeline-lsus-alleged-mishandling-of-sexual-assault-cases/article_c5bc3000-7c89-11eb-bf5d-b3cfaf23cb7a.html).

18. Jacoby et al., *supra* note 13.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Kenny Jacoby et al., *Independent Investigation Finds That LSU Routinely Mishandled Allegations of Sexual Misconduct*, USA TODAY (Mar. 5, 2021, 8:33 PM), <https://www.usatoday.com/story/news/>

including arrests, hazing, or other sexual misconduct altercations, would be reported to senior athletic officials instead of the school's Title IX office.<sup>25</sup> This policy directly conflicted with Title IX and LSU's school policy of automatically reporting any allegations of sexual misconduct to the school's Title IX office.<sup>26</sup> In 2016, and 2018, Alleva reminded employees of their responsibility to report such incidents, but instead of stating to report them to LSU's Title IX office, he reiterated to report the incidents to athletic department officials involved in handling complaints against student-athletes.<sup>27</sup> This internal reporting policy within the athletic department would eventually lead to the abuses that occurred from 2016 to 2020.<sup>28</sup>

The current Department of Education investigations start with incidents beginning in 2016.<sup>29</sup> In 2016, LSU running back Darius Guice was caught taking a nude photograph of Samantha Brennan, a female student worker, and shared the photo with his teammates.<sup>30</sup> Brennan was called into a meeting with Sharron Lewis, the head of football recruiting, and Miriam Segar, a senior associate athletic director. The meeting resulted in Brennan not pressing charges and only filing a report with the LSU Police Department, not LSU's Title IX office.<sup>31</sup> Later in 2016, Guice was accused of raping a female tennis player at a party.<sup>32</sup> Guice claimed the female athlete was intoxicated, and when other tennis players alerted the head tennis coach, Julia Snell, the female student-athlete was administered a drug test.<sup>33</sup> The results got the tennis player kicked off the team and Snell did not report the incident to the Title IX office.<sup>34</sup>

In 2017, the female tennis athlete raped by Guice in 2016 attended rehab paid for by LSU.<sup>35</sup> While there, she informed a counselor that Guice had raped her, and the counselor reported the incident to LSU.<sup>36</sup> The athlete's father also

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investigations/2021/03/05/lsu-report-school-routinely-mishandled-sexual-misconduct-allegations/4587152001/.

25. *Id.*

26. *Id.*

27. Jacoby et al., *supra* note 2.

28. Manuel, *supra* note 17.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

reported the incident to the head tennis coach, Julia Snell; however, Snell reiterated that she did not believe the father's daughter.<sup>37</sup> Even though LSU was informed, and the tennis head coach was informed for a second time; the Title IX office never reached out to the athlete or her father.<sup>38</sup> Guice never received any on-field discipline, was allowed to finish out his career at LSU, and was drafted in the second round before being arrested for domestic violence in 2020.<sup>39</sup>

Also in 2016, then-LSU student Calise Richardson reported to her boss, Sharon Lewis, that her boyfriend, LSU football player Drake Davis, had been verbally and physically abusive.<sup>40</sup> After a football game in October 2016, Davis pushed Richardson to the ground after getting into an altercation at a local bar.<sup>41</sup> The next morning, Sharon Lewis called Richardson, accused her of starting the altercation and asked Richardson to have a meeting to hear Richardson's side of the story.<sup>42</sup> Richardson alleged she was never offered any resources during the meeting and was persuaded into not pressing any charges.<sup>43</sup> LSU's school policy at the time was for university employees to report any possible sexual misconduct or dating violence to the school's Title IX office; however, records show the office was never notified of the incident.<sup>44</sup>

In 2017, Drake Davis began dating a female tennis player named Jade Lewis.<sup>45</sup> Over the course of the next year, Davis would beat Lewis a total of six times.<sup>46</sup> Lewis informed her trainer and the head tennis coach, Julia Snell, of the incidents, but the incidents were never reported to the Title IX office.<sup>47</sup> In 2018 Davis punched Lewis's ribs, and three weeks later, Lewis reported the incident to the head trainer.<sup>48</sup> In April of 2018, Davis texted LSU's executive deputy athletic director, Verge Ausberry, that he had hit Lewis; still no one

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37. *Id.*

38. *Id.*

39. Chris Cwik, *Derrius Guice Suspended For Six Games Following Domestic Violence Arrest in 2020*, YAHOO! SPORTS (Aug. 13, 2021), <https://sports.yahoo.com/derrius-guice-suspended-for-six-games-following-domestic-violence-arrest-in-2020-222217243.html>.

