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**THE GROWING PLAGUE:  
TITLE IX, UNIVERSITIES, AND SEXUAL ASSAULT**

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**ABSTRACT**

*Sexual assault on college campuses is a deeply troubling problem. Title IX of the Education Amendments Act of 1972 requires universities to offer all students the ability to report any form of sexual assault, including off-campus incidents involving non-students.<sup>1</sup> Title IX also requires all universities receiving federal funding to employ at least one person to ensure Title IX compliance.<sup>2</sup> Recently, the media exposed multiple universities for their non-compliance with Title IX, including several whose athletic department directly contributed to the failure to comply.<sup>3</sup> Because the number of university sexual assault scandals continues to increase, universities should no longer oversee sexual assault claims on their own. This note urges the government to require universities to outsource Title IX investigations to third-parties. Students could file complaints with those third-parties, which would investigate claims without university interference.*

**INTRODUCTION**

Sexual assault on college campuses is pervasive. College-age women are three-times more likely to be sexually assaulted

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<sup>1</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011) [hereinafter DEAR COLLEAGUE LETTER], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

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

<sup>3</sup> See David Haugh, *Will College Athletics Be Next for the #MeToo Movement?*, CHICAGO TRIBUNE (Jan. 29, 2018, 7:30 AM), <https://www.chicagotribune.com/sports/college/ct-spt-haugh-michigan-state-sexual-assault-scandals-20180129-story.html>.

than women in general.<sup>4</sup> With respect to undergraduate students, an estimated 23.1% of females and 5.4% of males experience rape or sexual assault.<sup>5</sup> The actual sexual assault statistics are difficult to measure for a number of reasons,<sup>6</sup> but mostly because sexual assaults consistently go unreported every year.<sup>7</sup> They are not confined to any particular type of school; sexual assaults occur at private, public, and religious schools across the country.<sup>8</sup>

The media has recently exposed several schools for failing to report and remedy campus sexual assaults. These schools include Baylor University, Michigan State University, University of Minnesota, and Florida State University. These examples so clearly demonstrate schools' failure to oversee Title IX's sexual assault claims process.

First, this note will give a brief history of Title IX and its institutional requirements. Second, the note will analyze Baylor University's institutional failure to process sexual assault claims, and its athletic department's complicity. Third, the note briefly discusses other institutions' inability to comply with Title IX. Fourth, this note will propose a solution to take Title IX sexual assault oversight from universities and give it to third-party investigators.

## I. TITLE IX

On June 23, 1972, Congress passed Title IX of the Education Amendments to the Civil Rights Act.<sup>9</sup> Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or

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<sup>4</sup> *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Apr. 16, 2018).

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

<sup>6</sup> *Id.*

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

<sup>8</sup> See Kevin Miller, *Schools Are Still Underreporting Sexual Harassment and Assault*, AAUW (Nov. 2, 2018), <https://www.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/>.

<sup>9</sup> *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last visited Apr. 16, 2015).

activity receiving Federal financial assistance.”<sup>10</sup> The U.S. Department of Education’s Office for Civil Rights enforces Title IX by overseeing programs who receive federal assistance and ensuring that they comply with its requirements.<sup>11</sup> Title IX applies to any institution receiving federal financial assistance.<sup>12</sup> It covers most university conduct, but the law specifically directs schools to comply through their “recruitment, admissions, financial assistance, athletics, employment, and discipline” processes.<sup>13</sup> The Office for Civil Rights evaluates, investigates, and resolves complaints brought by individuals against a university when the university engages in sex discrimination.<sup>14</sup>

Sexual harassment and sexual assault are forms of discrimination under Title IX.<sup>15</sup> Title IX applies broadly with regard to these forms of discrimination; it covers any incident involving a student, occurring on- or off-campus.<sup>16</sup> Institutions “must proactively prevent and respond to claims of sexual harassment, sexual violence, and other forms of gender-based violence retaliation, discrimination and must have an impartial and prompt process for investigating and adjudicating reported cases.”<sup>17</sup> Schools must not only investigate claims but must provide survivors with certain accommodations<sup>18</sup> and with the right to report the incident to the police.<sup>19</sup>

Title IX prohibits any form of sex discrimination involving school athletics.<sup>20</sup> Before Title IX, female athletes had few opportunities because the National Collegiate Athletic Association (NCAA), which became the ruling body for college athletics, did not offer scholarships to women and had no championships for women’s teams.<sup>21</sup> Congress created Title IX to

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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

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

<sup>15</sup> *Your Title IX Rights, END RAPE ON CAMPUS*, <http://endrapeoncampus.org/title-ix/> (last visited Apr. 11, 2018).

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

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

<sup>18</sup> For example, living or academic accommodations.

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

<sup>20</sup> *Title IX Enacted, HISTORY* (Nov. 16, 2009), <https://www.history.com/this-day-in-history/title-ix-enacted>.

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

remedy the that imbalance. Although universities do not have to spend the same amount of money on women's athletics programs as they do on men's, Title IX prohibits schools from maintaining more programs for one sex than the other.<sup>22</sup> Since 1972, the number of women athletes has grown from 295,000 in 1972 to more than 2.6 million in 2009.<sup>23</sup>

Title IX has been largely successful in combating programmatic sex discrimination; however, the sheer number of institutions receiving funds and the pervasiveness of sexual assault has shown the Act's deficiencies. In 2015, the Office for Civil Rights reported that approximately "16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums" receive funding.<sup>24</sup> Given the huge number of institutions it has to oversee, in 2011 the Department of Education released a "Dear Colleague Letter" to remind institutions of their duties to protect against sexual violence.<sup>25</sup> The letter stated that each university must:

- (a) disseminate a notice of nondiscrimination;
- (B) designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX;
- and (C) adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.<sup>26</sup>

The Dear Colleague Letter also reminded the institutions to hire a Title IX coordinator to oversee complaints and identify "any patterns or systemic problems that arise during review of such complaints."<sup>27</sup>

Universities' current Title IX compliance systems are generally ineffective. Title IX coordinators should work with

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

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

<sup>24</sup> OFFICE FOR CIVIL RIGHTS, *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (Apr. 2015).

