

It's Game Time: Complying with the NCAA Policy on Campus Sexual Violence

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Disclaimer



We can't help it – we're lawyers

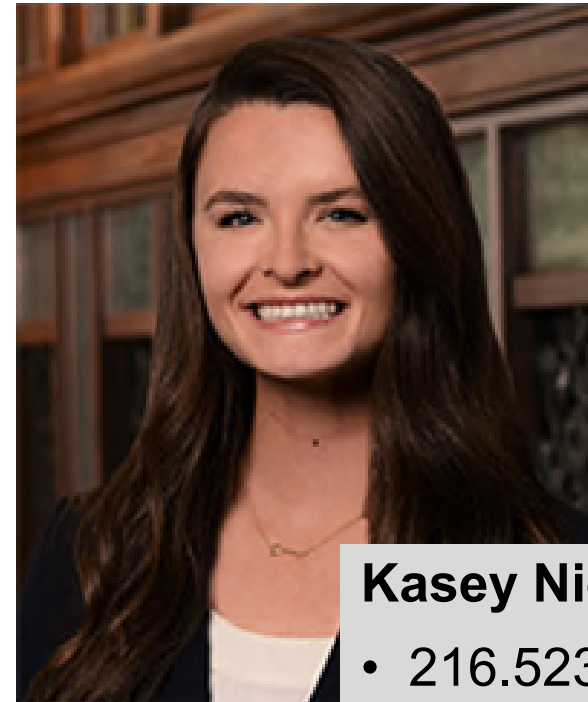
- We are not giving legal advice today.
- Please consult with your legal counsel regarding specific situations.
- Use chat function to ask general questions and hypotheticals. We encourage questions!
- Yes, we will send out the slides. If you used your email to register, look for a “Thank You For Attending!”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

About Us



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More information

Upcoming Event

- Higher Ed Athletics Compliance Update
 - Wednesday, March 15, 2023
 - 12:00 PM to 1:00 PM (EST)

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Athletic Compliance Resource Center

Our team is particularly experienced in:

- Title IX compliance and investigations, including the NCAA Policy on Campus Sexual Violence (check out our Title IX and athletics resource page [here](#))
- Operationalizing Name, Image and Likeness
- Student-athlete safety and well-being
- Enforcement investigations
- Eligibility reviews
- Policy and procedure reviews including student-athlete handbooks
- Intellectual property portfolio development and management
- Multimedia streaming rights agreements, product licensing, and sponsorship
- Facilities compliance
- E-sports

Today's Agenda

- Background
- Attestation
- NCAA Policy on Campus Sexual Violence
 - Policy Items 1-3
 - Policy Item 4 (S-A disclosures)
 - Policy Item 5 (“reasonable steps”)
 - Policy Item 6 (collecting info)
- Practical Considerations
 - FERPA, record-keeping, policies and procedures

Background

The NCAA's Efforts

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



Background



The NCAA's Efforts

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

The Issue



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

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

Attestation

Runs from March 1 to May 15, 2023

- If a school is not able to attest their compliance with the NCAA policy, it will be prohibited from hosting any NCAA championship competitions for the next applicable academic year.
- See the FAQ on the NCAA's website



Policy Items 1-3



Since 2017, attest annually

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

Policy Items 4-6



Attestation begins in the 2022-2023 academic year

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

Annual student-athlete disclosure/questionnaire

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

Written policy about collecting information from other schools



GOVERNANCE

NCAA Board of Governors Policy on Campus Sexual Violence

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

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

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

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

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

Policy Implementation Resources

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

Annual Attestation Process Resources

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

Stakeholders



Cross-campus collaboration

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

Critical
<ul style="list-style-type: none">• General counsel• Title IX coordinator• Athletic administrator (AD, SWA)• Admissions officers

Others to Consider
<ul style="list-style-type: none">• Dean of students office• Student conduct office• President/chancellor• Student-athlete representatives• Compliance officers• Coaches

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

What Misconduct is Covered?

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

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

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

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



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Policy Items 4-6



What is the **?

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

What Misconduct is Covered?



Two buckets

Resulted in discipline through a Title IX proceeding

1


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

2

What Misconduct is Covered?

Bucket 1

“Discipline through a Title IX proceeding”

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

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

What Misconduct is Covered?

Bucket 2



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

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

Interpersonal violence

- Dating violence
- Domestic violence

Sexual Violence

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

Other Acts of Violence

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

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

Policy Item #4

Student-athlete must complete an annual disclosure/questionnaire

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



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Policy Item #4 – Key questions



Student-athlete must complete an annual disclosure/questionnaire

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

Student-athlete questionnaire

Who must fill it out?

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



When should the student-athlete complete the questionnaire?

Factors to consider

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



Student-athlete questionnaire



What should the questionnaire include?

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

Student-athlete questionnaire



What should the questionnaire include? Continued

Will your school ask about...

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

Student-athlete questionnaire



What should the questionnaire include? Continued

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

Student-athlete questionnaire



Penalties for failing to make full and accurate disclosure

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

Hypothetical Disclaimer



Report or not to report?