40. Jacoby et al., *supra* note 2.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Manuel, *supra* note 17.

46. *Id.*

47. *Id.*

48. Jacoby et al., *supra* note 2.

was notified.<sup>49</sup> LSU athletics finally filed a Title IX report, but it took LSU two months until they interviewed Lewis, and by then, Davis had beaten Lewis three more times.<sup>50</sup> Not until August of that year did an LSU athletic department employee contact the LSU Police Department and provide photos and text messages of Davis's actions against Lewis.<sup>51</sup> Eventually, Davis was arrested the next day.<sup>52</sup> In 2019, Davis admitted in court that he hit Lewis and violated a court-issued protective order.<sup>53</sup> In July of 2019, Davis was finally expelled from LSU.<sup>54</sup>

When Davis was arrested in 2018, Calise Richardson, Davis's first abuse victim from 2016, went to Verge Ausberry to tell him about the abuse she received from Davis in 2016.<sup>55</sup> Richardson stated feeling guilty and responsible for Jade Lewis's pain, because of not reporting Davis back in 2016, and mentioned about reporting about the abuse then.<sup>56</sup> However, Ausberry stopped her and told Richardson to talk to Miriam Seager since it involved a dating incident with a student-athlete.<sup>57</sup> Richardson never got a hold of Seager and the only response she received was one voicemail left by Seager.<sup>58</sup> This led Richardson to file a complaint with LSU's Title IX office, against Sharron Lewis for her lack of reporting of the original sexual assault complaint in 2016.<sup>59</sup>

Under that investigation, Sharron Lewis admitted that she was unaware of LSU's Title IX office until 2017, and that she would have reported the Title IX issues involving student-athletes to either Miriam Segar or Verge Ausberry.<sup>60</sup> The investigation found that Sharron Lewis violated LSU's Title IX policy by not reporting the abuse in 2016; however, LSU did not issue any punishment.<sup>61</sup> Lewis would later be promoted to associate athletic director in August of 2020.<sup>62</sup> The investigation also showed that Lewis and Ausberry had a practice

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Manuel, *supra* note 17.

55. Jacoby et al., *supra* note 2.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*



of reporting sexual misconduct allegations not to LSU's Title IX office, but instead to Segar.<sup>63</sup> This guidance was from the highest person in the athletic department, the athletic director, Joe Alleva.<sup>64</sup> Even when incidents were reported to Segar, she would not always properly relay the allegations to the school's Title IX office.<sup>65</sup>

In October of 2020, *USA Today* sued LSU for four more police reports that allege LSU football players committed acts of sexual assault.<sup>66</sup> LSU only released three reports and redacted any information related to suspects, victims, or witnesses.<sup>67</sup> In November of 2020, after reports of sexual assault cover-ups at LSU came to light, LSU was forced to hire an external law firm to conduct a Title IX investigation.<sup>68</sup> The investigation by the firm concluded that LSU's handling of sexual misconduct complaints was a "serious institutional failure' created by campus leaders," which ultimately left students at risk.<sup>69</sup> Although neither were fired, Verge Ausberry received a thirty-day unpaid suspension and Miriam Seager received a twenty-one-day unpaid suspension.<sup>70</sup> Finally, in February and March of 2021, the Department of Education launched its own investigations into LSU's handling of sexual misconduct cases.<sup>71</sup>

### III. THE DELIBERATE INDIFFERENCE STANDARD

#### A. Case Law

The Supreme Court has held that for a school to be held liable for student-on-student sexual harassment, the school must have had actual knowledge of the harassment and its response amounts to deliberate indifference.<sup>72</sup> Courts have concluded that schools can be found liable for violating Title IX if the school implemented a policy that inadequately trained and provided guidance

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63. *Id.*

64. *Id.*

65. *Id.*

66. Manuel, *supra* note 17.

67. *Id.*

68. Brooks Kubena, *LSU Hires Law Firm to Review Sexual Misconduct Policies in Wake of USA Today Investigation*, ADVOCATE (Nov. 16, 2020, 6:03 PM), [https://www.theadvocate.com/baton\\_rouge/sports/lsu/article\\_db881c04-2866-11eb-bfe2-5f35aaa0e9a7.html](https://www.theadvocate.com/baton_rouge/sports/lsu/article_db881c04-2866-11eb-bfe2-5f35aaa0e9a7.html).

