


HUSCHBLACKWELL

Investigations Involving Student Athletes: Issues to Consider and Best Practices


August 24, 2021

1


Presenters



Jason Montgomery
Partner
816-983-8291 (Direct)
jason.montgomery@huschblackwell.com



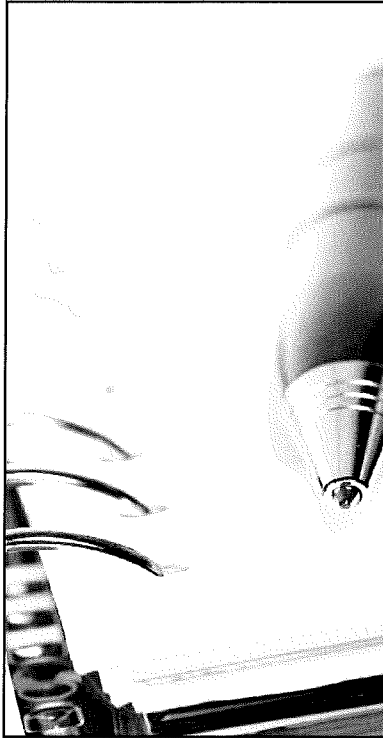
Aleks Rushing
Senior Associate
314-345-6275 (Direct)
aleks.rushing@huschblackwell.com



A.J. James
Associate
816-983-8418 (Direct)
aj.james@huschblackwell.com

HUSCHBLACKWELL

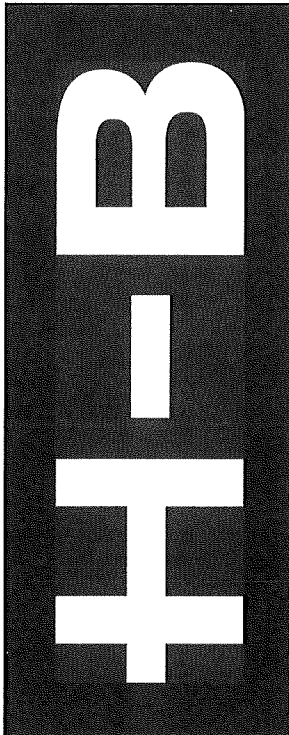
2



Topics

- Student Athlete–Peer Investigations
- Student Athlete–Coach Investigations
- NCAA Investigations

3



HUSCH BLACKWELL

Student Athlete-Peer Investigations

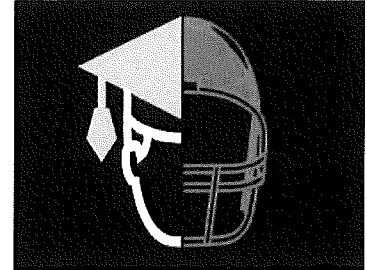


4

H-B

Unique Factors...Perhaps Not So Unique

- Internal and external pressures
- Conflicts of interest, bias, and prejudice
- Maintaining confidentiality
- Maintaining consistency



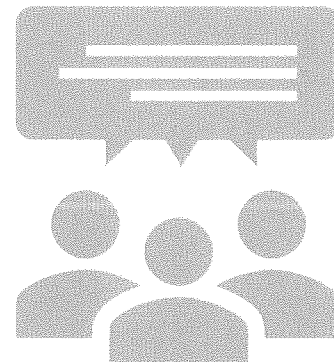
HUSCH BLACKWELL

5

H-B

Internal and External Pressures

- Perceived and actual pressures
 - Internal
 - External



HUSCH BLACKWELL

6

H-B

Conflicts of Interest, Bias, and Prejudice

- Follow your conflict of interest policy consistently
- Identify conflicts early
- Training



HUSCH BLACKWELL

7

H-B

Scenario re: Conflicts of Interest Policy

- **Policy Language:** The Title IX Coordinator, investigator, hearing officer, administrative officer, appeals officer, and informal resolution facilitator will be free of any material conflicts of interest or material bias. Any party who believes one or more of these institution officials has a material conflict of interest or material bias must raise the concern promptly so that the institution may evaluate the concern and find a substitute, if appropriate. The failure of a party to timely raise a concern of a conflict of interest or bias may result in a waiver of the issue for purposes of any appeal or otherwise.

HUSCH BLACKWELL

8

H-B

Scenario re: Conflicts of Interest Policy

- Female Diving Team Member accuses Male Swimming Team Member of non-consensual sexual intercourse.
- You are the assigned investigator and you identify as female.