<sup>25</sup> DEAR COLLEAGUE LETTER, *supra* note 1.

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

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

school or local law enforcement when necessary to carry out investigations.<sup>28</sup> Institutions should train administrators, teachers, and students on how to identify sexual assault and the remedial measures offered by the school.<sup>29</sup> Title IX coordinators should ensure institutions are following Title IX to help battle the subject of sex discrimination at schools.<sup>30</sup>

## II. ATHLETICS ABOVE ALL ELSE: BAYLOR UNIVERSITY

In 2015, Baylor University came under fire for failing to investigate and manage its students' sexual assault claims. Since 2015, Baylor has fired its president, Ken Starr, and head football coach, Art Briles.<sup>31</sup> It also placed on probation its athletic director, Ian McCaw, who eventually resigned.<sup>32</sup> The incident at Baylor exemplifies how universities continuously create systems that fail to protect the students. Baylor is not unique in having numerous campus sexual assault claims, but two things about its scandal were unique: (1) the duration of its systemic failure to investigate the claims, and (2) the involvement of its athletics department.

It is difficult to know the exact number of sexual assaults that Baylor attempted to cover-up; however, a lawsuit claims that thirty-one football players committed fifty-two rapes between 2011 and 2014.<sup>33</sup> Along with the numbers alleged in the civil lawsuit, Pepper Hamilton, a civil litigation firm, conducted its own investigation and found that at least seventeen women reported sexual assault by nineteen players, some of which involved gang rape.<sup>34</sup> For at least three years, if not more, football

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

<sup>29</sup> *Id.*

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

<sup>31</sup> Jay Croft, *A Timeline of Baylor University Sex Assault Accusations*, CNN (May 17, 2017, 8:44 PM), <https://www.cnn.com/2017/05/17/us/baylor-sex-assault-cases-timeline/index.html>.

<sup>32</sup> Shawn Nottingham, *Baylor University: Ken Starr Bumped from Presidency*, CNN (May 27, 2016, 5:34 PM), [https://www-m.cnn.com/2016/05/26/us/baylor-kenneth-starr-art-briles/](https://www.m.cnn.com/2016/05/26/us/baylor-kenneth-starr-art-briles/).

<sup>33</sup> *Timeline: Baylor Football Sexual Assault Scandal*, WFAA (Mar. 14, 2018, 8:35 AM), <https://www.wfaa.com/article/sports/ncaa/timeline-baylor-football-sexual-assault-scandal/287-528654814>.

<sup>34</sup> *Id.*

players continued to sexually assault women on campus without any consequences. The lack of consequences can be attributed to the university's administration, athletic department, and its football program's ascendance.

Baylor had not had a winning football season since 1995, but before the 2008 season, the university hired Art Briles as its head football coach.<sup>35</sup> With Coach Briles, everything began to change.<sup>36</sup> Briles led his team to a winning season within three years, which led to money pouring in from boosters.<sup>37</sup> Baylor's President, Ken Starr, applauded the football program's success—success in athletics generally means success for the university as a whole.<sup>38</sup> That success, however, caused the school to value winning and recruiting talent above all else, especially its morals and duties under Title IX.<sup>39</sup> Recruits were transferring to Baylor without proper background checks, and some of those recruits sexually assaulted women on Baylor's campus.<sup>40</sup>

Under Briles, Baylor's football program implemented a “show-em a good time” policy and used sex, along with Baylor recruitment programs, to ensure top recruits would attend Baylor.<sup>41</sup> Football staff and athletic administrators continuously protected the football players by underreporting and intervening in sexual assault claims.<sup>42</sup> The program also established a “see no-

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<sup>35</sup> Marc Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html>.

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

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.*

<sup>40</sup> Chip Patterson, *Docs: Art Briles, Baylor Officials Actively Involved in Covering up Player Incidents*, CBS SPORTS (Feb. 3, 2017, 3:14 PM), <https://www.cbssports.com/college-football/news/docs-reveal-art-briles-baylor-coaches-actively-involved-in-covering-up-player-incidents/>.

<sup>41</sup> Sarah Mervosh, *New Baylor Lawsuit*, DALLAS NEWS (Jan. 2017, 7:28 PM), <https://www.dallasnews.com/news/baylor/2017/01/27/new-baylor-lawsuit-describes-show-em-good-time-culture-cites-52-rapes-football-players-4-years>.

<sup>42</sup> Patterson, *supra* note 40.

evil, report no-evil” policy and ensured the football players would evade consequences any other student would have faced.<sup>43</sup>

Regardless of the evidence showing that the football program promulgated these policies, the university administration clearly failed to oversee Title IX.<sup>44</sup> It instead used the football program as a scapegoat.<sup>45</sup> This had dire consequences. In 2011, the Obama administration issued its “Dear Colleague Letter” mandating that all universities designate at least one individual to be a Title IX coordinator.<sup>46</sup> A year passed, and Baylor had yet to hire and appoint a Title IX coordinator.<sup>47</sup> During this time, one of the first sexual assault accusations against a football player came to light.<sup>48</sup>

Jasmine Hernandez came forward in 2012, alleging that Baylor University football player Tevin Elliot raped her.<sup>49</sup> The State of Texas charged Elliot with rape, and he was eventually convicted of two counts of sexual assault and sentenced to twenty years in prison.<sup>50</sup> The Texas Court of Appeals affirmed his conviction.<sup>51</sup> Around the time of Elliot’s trial and conviction, another woman at Baylor came forward alleging that a Baylor football player, Sam Ukwuachu, sexually assaulted her.<sup>52</sup> Ukwuachu was sentenced to six months in jail and ten years of probation.<sup>53</sup>

Three years after receiving a federal directive to hire a Title IX coordinator, and after two football players were criminally charged with sexual assault, Baylor finally hired Patty

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<sup>43</sup> *Id.*

<sup>44</sup> See BAYLOR U. BOARD OF REGENTS, BAYLOR UNIVERSITY BOARD OF REGENTS FINDINGS OF FACT 4–5, <https://www.baylor.edu/thefacts/doc.php/266596.pdf>.