69. Jacoby et al., *supra* note 24.

70. *Id.*

71. Cutrone, *supra* note 15.

72. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

to employees which results in further abuse.<sup>73</sup> Courts have also “suggest[ed] that liability is appropriate where the funding recipient was deliberately indifferent to known prior acts of harassment by the same perpetrator against victims other than the [claimant].”<sup>74</sup> The deliberate indifference standard sets a “high bar” to meet in order to impose Title IX liability on a university.<sup>75</sup> The “standard . . . prevents institutional liability for conduct beyond the scope of its disciplinary reach.”<sup>76</sup>

In *Kollaritsch v. Michigan State University Board of Trustees*, the Sixth Circuit further held that for a student-victim to prevail on a claim under Title IX, they must prove the school’s inadequate response caused further actionable harassment.<sup>77</sup> This has led courts to state they “will not second guess a school’s disciplinary decisions—even a school’s decision not to impose any disciplinary measures—so long as those decisions are not clearly unreasonable” if there lacks any evidence of repeated actionable harassment.<sup>78</sup> Recent courts have ruled in favor of universities on motions for summary judgment in Title IX cases involving sexual harassment including both regular students and student-athletes.<sup>79</sup> These courts have rejected arguments for changing the standard from deliberate indifference to more of a strict liability standard or reasonableness standard to hold universities liable.<sup>80</sup>

One of the most recent cases discussing how courts currently apply the deliberate indifference standard is the case of *Foster v. Board of Regents of University of Michigan*.<sup>81</sup> The case involves Rebecca Foster, a student in the University of Michigan’s executive master of business administration program from 2012-2014.<sup>82</sup> While attending the program in Los Angeles, a male classmate allegedly forced himself onto her.<sup>83</sup> Foster reported the incident to the University’s Office of Institutional Equity and was granted a no-contact

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73. *Simpson v. Univ. of Colo.*, 500 F.3d 1170, 1178 (10th Cir. 2007).

74. *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 806 (M.D. Tenn. 2016).

75. *Stiles v. Grainger Cnty.*, 819 F.3d 834, 848 (6th Cir. 2016).

76. *DeGroote v. Ariz. Bd. of Regents*, No. CV-18-00310, 2020 WL 10357074, at \*9 (D. Ariz. Feb. 7, 2020).

77. *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 618 (6th Cir. 2019).

78. *See Jauquet v. Green Bay Area Cath. Educ., Inc.*, 996 F.3d 802, 809 (7th Cir. 2021).

79. *See Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 971 (6th Cir. 2020) (en banc); *Kowalski v. Mich. State Univ.*, No. 1:18-cv-390, 2021 WL 5568044, at \*2 (W.D. Mich. Feb. 24, 2021) (order on Motion to Stay and Order on Motion for Reconsideration—Document #59).

80. *Foster*, 982 F.3d at 968.

81. *Id.* at 960.

82. *Id.* at 962.

83. *Id.* at 962-63.

order.<sup>84</sup> The accused male student broke the order multiple times by texting her, writing threats, and blocking her path through doorways.<sup>85</sup> The University followed up on a complaint filed by Foster and moved the male student to another hotel, and banned him from any social events where Foster was in attendance.<sup>86</sup> The school also offered more accommodations for Foster and offered to let her finish the program in Ann Arbor, which she declined.<sup>87</sup> The male student continued to violate the no-contact order until the University banned him from attending class as well as graduation.<sup>88</sup> The male student did attend the graduation ceremony but was removed by campus police.<sup>89</sup> The school released an investigative report that ruled the male student had committed acts of sexual harassment, banned the student from campus for three years, and placed a permanent no-contact order with Foster.<sup>90</sup> Foster sued the school because they had prior acknowledgment of the incidents and failed to protect Foster from the student.<sup>91</sup>

The Sixth Circuit, hearing the case en banc, ruled in favor of the University.<sup>92</sup> The court held five things. First, that the University only had five days from the first notice of sexual harassment to the end of the program, and every time harassment was reported, the school increased measures to stop the misconduct.<sup>93</sup> Second, that the University took proportionate measures to accommodate Foster and her needs, even offering her to attend classes from a different campus, but she declined that option.<sup>94</sup> Third, that when the harasser violated the no-contact order, the schools' actions of banning him from future classes and graduation was an appropriate measure.<sup>95</sup> Fourth, that when the male student posted on Facebook that he would attend the graduation, the University police had officers stay overnight in Foster's hotel; these actions indicated the opposite of deliberate indifference.<sup>96</sup> Finally, when the male student did show up to graduation, the University police arrested him and put

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84. *Id.* at 963.

85. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 963-64 (6th Cir. 2020) (en banc).

86. *Id.* at 963.

87. *Id.* at 964.

88. *Id.*

89. *Id.* at 965.

90. *Id.*

91. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 965 (6th Cir. 2020) (en banc).

92. *Id.* at 971.

93. *Id.* at 966.

94. *Id.*

95. *Id.*

96. *Id.* at 967.

him on a plane back to California, preventing any contact with Foster, which also did not show deliberate indifference.<sup>97</sup>

The Court, in the end, found that looking at the University's actions, it took reasonable steps to protect Fosters' learning experience, which is the purpose of Title IX.<sup>98</sup> The Court found that the escalating measures of verbal warnings, severe sanctions, suspension from class, and being banned from graduation were reasonable measures designed to stop any harassing actions from continuing.<sup>99</sup> The Court struck down the notion that just because harassment continues, a jury will find that a school was deliberately indifferent and reiterated that a school can only be found liable if they took no actions or unreasonable actions in the light of circumstances.<sup>100</sup> Ultimately the Court ruled that "a school may be held liable only for what it can control."<sup>101</sup>

### *B. Department of Education 2020 Title IX Final Regulations*

In August of 2020, the Department for Education released its updated Final Regulations on Title IX.<sup>102</sup> At the time, Education Secretary, Betsy DeVos stated the Final Regulations would bring historic changes to Obama-era regulations that would make the grievance process fairer and better protect accused students.<sup>103</sup> The Final Regulations added new protections to accused college students; mandating live hearings by a party that is neither the university's Title IX coordinator nor the investigator, allows real-time cross examination of each student by the other student's representative, and added a right to an appeal.<sup>104</sup> The regulations also gives school's the right the raise the evidentiary standard to find a respondent liable from a preponderance of the evidence, to a clear and convincing standard.<sup>105</sup>

Also within the Final Regulations the department announced that the same framework used in case law to determine if a school was liable under Title IX

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97. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 967 (6th Cir. 2020) (en banc).

98. *Id.*

99. *Id.*

100. *Id.* at 968.

101. *Id.* at 971.

102. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,026-579 (Aug. 14, 2020).

103. Tovia Smith, *Federal Rules Give More Protection to Students Accused of Sexual Assault*, NPR (May 6, 2020, 9:11 PM) <https://www.npr.org/2020/05/06/851733630/federal-rules-give-more-protection-to-students-accused-of-sexual-assault>.

104. *Id.*

105. *Id.*

for sexual discrimination arising out of sexual harassment, would now be the same framework the Department would use to determine liability under its investigations.<sup>106</sup> The Department claims that “[d]eliberate indifference provides appropriate flexibility for recipients while holding recipients accountable for meaningful responses to sexual harassment that prioritize complainants’ wishes.”<sup>107</sup>

Regarding the deliberate indifference standard itself, the Department focused on two aspects, supportive measures for victims, and a fair grievance process for the respondent.<sup>108</sup> The Final Regulations now hold that for a school to not be deliberately indifferent:

[their] response [must] treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.<sup>109</sup>

The Department further explained the proper steps a university should take:

[t]he Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.<sup>110</sup>

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106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,032-34.

107. *Id.* at 30,209.

108. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,209 (Aug. 14, 2020).

109. *Id.* at 30,087.