- *Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

Hypothetical #1



Report or not to report?

- Sally is an **incoming** women's basketball student-athlete.
- In high school, Sally's ex-boyfriend alleged that Sally was stalking him.
- After a Title IX investigation, the decision-maker found that Sally did not violate the stalking provision of the policy.

Should Sally report this conduct on her questionnaire? *Under the NCAA requirements and definitions, no.*

Hypothetical #2



Report or not to report?

- Hank is an **transfer** track & field student-athlete.
- When Hank was at his previous college, he was charged for public indecency after a drunk night out at the bars.
- The athletic department had Hank sit out one meet for his conduct, but he was not disciplined through any formal proceedings at the College.

Should Hank report this conduct on his questionnaire?

Consider:

- *Is public indecency a crime that is sexual, interpersonal or other acts of violence? Depends on State law - it is considered a sex offense in Ohio*
- *Was Hank criminally convicted? No – he was only charged and not enough info to say he was convicted – so probably wouldn't have to report it under this bucket.*
- *Was Hank disciplined through a Title IX proceeding? No. HOWEVER, Hank was disciplined (although it seems like informally) by the athletic department for this conduct. (many other issues that come up with this!)*
- *If you follow the NCAA Policy, likely that Hank wouldn't report this conduct. However, if your policy includes and specifies team discipline – he would likely have to report it.*

Hypothetical #3



Report or not to report?

- Bobby is an **transfer** football student-athlete.
- Bobby is a Respondent in a sexual assault Title IX matter that is ongoing at his former institution.
- The investigation is over and after seeing the evidence, Bobby is pretty sure that he will be found not responsible.
- Bobby just wants to move on and start over somewhere else.

Should Bobby report this conduct on his questionnaire? **Yes, this is an ongoing Title IX proceeding.**

Bonus: what if Bobby was an incoming freshman and the incomplete Title IX proceeding was at his high school? More complicated and Depends on how to interpret the NCAA Policy – says that school must ask TRANSFER students about incomplete title ix proceedings – not incoming students. But would the institution still want to know this info? If so, should have this on your questionnaire.

Policy Item #5

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

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



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Reasonable steps to confirm

Do your due diligence!

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



Must share!

(In a manner consistent with federal and state law)

School 1



Former Institution and where
student-athlete is transferring
from

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

School 2



New Institution and where
student-athlete is transferring
to

Hypothetical #4



You are reviewing the questionnaires...

- Hannah, a **transfer** women's tennis student-athlete, completes the questionnaire in the Fall 2022
- Hannah indicated that she was disciplined for sexual harassment at her prior school, but expresses that it was all a misunderstanding with her ex-boyfriend, who was also found responsible for sexual harassment.
- Hannah said she appealed the decision, but it was upheld and she fulfilled her semester suspension and mandatory counseling and hasn't been in trouble since.

What do you do?

Consider:

- *Go through your "reasonable steps" and conduct your due diligence - Meet with Hannah, contact the prior institution for more information to confirm that she has been found responsible and anything else that may be relevant (FERPA!), background check? Internet search?*
- *Should this have been vetted through the recruiting process?*
 - *What is the process in which a coach finds out this information and communicates it to the AD/Title IX coordinator?*
- *What to do with Hannah's information? Not recruit her?*
 - *Does it matter that if the sexual harassment was an inappropriate joke and not something more severe like a sexual assault?*

Hypothetical #5



It's now baseball season...

- Tom, [transfer](#) baseball student-athlete, completes the questionnaire in the Fall 2022
- Tom does not indicate that he has been involved in a Title IX proceeding or criminal conviction
- In late February 2023, there are rumors floating on campus that Tom had raped someone at his previous school

What do you do?

Consider:

- *First, have a conversation with Tom to get his response. (Who do you include in this conversation?)*
- *What if Tom says that this is true but there was never a formal complaint filed against him? What do you do next?*
- *What if there was a formal complaint filed against him and they reached an informal resolution? If “disciplined” he should have reported this.*
 - *Now Tom is untruthful on the questionnaire... any recourse or discipline for this? Look at your policy or procedure.*
- *Did the institution go through reasonable steps to confirm that Tom was telling the truth?*
 - *What if the institution didn't – any penalties for the institution? Unclear. Situation like this may lead you to review how you are conducting your due diligence and your “reasonable steps”*
- *What if there is public outcry – how to address?*