<sup>45</sup> See Sarah Brown, *Baylor ‘Set the Football Program on Fire’*, THE CHRONICLE OF HIGHER EDUC. (July 22, 2018), <https://www.chronicle.com/article/Baylor-Set-the-Football/243983>.

<sup>46</sup> WFAA, *supra* note 33.

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

<sup>48</sup> Croft, *supra* note 31.

<sup>49</sup> *Id.*

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

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

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

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

Crawford.<sup>54</sup> Crawford was entrusted with overseeing Title IX claims made by students and investigating all claims to the fullest extent.<sup>55</sup> Crawford soon realized that her role on paper was drastically different from the role the administration actually gave her.

Baylor's administration implemented rules and policies that effectively prevented Crawford from investigating Title IX claims.<sup>56</sup> Crawford resigned from her position as Title IX coordinator in 2016 and filed a complaint with the U.S. Department of Education's Office for Civil Rights, alleging that Baylor actively shirked its responsibility to process Title IX complaints.<sup>57</sup> Throughout the duration of her job, Crawford felt that the harder she worked, the more resistance she experienced from the school's leadership, causing her to doubt the school's willingness to pursue sexual assault complaints.<sup>58</sup> Baylor made it difficult for Crawford to access to police reports, it placed administrative roadblocks in front of her when she tried to schedule interviews with athletes, and administrators consistently told her to do one thing, while acting like they wanted her to do another.<sup>59</sup> At one point, Baylor's athletic director asked Crawford to give any currently-enrolled athletes immunity from investigations.<sup>60</sup> Crawford claimed that the university was more interested in protecting its athletic department than its students.<sup>61</sup> This insulation allowed its then-mediocre football program to rise to prominence.<sup>62</sup>

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<sup>54</sup> Zac Ellis, *A Timeline of the Baylor Sexual Assault Scandal*, SPORTS ILLUSTRATED (May 26, 2016), <https://www.si.com/college-football/2016/05/26/baylor-art-briles-sexual-assault-ken-starr>.

<sup>55</sup> *Id.*

<sup>56</sup> Paula Lavigne & Mark Schlabach, *Former Baylor Title IX Coordinator*, ESPN (Oct. 5, 2016), [http://www.espn.com/college-football/story/\\_/id/17720930/former-baylor-title-ix-coordinator-patty-crawford-says-school-hindered-ability-do-job](http://www.espn.com/college-football/story/_/id/17720930/former-baylor-title-ix-coordinator-patty-crawford-says-school-hindered-ability-do-job).

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

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

<sup>59</sup> *Baylor Outside the Lines* (ESPN television broadcast Nov. 2, 2016).

<sup>60</sup> *Id.*

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

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



In 2015, Baylor's Board of Regents hired Pepper Hamilton to conduct an external review of its method of investigating claims of sexual assault.<sup>63</sup> Pepper Hamilton released its report to the Board of Regents, discussing the numerous shortcomings and mishandling of reports in what should have been a "supportive, responsive, and caring environment for students."<sup>64</sup> The Pepper Hamilton report supported Crawford's claims of roadblocks and lack of administrative support, and found evidence that the football program protected and prioritized football players over victims.<sup>65</sup>

Baylor's previous systematic lack of interest in pursuing Title IX claims soon became clear.<sup>66</sup> Baylor failed to educate students and faculty, provide clear information on resources, provide adequate investigations, and prevent potential hostile situations.<sup>67</sup> The report outlined the administration's failure to oversee and investigate Title IX claims, as well as the football team's own policies contributing to an environment in which sexual assault was ignored, if not sometimes encouraged.<sup>68</sup> Although the Pepper Hamilton report also included a list of policies Baylor should implement, Crawford alleged that the university failed to make them.<sup>69</sup> The changes fell short, Crawford says, because Baylor was quick to place all the blame on the football program.

Although Baylor fired most coaches and administrators on the football team and athletic department, the school's real problems reached the school administration itself.<sup>70</sup> Ian McCaw, Baylor's athletic director during the timeframe in question, claims the university used the football team and athletic programs as scapegoats for the university's inability to manage Title IX.<sup>71</sup> McCaw believes the university failed to adequately train anyone

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<sup>63</sup> Ellis, *supra* note 54.

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

<sup>65</sup> Nicole Auerbach, *Dissecting Pepper Hamilton's Report on Baylor's Failings*, USA TODAY (May 26, 2016, 2:48 PM), <https://www.usatoday.com/story/sports/ncaaf/2016/05/26/pepper-hamilton-report-baylor-sexual-assault-art-briles-fired/84985048/>.

<sup>66</sup> *Id.*

<sup>67</sup> BAYLOR U. BOARD OF REGENTS, *supra* note 44.

<sup>68</sup> Auerbach, *supra* note 6565.

<sup>69</sup> Lavigne & Schlabach, *supra* note 56.

<sup>70</sup> *Id.*

<sup>71</sup> Brown, *supra* note 45.

in the athletic department on Title IX, and firing the football coaches and athletic department administrators was merely a public demonstration to show that Baylor could take quick, decisive actions.<sup>72</sup>

Crawford and McCaw's allegations that Baylor used the football program and athletic department as scapegoats do not stand alone; Baylor students substantiate their claims.<sup>73</sup> Jasmine Hernandez, the Baylor student who first reported a football player for sexual assault, spoke out against the school's lack of resources and overall indifference to her sexual assault claim.<sup>74</sup> After the incident, Hernandez visited Baylor's health services center, but was told the counseling center was overbooked and unable to make an appointment.<sup>75</sup> Hernandez went back to medical services several times, who consistently told her that they did not have any openings.<sup>76</sup> Hernandez's mother personally reached out to Briles when academic services were unaccommodating, only to discover that the university did not take any action to investigate the claims.<sup>77</sup> Hernandez's grades declined, she lost her academic scholarship, and she dropped out of Baylor within a year of her rape. Meanwhile, Baylor's football team experienced tremendous success.<sup>78</sup>

Baylor has settled seven lawsuits, all involving its mishandling of Title IX sexual assault claims under Title IX.<sup>79</sup> Ten anonymous students are currently still involved in litigation stemming from the school's failures.<sup>80</sup> Baylor's current head football coach, Matt Rhule, announced early in 2018, the

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

<sup>73</sup> Tracy & Barry, *supra* note 35

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Jordan Ray, *Baylor Settles with Ex-Volleyball Player Who Accused Football Players of Gang Rape*, STAR-TELEGRAM (July 13, 2018, 4:30 PM), <https://www.star-telegram.com/sports/college/big-12/baylor-bears/article214863715.html>.