110. *Id.*

The new regulations also make every employee of elementary and secondary schools' mandatory reporters; however it does not extend the same standard to all university employees.<sup>111</sup> The Department gave universities wide discretion to make their own employee reporting policy to decide which employees would be mandatory reporters and which ones are not.<sup>112</sup> The Department reiterates under the new Final Regulations, schools are now specifically required to investigate allegations in a formal complaint and must explain to each complainant the option of filing a formal complaint.<sup>113</sup> However, the Department states that without a formal complaint the deliberate indifference standard requires that a school's response still not be clearly unreasonable in the light of known circumstances.<sup>114</sup> The final ruling also clarified that a university must only respond to off-campus incidents that are in places, or occurring, during events the school is involved with.<sup>115</sup>

The Department of Education at the time believed the deliberate indifference standard was the correct standard and that "there are many different factual circumstances under which a recipient's response may be deemed deliberately indifferent."<sup>116</sup> The Department believed that under the standard it is expected that a school will consider whether the respondent is in a position of power or not and that it will act reasonably in light to that known fact.<sup>117</sup> It further believed the changes to the deliberate indifference standard "ensure[d] that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process."<sup>118</sup>

#### IV. WAS LSU DELIBERATELY INDIFFERENT?

As one can see from recent case law, schools have much leeway regarding the types of measures they wish to implement when handling sexual misconduct cases. Although schools cannot do nothing, they can only be held liable for their inactions or actions that are deemed unreasonable, considering

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111. *Id.* at 30,040.

112. *Id.* at 30,043.

113. *Id.* at 30,209.

114. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,107-08 (Aug. 14, 2020).

115. *Id.* at 30,550.

116. *Id.* at 30,209-10.

117. *Id.* at 30,211.

118. *Id.* at 30,034.

the circumstances. Based on the facts gathered through investigations so far, it appears that the way LSU handled sexual misconduct cases can only be reasonably seen in one way, being deliberately indifferent, if not worse. The actions the University of Michigan took in *Foster* happened over the course of five days and they were still able to implement multiple levels of discipline for the accused harasser.<sup>119</sup> The alleged harassment at LSU had gone on for well over five years before LSU seemed to take any significant actions.<sup>120</sup> While many may think what the University of Michigan did in *Foster* was inadequate and should have been held liable under Title IX, they will be horrified at the inactions LSU took when presented with evidence of sexual misconduct by their student-athletes.

Title IX itself and LSU's own Title IX policy require school officials to report all sexual assault and dating violence allegations directly the schools' Title IX coordinator for investigation.<sup>121</sup> These "policies specifically bar athletic department officials from being involved in the handling or investigation of complaints against [student-]athletes."<sup>122</sup> However, the exact opposite had occurred, the athletic department itself had implemented a policy in direct conflict with the school's policy. The athletic department purposefully did not direct complaints to the Title IX office but kept them "in-house" to protect high-profile student-athletes. When multiple coaches of teams were presented evidence of sexual violence, they either chose not to report the incident or chose not to believe their players. High-ranking LSU athletic officials, from the executive athletic director to the head of football recruiting, made plans to prevent star football players from facing the consequences of their actions.<sup>123</sup>

All of these steps allowed sexual abuse to continue on-campus and off-campus while allowing players to continue playing. There is no evidence that anyone in the athletic department prevented the abused students from seeing their abusers or facing more abuse. Their inactions or actions of preventing proper reporting furthered the abuse victims received and led to more innocent people being victimized. The continuation of sexual harassment undoubtedly affected these students' academic abilities, which Title IX was enacted to protect. It should be clear from the evidence that LSU employees within the athletic department when alerted of sexual misconduct involving notorious

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119. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 962-65 (6th Cir. 2020) (en banc).

120. Manuel, *supra* note 17.

121. Jacoby et al., *supra* note 2.

122. *Id.*

123. *Id.*

male student-athletes, purposefully did not report the complaint to LSU's Title IX office, and that in not doing so allowed the abuse to continue. It is fair to say in many instances LSU tried to protect the student-athlete more than they tried to protect the victims.

When a court or the Department of Education applies the deliberate indifference standard to the known facts of what was occurring at LSU, they must find that LSU was liable in order to protect future students from experiencing abuse. The court in *Foster* indicated that just because abuse continues, it does not automatically mean a school was deliberately indifferent.<sup>124</sup> However, a court must find that a school's actions were unreasonable in light of the circumstances to be liable.<sup>125</sup> It is unquestioned that the abuse continued at LSU; multiple students made complaints about the same student-athlete, yet there is no evidence those players were ever disciplined or forced in any way to cease seeing their victims.<sup>126</sup> As the *Foster* court indicated, a school should only be found liable for what it can control.<sup>127</sup> Employees in the athletic department tried to control the whole situation from the instant they were alerted of any sexual misconduct. They controlled who would be reporting the misconduct and then tried to control the way victims wanted to react to their abuse. The only steps LSU appeared to take was to try to control the situation and cover up any wrongdoing of their student-athletes at the expense of their victims.<sup>128</sup>

