Wednesday, May 12, 2021

It has been nearly one full year since the National Collegiate Athletic Association (NCAA) expanded its campus sexual violence policy, placing additional obligations on member institutions. While many stakeholders were hoping for additional guidance from the NCAA to address some of the questions left unanswered, the only additional communication from the NCAA so far has been to delay the effective date from the 2021-2022 academic year to the 2022-2023 academic year.

While this delay affords institutions additional time to prepare for compliance, the COVID-19 pandemic and the impending rewrite of regulations under Title IX of the
Education Amendments of 1972 has left administrators pulling double duty. In addition, with the name, image, and likeness train coming full steam ahead, the workload on university administrators is not going to lighten. The 2022-2023 academic year will be here before we know it, and now is as good a time as any to begin preparing institutional policies and procedures. Below are some key items and questions that university Title IX and athletics administrators may want to think about to prepare.

The NCAA’s policy places three obligations on member institutions:

1. On an annual basis, collect information from all incoming, current, and transfer student-athletes regarding whether “their conduct ... resulted in an investigation, discipline through a Title IX proceeding[, or a criminal conviction for sexual, interpersonal[, or other acts of violence.”

2. Take reasonable steps to confirm the information provided by prospective, continuing, and transfer student-athletes, and provide information to other member institutions that are attempting to confirm information received from transfer student-athletes.

3. Implement policies to “gather conduct-related information from former schools attended by recruited prospects and transfer student-athletes.”

**Information gathering: how and when?**

An institution may want to consider implementing a policy that includes how and when it will collect the NCAA’s required information from each specific group. University administrators may want to consider addressing the following questions in the policy:

- For incoming prospective and transfer student-athletes, does the institution want to collect the required information prior to an official visit, or only after a student-athlete has signed a financial aid agreement?

- Should institutions collect this information on a continuing basis?

- While not specified in the NCAA’s policy, how would an institution respond to a prospect or transfer engaging in conduct that would otherwise need to be disclosed under this policy?

- For current student-athletes, will there be a uniform certification date or a different date for each team?

- Does the institution want to include a stand-alone provision requiring an ongoing notification obligation, or is that covered by a comprehensive student-athlete discipline policy?

**What conduct is covered by the NCAA’s policy?**

Many questions remain about what specific conduct must be disclosed. It is unclear whether all sexual misconduct must be reported. It appears that only conduct of a
violent nature must be included. It remains unclear whether an institution must disclose stalking, exploitation, and voyeurism.

**What are some reasonable steps to confirm disclosed information?**

The NCAA's policy requires institutions to take reasonable steps to confirm information provided by incoming, current, and transfer student-athletes. The NCAA has not addressed what would qualify as “reasonable steps” sufficient to comply with its policy. Institutions may want to consider addressing the following questions in their policies:

- Are criminal background checks required?
- Who should be designated to request, receive, and examine the information from other schools and member institutions?
- Do institutions need to modify their Family Educational Rights and Privacy Act (FERPA) policies or releases to gather or release this information?

**What will the institution’s disciplinary actions be?**

The NCAA's policy also indicates that prospective, current, and transfer student-athletes who fail to fully or accurately disclose information may be subject to discipline. Institutions may want to determine the types and levels of discipline that will be administered, including whether such penalties will include denial of admission or removal from a team.

**Who may be involved in policy development?**

An institution’s NCAA-compliant policy may affect several departments on campus, including athletics, the Title IX office, and the office of student conduct. Therefore, these units may want to connect to discuss particular policy nuances.

**Is now really the time to be worrying about this?**

Yes. Although the effective date of the NCAA's policy is not for another full academic year, coaches recruit several classes in advance. Chances are that coaches on campus already have their eyes set on the 2022 recruiting class. While many coaches currently engage in a similar vetting process during student-athlete recruiting, it may nevertheless be helpful for them to understand what will be required of those student-athletes, including the potential consequences should a prospective student-athlete disclose that he or she has engaged in behavior prohibited under the policy.


National Law Review, Volume XI, Number 132

sexual-violence-policy