<sup>80</sup> Mac Engel, *Think Baylor's Problems Are Over? Not So Fast, Thanks to These Jane Does*, STAR-TELEGRAM (July 26, 2018, 1:19 PM), <https://www.star-telegram.com/sports/spt-columns-blogs/mac-engel/article215485530.html>.

suspension of three football players amid current sexual assault allegations.<sup>81</sup> After the story about Baylor became public, the NCAA decided to investigate the allegations.<sup>82</sup> The NCAA released its report in October 2018, and cited Baylor for a “lack of institutional control.”<sup>83</sup> The NCAA finding a “lack of institutional control” is one of the most severe findings it can make about a school, and it may prompt the NCAA’s “death penalty.”<sup>84</sup> The death penalty shuts down a school’s football program outright.<sup>85</sup> However, this punishment has only been utilized once in NCAA history.<sup>86</sup>

### III. OTHER UNIVERSITIES’ COMPLIANCE WITH TITLE IX

The situation at Baylor is unique. No other university has been so exposed as having similar institutional failures.<sup>87</sup> However, other universities have experienced sexual assault incidents and failed to comply with Title IX.<sup>88</sup> The evidence of other universities’ inability to manage sexual assault allegations furthers the proposition that universities should no longer manage and oversee Title IX compliance.

#### A. UNIVERSITY OF MINNESOTA

Former athletes from the University of Minnesota are suing the university for wrongful expulsion or suspension after the university investigated the sexual assault of a female student by University of Minnesota football players.<sup>89</sup> The female student

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<sup>81</sup> WFAA, *supra* note 33.

<sup>82</sup> Meredith Cash, *NCAA Completes Investigation Into Baylor’s Sexual Assault Scandal and Cites School for ‘Lack of Institutional Control’*, BUS. INSIDER (Oct. 3, 2018, 12:40 PM), <https://www.businessinsider.com/ncaa-completes-investigation-baylor-2018-10>.

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

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

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> BAYLOR U. BOARD OF REGENTS, *supra* note 44, at 4.

<sup>88</sup> *See* Haugh, *supra* note 3.

<sup>89</sup> Sarah Horner, *UMN Report Details Woman’s Sexual Assault Allegations, Gophers Football Players’ Defense*, TWIN CITIES PIONEER PRESS (Jan. 4, 2017, 1:51 PM),

filed a complaint with the university claiming twelve Minnesota football players and one recruit sexually assaulted her.<sup>90</sup> After the student filed her complaint, Minnesota suspended ten football players once its Office of Equal Opportunity and Affirmative Action completed their investigation into the claim.<sup>91</sup> The athletes suing the university are asking for \$45 million, as they claim the university violated their Due Process rights and discriminated against them based on their race and gender.<sup>92</sup>

The University of Minnesota, so far, has shown their ability to take the proper steps and follow protocol in investigating Title IX complaints.<sup>93</sup> Although the university appears qualified to successfully manage Title IX claims, it is still being sued for its investigation. A third-party investigatory organization would take the entire Title IX process out of university control, which would likely insulate the schools from Title IX lawsuits.

## B. MICHIGAN STATE UNIVERSITY

Few systematic Title IX violations are as shocking as the recent one at Michigan State University. Michigan State recently reached a \$500 million settlement with the women and girls Larry Nassar sexually assaulted as the gymnastics team doctor.<sup>94</sup> Nassar—alone—was accused of sexually assaulting around 332 individuals during his time at Michigan State University and as a doctor of the United States Women’s Gymnastics team.<sup>95</sup>

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<https://www.twincities.com/2016/12/17/university-report-details-womans-sexual-assault-allegation-football-players-defense/>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Nick Martin, *Minnesota Football Players Involved in Sexual Assault Investigation Sue School For \$45 Million*, DEADSPIN (June 8, 2018, 4:47 PM), <https://deadspin.com/minnesota-football-players-involved-in-sexual-assault-i-1826681512>.

<sup>93</sup> *Id.*

<sup>94</sup> Katherine Lam, *Michigan State Reaches \$500M Settlement with Larry Nassar Sexual Assault Victims*, FOX NEWS (May 16, 2018), <https://www.foxnews.com/us/michigan-state-reaches-500m-settlement-with-larry-nassar-sexual-assault-victims>.

<sup>95</sup> *Id.*

Nassar began working at Michigan State and with USA Gymnastics in 1988.<sup>96</sup> The first reports of sexual assault committed by Nassar were in 1992.<sup>97</sup> Nassar continued to work at Michigan State, along with other gymnastic facilities, and in 1997, an athlete at Michigan State reported Nassar for sexual assault to then Michigan State gymnastics coach Kathie Klages.<sup>98</sup> Klages told the young woman that she was mistaken and misunderstood, and when other athletes reported the same incidents over the next few years, all were told that Nassar was a respected Olympic doctor and knew what he was doing.<sup>99</sup> Other athletic staff were informed of Nassar's actions, but school administrators told the athletes "they were fortunate to receive the best medical care possible from a world-renowned doctor."<sup>100</sup> In 2014, twenty-two years after the first report of sexual assault by Nassar, a Michigan State graduate reported Nassar to the Michigan State Sports Medicine Clinic, filed a Title IX complaint, and filed a police report.<sup>101</sup>

The 2014 report publicly exposed Nassar, but he continued working at Michigan State for another two years, until another student filed a police report.<sup>102</sup> Only then did the university relieve Nassar of clinical duties.<sup>103</sup> The State charged Nassar with first-degree criminal sexual abuse and possession of child pornography.<sup>104</sup> Klages was suspended in 2017, after records surfaced showing she discouraged athletes from filing complaints against Nassar.<sup>105</sup> Nassar was sentenced to 40 to 175 years in prison for the sexual abuse, which is set to begin after his 60-year sentence on the child pornography charges.<sup>106</sup> After Nassar received his sentence, Michigan State's president and