Unlike the University of Michigan, LSU did not take immediate action to separate the harasser from the victim; they instead actively tried to keep victims from pressing charges.<sup>129</sup> LSU did not have an escalating line of discipline for these students like the University of Michigan implemented in *Foster*.<sup>130</sup> It often took until the harasser was guilty in court for the school to expel them. From the facts, it appears the athletic department and the school were more concerned with keeping their star players on the field than protecting victims from receiving further abuse. Even with the high bar a victim must meet under the deliberate indifference standard, the victims at LSU have clear evidence that the school did not take proper measures to

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124. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 968 (6th Cir. 2020) (en banc).

125. *Id.*

126. *Jacoby et al.*, *supra* note 2.

127. *Foster*, 982 F.3d at 971.

128. *Jacoby & Armour*, *supra* note 14.

129. *Manuel*, *supra* note 17.

130. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 966 (6th Cir. 2020) (en banc).



prevent harassment from continuing and, in many cases, took improper actions to have it further continue.

#### V. AN ENVIRONMENT FOR CONTINUED VIOLATIONS

Although it was reported that the policy of reporting sexual misconduct allegations made against student-athletes to athletic department employees rather than the Title IX office came from athletic director Joe Alleva,<sup>131</sup> the problem stems much higher than just him. When LSU was asked of any evidence that the school itself tried to change the athletic department's reporting policy, it could produce none.<sup>132</sup> In fact, LSU's president during the time of the abuse, F. King Alexander, had to resign from his job at Oregon State University when the school placed him on probation because of the abuse scandal at LSU.<sup>133</sup> When Kansas was made aware of the allegations against Miles stemming from 2013, Miles was fired.<sup>134</sup> It has been reported that when the Miles incident occurred in 2013, Alleva sent an email to LSU counsel and F. King Alexander wanting to fire Miles, but no further actions were taken at the time.<sup>135</sup>

There is clear underlying evidence that the reporting policy implemented by the athletic department that resulted in the continuation of abuse was directed from the highest people not only within the athletic department but the University as well. However, the school neither acted nor changed the department's policies. When the school was presented with evidence of abuse, its investigation were slow and inadequate. Even after multiple investigations, no employees at LSU have been fired, while two former employees were forced to leave jobs for their actions at LSU.<sup>136</sup> One can easily observe by the school's actions that LSU as a whole, was complicit with the athletic

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131. Jacoby, *supra* note 2.

132. *Id.*

133. Kenny Jacoby et al., *Oregon State University President F. King Alexander Resigns Amid Fallout From LSU Scandal*, USA TODAY (Mar. 25, 2021, 11:56 AM), <https://www.usatoday.com/story/news/investigations/2021/03/23/oregon-state-university-president-alexander-resigns-amid-lsu-scandal/6965847002/>.

134. Chris Low, *Les Miles Out as Kansas Jayhawks' Head Football Coach*, ESPN (Mar. 9, 2021, 7:37 AM), [https://www.espn.com/college-football/story/\\_/id/31030339/les-miles-kansas-jayhawks-head-football-coach](https://www.espn.com/college-football/story/_/id/31030339/les-miles-kansas-jayhawks-head-football-coach).

135. Heather Dinich, *Investigation Into LSU Football Reveals Firing Recommendations For Coach Les Miles in 2013*, ESPN (Mar. 5, 2021), [https://www.espn.com/college-football/story/\\_/id/31011413/investigation-lsu-football-reveals-firing-recommended-coach-les-miles-2013](https://www.espn.com/college-football/story/_/id/31011413/investigation-lsu-football-reveals-firing-recommended-coach-les-miles-2013).

136. Jacoby et al., *supra* note 133; Low, *supra* note 134.

department's policy, and knowledge of it went beyond just the athletic director.