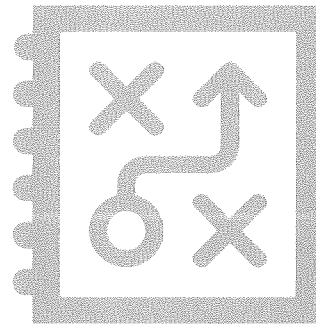
HUSCH BLACKWELL

9

H-B

Maintaining Confidentiality

- Communicating on issues outside of your office on as needed basis
- Importance of updating the parties
 - Confidentiality v. Anonymity
- Anti-retaliation policy



HUSCH BLACKWELL

10

H-B

Maintaining Consistency

- Treat all student athletes the same as all students
- Areas to Think About:
 - Scoping of policy allegations
 - Initial notices/support resources
 - Interim measures
 - Status reporting
 - Support persons/advisors of choice
 - Informal resolution
 - Final resolution notices

HUSCH BLACKWELL

11

H-B

Ross v. University of Tulsa (N.D. Okla. 2016)

- Two student athletes called University Police to report sexual assault of Jane Doe 1
- Jane Doe 1 refused to file a complaint
- Ross then reports to the University that she had been raped by the same athlete
- In the course of the University's investigation into Ross' allegation, it was discovered that another Jane Doe alleged that the same athlete had attempted to rape her



HUSCH BLACKWELL

12

H-B

Ross v. University of Tulsa (N.D. Okla. 2016)

- Ross filed suit
- Claimed University failed to protect her from the student athlete
 - Deliberately indifferent to rape accusations against the student

HUSCH BLACKWELL

13

H-B

Williams v. Board of Regents of University System of Georgia (11th Cir. 2007)

- Female student was sexually assaulted by three male student athletes
- Informed University Police the same night and an investigation began immediately
- Preliminary report was created within 48 hours of assault
- Full investigation report was available approximately 3 months after assault
- Disciplinary hearings 1 year after assault
 - Resulted in no sanctions to student athletes

HUSCH BLACKWELL

14

H-B

Williams v. Board of Regents of University System of Georgia (11th Cir. 2007)

- Findings:
 - Investigation and immediate response were not improper
 - Waiting nearly a year after assault and approximately 8 months after completion of initial investigation was deliberately indifferent
 - Rejected arguments that the University's own hearing process was delayed pending the outcome of criminal proceedings against the student athletes

HUSCH BLACKWELL

15

H-B

Best Practices for Investigations

- Preparation
- Building rapport
- Listen to verbal and non-verbal cues
- Consistency, consistency, consistency
- Be aware of compliance concerns
- Continue to track, monitor, and reevaluate
- Timing



HUSCH BLACKWELL

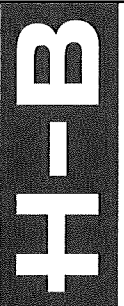
16



HUSCHBLACKWELL


Student Athlete-Coach Investigations

17



Unique Factors

- Power dynamic between coaches and players
- Reluctant reporters
- Cooperation issues
- Team dynamics



HUSCHBLACKWELL

HUSCHBLACKWELL LLP

18

H-B

DeCecco v. University of South Carolina (D.S.C. 2013)

- Plaintiff, a female athlete, made complaints about her female head coach and her male assistant coach
 - The two coaches were a married couple
- Plaintiff struggled in freshman year and in first season before allegedly experiencing sexual harassment by the male assistant coach
 - The male coach allegedly called Plaintiff to a closed-door meeting in a locker room office between the two of them and touched Plaintiff's leg inappropriately
- Plaintiff discussed the incident with her father and they decided that the coaches should report the incident as opposed to Plaintiff herself
- After the incident, Plaintiff's received less playing time and her scholarship was reduced
- Plaintiff asked for a meeting with athletic director to discuss "some concerns" but the athletic director informed her that the University's policy was for her to first discuss the issue with her coaches and then with the team's administrator with the athletic department
 - During her meeting with administrators, Plaintiff only described communication issues with her coaches

HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

19

H-B

DeCecco v. University of South Carolina (D.S.C. 2013)

- After Plaintiff continued to have issues with her coaches over the course of the next year, a joint meeting was held between Plaintiff and her father, the coaches, and athletic department officials
- During this meeting, the closed-door locker room meeting was first reported, causing a dramatic response from attendees
 - Father's question was "How appropriate is it for your male coach to have a closed, locked door meeting with a female athlete?"
 - Plaintiff's father was asked if he would like to make a formal complaint and asked if he should before the meeting changed topics and became more civil
- Plaintiff withdrew from the University after the meeting

HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

20

**B
H-B**

DeCecco v. University of South Carolina (D.S.C. 2013)

- Plaintiff sued the University and the coaches for Title IX violations and violations of her Constitutional rights, among other things
- Court found actual report to athletic department administrators did not indicate allegations of sexual misconduct
 - The athletic department made itself available to discuss any of Plaintiff's concerns through various meetings, but Plaintiff never reported sexual misconduct, only communication issues
- Individual coaches' knowledge of allegations could not be imputed upon the University

HUSCH BLACKWELL

21

**B
H-B**

Kesterson v. Kent State University (6th Cir. 2020)

- Plaintiff was a female athlete who reported to her coach that the coach's son, a male athlete at the University, had raped her
- Plaintiff's coach tried to keep the situation between themselves and discouraged Plaintiff reporting the incident
 - Plaintiff's coach did not report the incident despite being a mandatory report under University policy
 - The coach then began to treat Plaintiff less favorably than other players
- Plaintiff later told other University personnel of the rape, but nobody formally reported the incident
- Plaintiff later contacted the University's Title IX office herself and reported the rape as well as her coach's failure to report

HUSCH BLACKWELL

22

B
-
H
-
B

Kesterson v. Kent State University (6th Cir. 2020)

- Plaintiff sued alleging violations of her Constitutional rights and for Title IX violations
- Court found that it was clearly established law that a coach cannot retaliate against a player for reporting sexual misconduct
- Court found that Plaintiff's coach, and other University personnel, should have reported allegations to the University's Title IX office
 - However, none of the University personnel that Plaintiff reported to were "appropriate persons" such as to establish actual notice necessary to invoke Title IX liability
 - Failure to follow institutional mandatory reporting policy did not amount to deliberate indifference for purposes of Title IX liability

HUSCH BLACKWELL

23

B
-
H
-
B

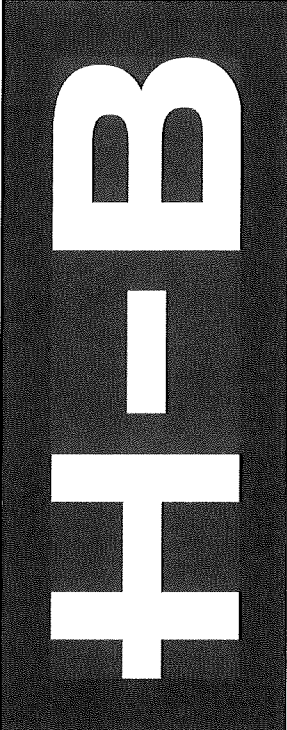
Best Practices for Investigations

- Maintain confidentiality to establish and retain trust between athletes and coaches
- Clearly explain anti-retaliation policies to all parties and witnesses in an investigation
- Reinforce reporting obligations to all athletics staff and coaches
 - Discourage coaches handling situations "in-house"
- When meeting with athletes, be thorough and exhaust scope of reports
- Be aware of concerns regarding balance of power



HUSCH BLACKWELL

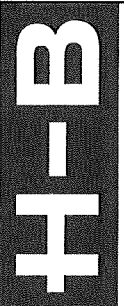
24



HUSCHBLACKWELL

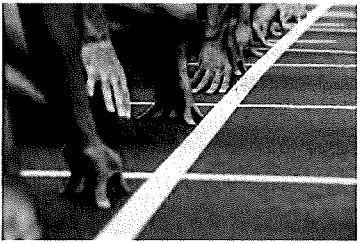
NCAA Investigations

25



Overview

- Types of NCAA inquiries that may involve student-athletes.
- Student-athlete requirements pursuant to NCAA rules.
- NCAA interview notice form.
- Case precedent.
- Limited Immunity.
- Other Considerations.



HUSCHBLACKWELL

© 2021 Husch Blackwell LLP

26

H-B

Types of NCAA Inquiries

Level I, II, III (Division I); major vs. secondary (Division II and III).

Level III or secondary = isolated or inadvertent, provides or intended to provide minimal advantage, and does not include significant impermissible benefit.

Institutional vs. NCAA.

HUSCH BLACKWELL

27

H-B

Types of NCAA Inquiries

- NCAA Notice of Inquiry.
- Involved Individual v. Fact Witness.
- Involved Individuals = current or former student-athletes or staff members with notice of significant involvement in alleged violations.
- NCAA can interview former student-athlete without your knowledge, e.g., transfer.
- NCAA Cooperative Principle.