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<sup>96</sup> James Dator, *A Comprehensive Timeline of the Larry Nassar Case*, SBINATION (Jan. 16, 2019, 11:36 AM), <https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state>.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

athletic director resigned.<sup>107</sup> The women and girls who stood in front of Nassar at his sentencing hearing and read their victim impact statements will never be made whole again, but their current settlement with Michigan State provides some compensation.<sup>108</sup>

Nassar sexually assaulted girls and young women for over twenty years as a “respected” Olympic and university doctor.<sup>109</sup> Student athletes are not the only university actors who commit sexual assault; universities protect staff and athletes alike. If a third-party organization investigated claims of Title IX violations, these women could have gone to the organization, and the university could do nothing to stop them. There is no way to know if the university could have prevented the sexual assaults by Nassar with an investigation of the first incident in 1992, but third-party organizations could prevent these incidents in the future.

### C. FLORIDA STATE UNIVERSITY

Florida State University (“FSU”) came under fire when media reports revealed the university’s cover-up of two sexual assault allegations against then-quarterback Jameis Winston.<sup>110</sup> In 2012, Erica Kinsman reported Winston raped her and sexually assaulted another unidentified woman.<sup>111</sup> One year later, the school investigated both reports while Winston continued playing football.<sup>112</sup> During both investigations, Florida State’s Police Chief called the Dean of Students in charge of Title IX investigations and asked if the university had a policy of telling victims about their potential attacker’s involvement in other allegations.<sup>113</sup> After the conversation, the dean shut down both investigations of Winston.<sup>114</sup> Only after Winston won the Heisman Trophy and the national championship did the investigation

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<sup>107</sup> *Id.*

<sup>108</sup> Lam, *supra* note 94.

<sup>109</sup> See Dator, *supra* note 96.

<sup>110</sup> Kirby Dick & Amy Ziering, *How Florida State Covered up Two Rape Reports Against Jameis Winston*, THE HUFFINGTON POST (Mar. 12, 2017), [https://www.huffingtonpost.com/kirby-dick/how-florida-state-covered\\_b\\_9421824.html](https://www.huffingtonpost.com/kirby-dick/how-florida-state-covered_b_9421824.html).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

continue.<sup>115</sup> When Winston was called to testify, he refused to answer any questions, and the university terminated the investigation.<sup>116</sup> Winston did not receive any punishment for the sexual assault allegations.<sup>117</sup>

Winston was not the only assailant on FSU's football team.<sup>118</sup> The director of Florida State's victim advocate program told lawyers that most of the twenty victims who claimed that football players sexually assaulted them declined to press student code of conduct charges out of fear.<sup>119</sup> Not only were charges rarely brought against the football players, but players received preferential treatment, including access to an athletic department official who helped the players connect with outside lawyers.<sup>120</sup> After the investigation of Winston was dropped, Kinsman filed a Title IX lawsuit against the university, which has been settled for \$950,000.<sup>121</sup> The settlement also requires that FSU implement "sexual assault awareness programs and greater transparency."<sup>122</sup>

Florida State University failed to investigate claims of sexual assault against a single athlete because he was the school's "golden goose." Students, along with the public, threatened Kinsman and hurled derogatory insults at her after she came forward, claiming that she was merely seeking attention.<sup>123</sup> Kinsman eventually left the university.<sup>124</sup>

Florida State's failure to investigate invalidated Kinsman's claim and once again demonstrates a university's perverse incentives to cover-up its athletes' sexual assault. If Kinsman could have reported her claim to a third-party

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See *FSU Official: Players Get Special Treatment, 20 Rape Claims in 9 Years*, FOX SPORTS (Nov. 20, 2015, 9:28 PM), <https://www.foxsports.com/college-football/story/florida-state-official-says-20-rape-allegations-against-football-players-in-9-years-112515>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Laura Wagner, *FSU Pays \$950,000 to Woman Who Accused Jameis Winston of Sexual Assault*, NPR (Jan. 25, 2016, 4:42 PM), <https://www.npr.org/sections/thetwo-way/2016/01/25/464332250/fsu-pays-950-000-to-woman-who-accused-jameis-winston-of-sexual-assault>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*; THE HUNTING GROUND (CNN, Feb. 27, 2015).

organization, the investigation would have been conducted differently and may have produced different outcome. The claims had little lasting effect, as Jameis Winston went on to be the first pick in the 2015 NFL Draft and currently plays for the Tampa Bay Buccaneers.<sup>125126</sup>

#### IV. SOLUTION

Sexual assault remains a severe problem at the four schools discussed in this note, and across the country. Investigations conducted by various authorities have cleared some universities,<sup>127</sup> but other schools, like Baylor, systematically fail to investigate Title IX claims. In response, some universities have created new procedures or updated their policies.<sup>128</sup> However, universities like Baylor made these changes only after victims came forward to put the world on notice that their universities failed them.

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<sup>125</sup> Draft Tracker, *Draft 2015*, NFL, <http://www.nfl.com/draft/2015/tracker#dt-tabs:dt-by-round> (last visited Apr. 23, 2019). Winston served a three-game suspension in the 2018 season after the NFL discovered Winston violated its code of conduct after allegations of sexual assault from an Uber driver from 2016 came to light. Jeanna Thomas, *NFL Suspends Jameis Winston 3 Games for Groping an Uber Driver*, SBINATION (June 29, 2018, 5:49 PM), <https://www.sbnation.com/2018/6/21/16696968/jameis-winston-tampa-bay-buccaneers-suspension-uber>.

<sup>126</sup> Athletes and athletic departments are not the only origin for Title IX violation scandals. *See, e.g.*, Ana Cabera and Sara Weisfeldt, *Punished After Reporting Rape at Brigham Young University*, CNN (Apr. 29, 2016, 4:09 PM), <https://www.cnn.com/2016/04/29/health/brigham-young-university-rape/index.html>. At Brigham Young University students and alumni started speaking out in 2016 over the university's policy of opening honor code violation investigations after a student reported sexual assault.