It is clear from the actions of officials at LSU and officials at other schools, as mentioned before, that this is a larger societal issue. The highest positioned leaders in our institutions of higher learning are actively covering up sexual misconduct allegations against high-profile student-athletes, coaches, and employees. Schools are actively trying to preserve the millions they receive from athletics, while risking millions in educational funding and settlement agreements to protect their athletic brands. The problem stems from the athletic director to the school president, to boosters that force their say for donations. With athletic department revenues increasing every year, largely driven by television contracts, universities will only be further incentivized to protect their student-athletes in order to keep them on the field.<sup>137</sup>

Unfortunately, the Department of Education's 2020 Final Regulations and its definition of the deliberate indifference standard will only make it harder for universities to keep their student-athletes accountable and easier for them to violate Title IX. To start, the Final Regulations does not make all employees at universities mandatory reporters like it does for employees of K-12 school, but instead allows universities to create their own reporting policy.<sup>138</sup> This will only lead to the further reporting problems like the ones that occurred at LSU. Universities will be able to use this to craft policies that potentially make certain employees of the athletic department, non-mandatory reporters, and will funnel complaints to those employees to avoid formal complaints being filed with the university's Title IX Office.

Second, although victims must be informed of their right to file a formal complaint, the regulations only mandates that universities investigate formal complaints,<sup>139</sup> this will further allow non-mandatory reporting athletic department employees to pressure victims into not filing formal complaints when victims are funneled to them. The same system of underreporting that occurred at LSU can be easily implemented at other universities under the Final Regulations. Universities could potentially create policies that make certain high-profile employee's non-mandatory reporters, have them handle the complaints against student-athletes, and then while offering to file a formal

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137. Stewart Mandel, *The Future of Power 5 TV Contracts: The Next Windfall is Only a Few Years Away*, ATHLETIC (June 16, 2020), <https://theathletic.com/1870731/2020/06/16/college-football-television-contract-rights-power-5-big-ten-sec-big-12-pac-12-acc/>.

138. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,040 (May 19, 2020).

139. *Id.* at 30,129.

complaint, ultimately persuading the victim into not filing one. Such a system could potentially avoid liability under an investigation or lawsuit under the Departments definition of the deliberate indifference standard.

In fact, the Final Regulations seem to almost encourage or at least empower this type of behavior from universities. The Final Regulations largely focus on providing supportive measures to claimants while a proper grievance process to respondents to not be deliberately indifferent.<sup>140</sup> This might only further encourage schools to implement policies to suppress disciplining student-athletes or filing any formal complaint against them. The heightened grievance procedures will only cost the school more money and bring more evidence to light which may chill a university's desire to investigate a high-profile, athlete, coach, or employee. The additions of live cross examination and an appeals process will likely chill victims from wanting to file formal complaints and reliving their abuse, further shielding universities and protecting them from having to discipline a high-profile student-athlete, coach, or employee.

In fact many coaches have already noted this could potentially make it harder for them to keep control of their teams.<sup>141</sup> They are afraid to discipline any player accused of sexual misconduct, either through suspension, expulsion, or physical discipline, without the school first going through a proper grievance process.<sup>142</sup> The addition of the required grievance process under the 2020 Final Regulations, limits one of the powerful tools universities can use to control and discipline student-athletes, suspension and removal from their athletic teams. Universities and their athletic departments are already hesitant to discipline high-profile athletes and coaches due to the potential negative effects it may have on the field. The additional grievance process requirements will only further entrench schools into not disciplining athletes until they absolutely have to. If schools are unable to do so or are now even further incentivized not to do so, student-athletes could potentially act out even more which could lead to more cases of sexual misconduct.

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140. *Id.* at 30,034.

141. Paula Lavigne, *Why Critics Say a Trump-Era Title IX Rule Hurts Coaches' Ability to Discipline Athletes Accused of Sexual Misconduct*, ESPN (Mar. 4, 2022), [https://www.espn.com/college-sports/story/\\_/id/33405557/why-critics-say-trump-era-title-ix-rule-hurts-coaches-ability-discipline-athletes-accused-sexual-misconduct](https://www.espn.com/college-sports/story/_/id/33405557/why-critics-say-trump-era-title-ix-rule-hurts-coaches-ability-discipline-athletes-accused-sexual-misconduct).