Policy Item #6

Written policy about collecting information from other schools

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

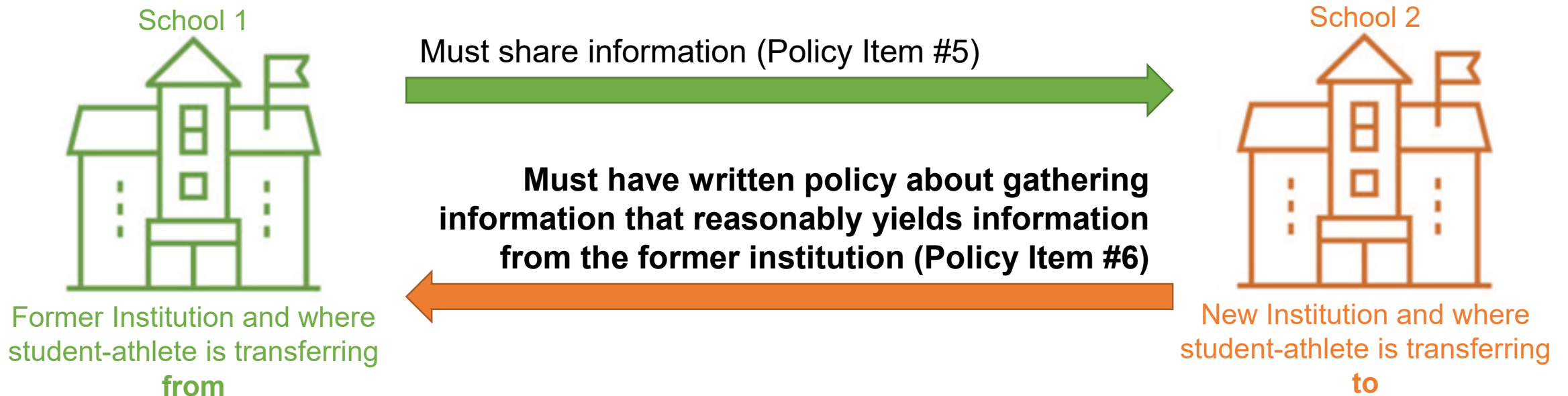


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Policy Item #6

Written policy about collecting information from other schools

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



Reasonably yield information from the former institution

How will your institution do this?

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



FERPA

Family Educational Rights and Privacy Act (FERPA)

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



Former Institution and where student-athlete is transferring from

Example of FERPA waiver

STATE UNIVERSITY FERPA WAIVER

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

FERPA

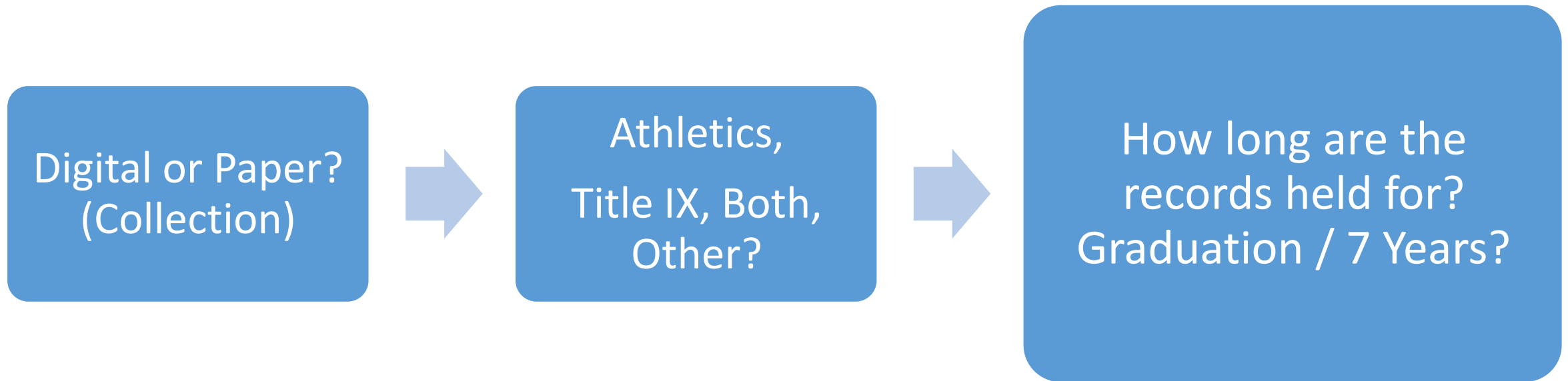


When to have FERPA waiver signed

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

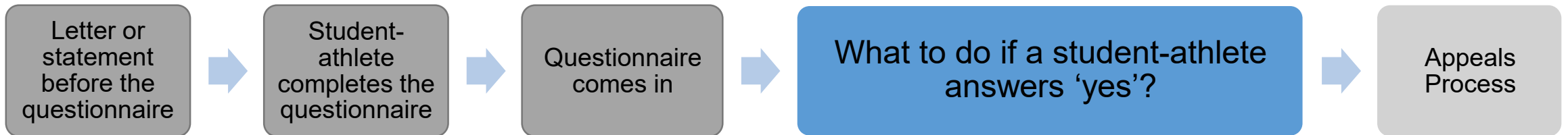
Recordkeeping

Who Holds the Records?



Process/Procedure

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



- IT DEPENDS!
 - Could be that the student-athlete cannot participate in athletics, or that he/she cannot receive athletic aid
 - SHOULD NOT be limiting anyone’s ability to attend a school
 - Should be made on an individualized basis

Institutional Policies



Where to house this policy

- Within your Title IX Policy?
- Separate Policy?

Closing Thoughts

Review your attestation requirements



- The NCAA gives your institution flexibility – use it to your advantage!
- This is year one – everyone is trying to figure out what works best for their campus!

Questions?

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