<sup>127</sup> *See* Martin, *supra* note 92.

<sup>128</sup> *See e.g.*, *Michigan State University Agrees to Change Its Response to Complaints of Sexual Harassment, Sexual Violence*, U.S. DEP'T OF EDUC. (Sept. 1, 2015), <https://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence>.



Some schools have used outside investigators to investigate allegations or conduct disciplinary hearings.<sup>129</sup> Using outside investigators is “generally intended to eliminate any potential conflicts of interest and ensure professionals conduct the type of work that some institutions have sometime struggled to understand.”<sup>130</sup> However, this method of conducting investigations can subvert Title IX’s purpose when an investigation turns into a pure criminal proceeding.<sup>131</sup> Instead of taking purely remedial measures, universities should create prophylactic systems for students to file sexual assault and Title IX complaints. Specifically, schools should consult with third-parties to conduct Title IX—not criminal—investigations of their students. This section will discuss potential third-party investigators, and the benefits and drawbacks of using each.

#### A. POLICE DEPARTMENTS

Three federal laws require campus employees, faculty, and personnel to report certain misconduct—Title IX, The Clery Act, and Title VII.<sup>132</sup> Relevant here, Title IX requires a “responsible employee” to report sexual assault to his or her university.<sup>133</sup> A responsible employee includes “any employee who has the authority to take action to redress the harassment, who has the duty to report sexual harassment to appropriate school officials, or an individual who a student could reasonably believe has this authority or responsibility.”<sup>134</sup> Once reported, the university will conduct an investigation pursuant to its own policies.<sup>135</sup>

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<sup>129</sup> Jeremy Bauer-Wolf, *Outsourcing Rape Investigations*, INSIDE HIGHER EDUC. (Oct. 9, 2017), <https://www.insidehighered.com/news/2017/10/09/some-colleges-opt-outsource-title-ix-investigations-hearings>.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> Brett A. Sokolow, *Who is a Mandated Reporter, of What?—Getting Some Clarity*, ASS’N OF TITLE IX ADMINS. 1, [https://cdn.atixa.org/website-media/o\\_atixa/wp-content/uploads/2012/01/18123011/WHO-IS-A-MANDATED-REPORTER-OF-WHAT-GETTING-SOME-CLARITY.pdf](https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18123011/WHO-IS-A-MANDATED-REPORTER-OF-WHAT-GETTING-SOME-CLARITY.pdf).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

Congress could expand Title IX to require responsible employees to report sexual assaults to their Title IX coordinator, who then must report all incidents to the local police department. Law enforcement departments already train their personnel to conduct sexual assault investigations.<sup>136</sup> Departments train officers “not to label a false report based on an initial interview, a victim’s response to the trauma, a statement that was taken back or recanted, or refusal to press charges.”<sup>137</sup> Officers understand a victim’s trauma and conduct their investigations accordingly.<sup>138</sup> Moreover, police departments train officers to anticipate a suspect’s potential defenses to allegations and collect evidence to counter these defenses.<sup>139</sup> Victims can expect privacy during the investigation and the ability to contact higher authorities within the department if they feel the department has not taken the allegations seriously.<sup>140</sup> Law enforcement personnel often have better access to evidence and can operate separately, allowing unbiased third-party review. Additionally, universities will not bear the costs of the investigations.

This solution has two downsides. First, victims of sexual assault often do not report to police; about two-thirds of sexual assaults go unreported.<sup>141</sup> There are several reasons victims choose to not report sexual assault to the police, including: fear of retaliation, a belief the police would not help, a belief that the assault should remain personal, or a belief the police could not find adequate evidence.<sup>142</sup> Moreover, police generally only investigate claims if there is a minimal threshold of evidence,

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<sup>136</sup> *Communicating with Law Enforcement*, RAINN, <https://www.rainn.org/articles/communicating-law-enforcement> (last visited Apr. 11, 2019).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Apr. 11, 2019).

<sup>142</sup> *Id.*

which may not exist when the victims feel afraid to disclose their assault.<sup>143</sup>

Second, criminal cases require an extremely high standard of proof. If the district attorney brings charges, the state must prove them beyond a reasonable doubt.<sup>144</sup> This high standard of proof requires that the state carry its burden to the point of near certainty.<sup>145</sup> However, the Dear Colleague Letter in 2011 required a “preponderance of the evidence” standard.<sup>146</sup> Preponderance of the evidence requires that the person alleging the action prove her case by just “more than 50%” certainty.<sup>147</sup> Even under the most recent Dear Colleague Letter, universities can use a preponderance of the evidence standard or a clear and convincing<sup>148</sup> standard when investigating and punishing students.<sup>149</sup> Regardless of the standard employed, if the state does not think that it could prove its case beyond a reasonable doubt, it may choose not to prosecute. On the other hand, a non-criminal proceeding at a university could still proceed because it would use a lower standard of proof.

Whether or not a police department could move forward with criminal charges, the university could always use the police report to conduct its own hearing. The university’s hearing would establish whether the suspect in question is responsible by its preferred standard and determine a suitable punishment. Outsourcing sexual assault investigations to local police departments could ensure impartiality and professionalism but may be too burdensome to effectively punish students—which may ultimately deter victims from coming forward.

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<sup>143</sup> *What to Expect from the Criminal Justice System*, RAINN, <https://www.rainn.org/articles/what-expect-criminal-justice-system> (last visited Apr. 11, 2019).

<sup>144</sup> *Id.*

<sup>145</sup> *Reasonable Doubt*, NOLO, <https://www.nolo.com/dictionary/reasonable-doubt-term.html> (last visited Apr. 11, 2019).

<sup>146</sup> See DEAR COLLEAGUE LETTER, *supra* note 1.

<sup>147</sup> See generally 2 MCCORMICK ON EVIDENCE 484 (Kenneth S. Broun ed., 6th ed. 2006) (nothing the most accepted meaning of “preponderance of evidence” is proof leading a fact-finder to determine that a fact’s existence is more probable than not).