142. *Id.*

## VI. PROPOSED CHANGES

Unless the Final Regulations and how courts are applying the deliberate indifference standard are changed, the same Title IX violations that have occurred at LSU and many other universities, will only continue to happen, and potentially increase in rate. The Final Regulations should be changed to read that every employee at a university is made into a mandatory reporter, just like the regulations did for K-12 employees. Some may argue that at LSU the school policy was for every employee to be a mandatory reporter, and complaints were still not properly filed with the Title IX office. However, whenever that happens, and in the case of LSU, a court and the Department of Education will find that the school was deliberately indifferent and will be able to hold the school accountable for trying to protect student athletes at the expense of their victims. Under the 2020 Final Regulations universities could potentially do the same conduct that happened at LSU and escape liability, because their school policy did not make certain employee's mandatory reporters. This provision in the Final Regulations creates a loophole that schools could use to further protect student athletes from facing formal Title IX complaints against them.

The Final Regulations also need to be changed to allow universities to suspend or temporarily remove student athletes from their teams when a complaint of sexual harassment is filed against them. The Department of Education should not hold a university liable if it does so and understand that student-athletes should be held to a higher standard. Many will ask why, but unfortunately the past actions of many student-athletes and the actions of universities protecting them at the expense of their victims, has shown they should be held to a higher standard at this point. As mentioned before the power, reputation, and financial incentives of having the best players on the field to have the best team, has already pushed too many universities into making the wrong decisions. Allowing universities to take proactive disciplinary measures will give coaches and universities greater control over their players and hopefully stop potential abuse from occurring or at least reoccurring.

Courts must be reluctant to protect universities even if there is evidence that the school tried to mitigate further abuse. The deliberate indifference standard does that right now; if a school can show they took reasonable steps to mitigate abuse, they can avoid liability.<sup>143</sup> The courts must now set a new standard, that if a school is to avoid Title IX liability, they must not only take

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143. *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960, 967 (6th Cir. 2020) (en banc).

steps to mitigate further abuse, but take the correct steps as listed in the schools Title IX policy. Courts should also look at the university's Title IX policy itself. If the policy is constructed in a way to foster deliberate indifference the court must find liability, even if there are no direct actions of deliberate indifference.

Courts have their role in holding universities accountable and stopping them from protecting student-athletes at the expense of their victims. Courts should not set such a high burden of proof for victims to prove that a university was deliberately indifferent. Universities may try to claim that they took specific steps to prevent abuse and that their actions were at least reasonable, but courts cannot accept this standard. A court must find liability when a school does not correctly follow the specific steps, laid out in the university's Title IX policy. Following a different policy or taking measures that circumvent the school's policy must be seen as violating Title IX. As LSU did, schools cannot implement policies that allow athletic employees to act as decision makers when there is no decision to be made. Courts must find that when a school official is alerted of sexual misconduct, the only proper next step is to report it to the school's Title IX coordinator. Any other type of reporting or keeping the complaint "in-house" must be seen as a step towards violating the law.

If courts adopt this new standard, the burden will shift to the universities and their Title IX policy itself. Universities will be forced to make adequate Title IX policies and make sure their employees implement said policies to avoid liability. If the university's policy is adequate the only question under a claim would be if the university officials correctly followed the university's Title IX policy. This shifts the burden from victims having to prove that university's actions were unreasonable to simply having to show the school did not follow its own policy or that the policy itself was inadequate on its face. This would not be strict liability; if abuse continues, but the university officials followed the proper Title IX policy, liability would not be proper. Courts should shift the burden back to universities on making sure their policies are adequate and that their employees properly follow said policies and liability should be found when either of those are found to be missing.

#### CONCLUSION

Implementing this new standard within the courts and closing the loopholes created by the Department of Education's 2020 Final Regulations could finally start to hold universities accountable for protecting student-athletes who have committed acts of sexual misconduct. The new standard is a nice middle-ground between strict liability and the current deliberate

indifference standard. Schools will not be found liable just on the fact that abuse did reoccur but will not be able to avoid liability by implementing inadequate policies that take some steps, but not the proper ones. Closing the loopholes created by the Final Regulations will stop universities from being able to craft policies that are inadequate and take actions that could circumvent liability under Title IX. The new standard puts the burden on universities to implement stronger Title IX policies and to better educate their employees on their university's policy. Many of the cases discussed are examples of how bad policies and poor education has led to further abuse at universities. Closing the loopholes in the current Final Regulations will also hopefully prevent any universities from taking further actions that protect high profile student-athletes, coaches, and employees at the expense of their victims. Combined, a new standard and closing loopholes the Department of Education created in 2020, will finally start to hold universities accountable for their actions, and allow victims of sexual harassment to receive justice.