<sup>148</sup> Bauer-Wolf, *supra* note 129.

<sup>149</sup> *Id.*

## B. PRIVATE THIRD-PARTY ORGANIZATIONS

Since the 2011 and 2017 Dear Colleague Letters, some universities have started hiring outside professionals, including law firms, to manage and investigate Title IX complaints.<sup>150</sup> Universities have expressed an interest in avoiding trials on campus because of potential bias and distractions.<sup>151</sup> The advantage of using an outside source is that the school could make sure that the investigation is unbiased and those involved do not have a connection with the students.<sup>152</sup>

In 2017, the Department of Education promulgated new guidelines in response to the 2011 Dear Colleague Letter and a belief that some the standards set forth in the 2011 Letter “created an incentive for overzealous administrators to completely disregard the rights of the accused while conceiving ample protections for the accuser, and ultimately perpetuating an unfair system.”<sup>153</sup> Because both victims and perpetrators have sued schools alleging that the schools discriminated against them during the investigations, it is no wonder some universities are opting to hire outside investigators.<sup>154</sup> And because Title IX requires universities to provide victims with a “prompt, adequate, and impartial investigation,” it is of great importance that the investigative process remain unbiased.<sup>155</sup> Thus, a private third-party organization is a potential solution to universities’ Title IX issue.

A Title IX investigation is a sensitive and delicate matter. Those investigating sexual assault allegations must understand

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<sup>150</sup> *Id.*; see also Joseph Lento, *Why Some Colleges are Outsourcing Sexual Assault Investigations*, STUDENT DISCIPLINE DEF. (June 14, 2018), <https://www.studentdisciplinedefense.com/outsourcing-college-sexual-misconduct-cases>.

<sup>151</sup> Bauer-Wolf, *supra* note 129.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *The Importance of Outsourcing Your Title IX Investigation*, CAPINVAID INVESTIGATING (Apr. 1, 2018), <https://www.capinvaid.com/the-importance-of-outsourcing-your-title-ix-investigation/>.

how to investigate them and Title IX's legal requirements.<sup>156</sup> While hiring outside parties to conduct the investigation is a step in the right direction, not all universities use this alternative method. Instead, when universities find themselves involved in a scandal, they then begin to hire outside sources to investigate the university's compliance.<sup>157</sup> The University of Virginia found out how costly these remedial measures were when they paid \$500,000 to a Washington, D.C. law firm to investigate the university's management of a sexual assault case, and then paid Pepper Hamilton \$660 and \$550 an hour to help revise university policies.<sup>158</sup> Other campus measures are costly as well, including hiring consultants to review requests from the Office of Civil Rights, or providing training sessions to faculty.<sup>159</sup> While training and other workshops may be invaluable to the students, it appears universities are using them as remedial measures *after* someone exposes the university's failures.<sup>160</sup> Instead of universities hiring third parties to investigate the university's own compliance, a third-party organization should exist to oversee and manage all Title IX claims at universities.

The benefit of having any type of third-party organization oversee Title IX complaints is an assurance of an unbiased and properly facilitated investigation. As discussed above,<sup>161</sup> universities can have conflicts of interests preventing adequate—or even minimal—investigations. A third-party organization could investigate without any university interference. Third party investigators also have fewer built-in biases than school administrators, as they have no direct connection to the students, coaches, or other administrators involved in the investigation.

This note discusses potential third-party organizations to oversee Title IX investigations. Any third-party organization used to oversee sexual assault allegations would cooperate with local

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<sup>156</sup> *Id.*

<sup>157</sup> Sarah Brown, *An Uncertain Future for Title-IX Compliance Consultants*, THE CHRONICLE OF HIGHER EDUC. (Jan. 24, 2017), <https://www.chronicle.com/article/An-Uncertain-Future-for-Title/238950>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* (some of these training sessions can cost up to \$1,000 each).

<sup>160</sup> *Id.* (universities are beginning to hire consultants to ensure compliance with Title IX).

<sup>161</sup> See Bauer-Wolf, *supra* note 129.

police departments when necessary, including when the victim decides, on her own, to report the incident to the police. The third-party organization is a preferred alternative to local police investigations because of the various reasons victims choose to not report to the police.<sup>162</sup> This note now explores whether the government, a private organization, or a public organization should create the third-party Title IX investigator.

### 1. Government

Congress could create an additional branch within the Department of Education to investigate claims of sexual assault and ensure case-by-case Title IX compliance. The Department of Education already has oversight of university Title IX compliance, but a new branch would take away the schools' responsibility to investigate claims on their own.<sup>163</sup> The Office of Civil Rights pursue all Title IX complaints to ensure the university's involvement in the investigation is minimal. Giving the Office of Civil Rights complete oversight would ensure an unbiased investigation with little-to-no university obstruction.

The problem with having the federal government manage all Title IX complaints is clear—it would be prohibitively expensive and time-consuming given the government's lack of manpower. The government would potentially have to create an office in each state, with smaller offices in major cities to ensure opportunity and access. The creation of these offices would require a significant amount of money and many people to operate. Because federal spending can fluctuate so much each year, the federal government may not be able or willing to create an adequately-sized Title IX office.

Instead of a federal office, state and local governments could provide their own compliance offices. To be sure, state and local governments would likely have to appropriate more money to their education systems, but significantly less than the federal government. Moreover, local offices would ensure greater efficiency, and each state could experiment with different types of investigatory methods and funding mechanisms.

A government-run Title IX office would solve several of the concerns discussed above. The government office would be free from university interference. If an investigator needed to

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<sup>162</sup> See RAINN, *supra* note 141141 (explaining several reasons why victims choose not to report sexual assault to the police).

<sup>163</sup> See RAINN, *supra* note 4.

interview a student, the government office would be free to schedule the interview. A government office could resolve the concerns of bias; however, it could produce slow investigations and present some of the same law-enforcement deterrence issues discussed above. Because this solution presents several logistical issues and problems of funding, it is less desirable than those discussed below.

## 2. *For-Profit Corporations*

A private company could oversee Title IX claims in much the same way as law firms currently investigate university compliance with Title IX—only now by investigating an individual’s claim. This, however, may not easily be profitable. The company would need to consider funding, particularly at the beginning of forming, and how to create profit thereafter. If the company required students to pay fees to file complaints, the amount of people reporting Title IX complaints would very likely decrease.<sup>164</sup>

Accordingly, universities would likely have to contribute to the private company an amount of money proportionate to their student population. The issue here is the lack of oversight for private companies. Since private companies do not have to comply with the same disclosure standards as public companies, the potential for complications or corruption is higher.<sup>165</sup> To remedy this problem, the government would likely have to impose significant regulations on the companies’ relationships with the schools and their investigatory methods. This solution creates a new problem—the private firm may become a virtual extension of the government, which leads to the problems discussed in the previous subsection. This relationship would be unlikely to result in profits to shareholders *and* cheap enforcement mechanisms for victims and universities.

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<sup>164</sup> Jerilyn Klein Bier, *Most College Students Go Broke At Least One Semester*, FIN. ADVISOR (Nov. 3, 2018), <https://www.famag.com/news/most-college-students-go-broke-at-least-one-semester-25838.html> (“Nearly two-thirds of undergraduate students . . . reported that they had run out of money before the end of a semester at some point during their college career.”).

<sup>165</sup> See *Engaging the Private Sector in the Fight Against Corruption*, TRANSPARENCY INTERNATIONAL, [https://www.transparency.org/whatwedo/activity/engaging\\_the\\_private\\_sector\\_in\\_the\\_fight\\_against\\_corruption](https://www.transparency.org/whatwedo/activity/engaging_the_private_sector_in_the_fight_against_corruption) (last visited May 10, 2019).

### 3. Non-Profit Organization

Non-profit organizations provide the same benefits as a for-profit business working with the government, without the duty to shareholders. A non-profit must consider funding, whether from the government or private donations. A non-profit is a legal entity whose organizational mission is placed above the personal interests of its members.<sup>166</sup> Individuals associated with non-profits are not liable for the non-profit's debts, and creditors and courts are limited in their reach to the non-profit's assets.<sup>167</sup>

Because a non-profit organization places its mission and goals over the personal interests of employees, it is uniquely-suited to pursue Title IX investigations for universities. However, one of the biggest issues a non-profit would face is employing individuals to conduct the investigations.<sup>168</sup> Non-profits sometimes rely on volunteer staff, whereas for-profit corporations mostly use paid employees to pursue their work.<sup>169</sup> A non-profit established to conduct Title IX investigations needs to be reliable and stable. Individuals need be sure that when they go to an organization, company, or government office, employees will manage their complaint in a timely, efficient, professional, and unbiased manner. If non-profits need government funding—either directly or indirectly—to operate effectively, they may, like for-profit corporations, become arms of the government.

### 4. Proposal: Market Solution

Each solution presented above presents its own set of potential problems. Police departments have the potential to scare victims from reporting, as some do not want to involve the police in their claim. The federal government is already a slow-moving entity and establishing an office in every state could be an unrealistic cost. Private and public companies must consider

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<sup>166</sup> *Funding Sources for Charities and Non Profit Organizations*, KNOWHOWNONPROFIT, <https://web.archive.org/web/20180312201516/https://knowhownonprofit.org/governance/board-responsibilities/raisingmoney#> [https://perma.cc/2URD-ZDKA].

<sup>167</sup> *Id.*

<sup>168</sup> See Sheela Nimishakavi, *In a Tight Job Market, Nonprofits May Suffer Unless They Use What They've Got*, NPQ, Sept. 5 2017, <https://nonprofitquarterly.org/2017/09/05/tight-job-market-nonprofits-may-suffer-unless-use-theyve-got/>.

<sup>169</sup> *Id.*



funding and costs, including where such funding comes from. Instead of requiring universities to outsource their Title IX investigations to one third-party organization, universities should be required to outsource their investigating and allow them to choose which third-party organization.

If Congress requires universities to outsource their Title IX claims while allowing them to choose which third-party to use, the market can resolve the issue of which third-party should conduct the investigations. Universities already utilize law firms or other companies to investigate their own Title IX compliance. A prophylactic requirement will ensure that schools pursue Title IX claims when they are filed—ensuring compliance with Title IX. Companies or non-profits will be developed and continue to be funded by the universities. Universities will be required to budget and monitor the costs of outsourcing Title IX claims.

This solution allows the market to develop based on need, helping to resolve several issues. Investigators could compete with each other in a lucrative business; schools will always require good investigators to remain in compliance. The market solution is also cheaper for the federal government. It can maintain its oversight role without creating new offices or appropriating more funds.

The third-party organizations should still be required to cooperate and work with police departments when necessary, but they should *not* be required to report the claims to the police when the claimant does not give her consent to do so. Victims filing Title IX claims could feel safer reporting their claims and feel like their university will not have perverse motives to undermine the investigations.

One of the main concerns with universities managing Title IX claims is the potential bias from university staff, administrators, athletic departments, or coaches. The market solution ensures that the most effective neutral third-parties handle victims' claims, while keeping the schools in compliance with Title IX. The third-party would then give their report to the university with a suggested plan of action and universities would implement those actions. The investigations would be conducted in an efficient and timely manner and third-parties can give students peace of mind that their investigations are being done properly. Of course, if students are unhappy with the progress or method of the third-party's investigation, they can report the third-party's conduct to the Office for Civil Rights under the Department of Education.

## V. CONCLUSION

The media placed a spotlight on college sexual assault when it exposed Baylor, Michigan State, the University of Minnesota, and Florida State, but schools of all kinds have failed to adequately prevent and punish sexual assault—particularly when an athletic department is involved. Schools fail to respond to Title IX claims for a variety of reasons. Accordingly, the federal government should require universities to contract with third-party organizations to investigate all Title IX sexual assault claims. Universities are already required to comply with Title IX and operate in a non-discriminatory manner. Mandatory third-party investigators would ensure their compliance with Title IX by forcing them to set aside some of their superficial interests—especially the protection of their athletic programs—and protect victims of sexual assault.