HUSCH BLACKWELL

28

H-B

Student-Athlete Requirements

- Bylaw 10.1 Unethical Conduct (Division I, II, III)
 - Applies to Prospects and enrolled student-athletes.
 - Refusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or individual's institution;
 - Knowingly furnishing or influencing others to furnish false or misleading information concerning involvement or knowledge relevant to possible violation of an NCAA regulation;
 - Competing under an assumed name;
 - Failure to provide complete and accurate information to the NCAA, NCAA Eligibility Center or institution regarding amateur status.

HUSCH BLACKWELL

29

H-B

Student-Athlete Requirements

- Bylaw 10.3 Prohibition Against Sports Wagering Activities.
- Violation of Bylaw 10 can significantly affect student-athlete's eligibility.
- NCAA Student-Athlete Reinstatement Guidelines (Separate process managed by another department at the NCAA, not under purview of enforcement) – lose a season, sit a season to permanent ineligibility.

HUSCH BLACKWELL

30

H-B

NCAA Interview Notice Form



Division I, II and III.



“You are about to be interviewed by a representative of the NCAA enforcement staff. You may be represented by personal legal counsel during this interview. Information obtained during this interview may be shared with NCAA Eligibility Center. Prior to this interview, the NCAA would like to notify you of the following bylaw.”

HUSCH BLACKWELL

31

H-B

NCAA Interview Form

Disclosure of Purpose of Interview – knowledge of or involvement in a violation of NCAA legislation.

Responsibility to Cooperate.

Failure to Cooperate (Division I).

Failure or Refusal to Produce Materials (Division I).

Bylaw 10.1 Unethical Conduct.

HUSCH BLACKWELL

32

H-B

NCAA Case Precedent

NCAA News Release

Division I Committee On Student-Athlete Reinstatement Upholds Staff Decision For Dez Bryant

For Immediate Release
Wednesday, November 5, 2009

Contact(s)
Stacey Osburn
Associate Director of Public
and Media Relations
317/917-6117

The Division I Committee on Student-Athlete Reinstatement, an independent membership committee, has upheld the NCAA staff decision regarding Oklahoma State University football student-athlete Desmond Bryant. With this decision, Mr. Bryant will be required to sit out a season while being charged a season of eligibility as a condition for his reinstatement. The student-athlete was declared ineligible by the university for violations of the NCAA ethical conduct and preferential treatment rules.

The Division I Committee on Student-Athlete Reinstatement is comprised of commissioners, athletic directors and faculty athletics representatives from NCAA member colleges, universities and conferences. The committee has the final authority for all reinstatement decisions.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

33

H-B

NCAA Case Precedent

- **Dez Bryant Case (2009)** – interviewed by NCAA investigators about meeting with Deion Sanders because of concern about connection with a professional agent. Asked if he worked out with Sanders, visited Sanders' home and met with agent. Bryant denied ever meeting with Sanders when he had in fact met with Sanders. Question whether there was an underlying violation but nevertheless suspended the remainder of the 2009 season.
- **James Wiseman Case (2019)** - NCAA notified that Wiseman likely ineligible and he played, sought TRO, received and played 2 games, eventually suspended 12 games, dropped suite and left institution. University of Memphis addressing through NCAA infractions process.
- **Student-Athlete Reinstatement cases** are not publicly available, membership access through a system called RSRO, student-athlete's names and institution redacted.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

34

H-B

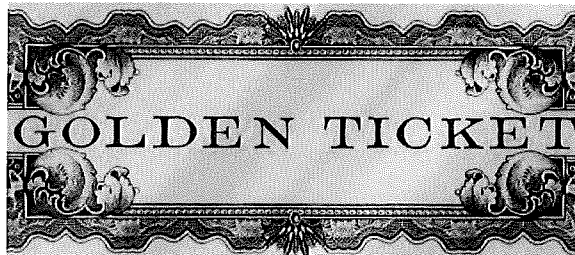
NCAA Limited Immunity

Authorized by Bylaws 19.3.7-(c) and 19.3.7-(d) (Division I) and Bylaw 32.3.8 (Division II and III).

Institution or Attorney can make request of NCAA enforcement staff, decided by chair of NCAA COI upon recommendation.

Most often with former student-athletes who received impermissible benefit or other violation at previous institution.

Limited, because protects individual from consequences from NCAA legislation, not from actions that could be taken by individual's institution or future violations.



HUSCH BLACKWELL

H-B

Other Considerations



Statute of Limitations.



Academic violations used to be included in Bylaw 10, now Bylaw 14 (student-student vs. institutional or other assistance).

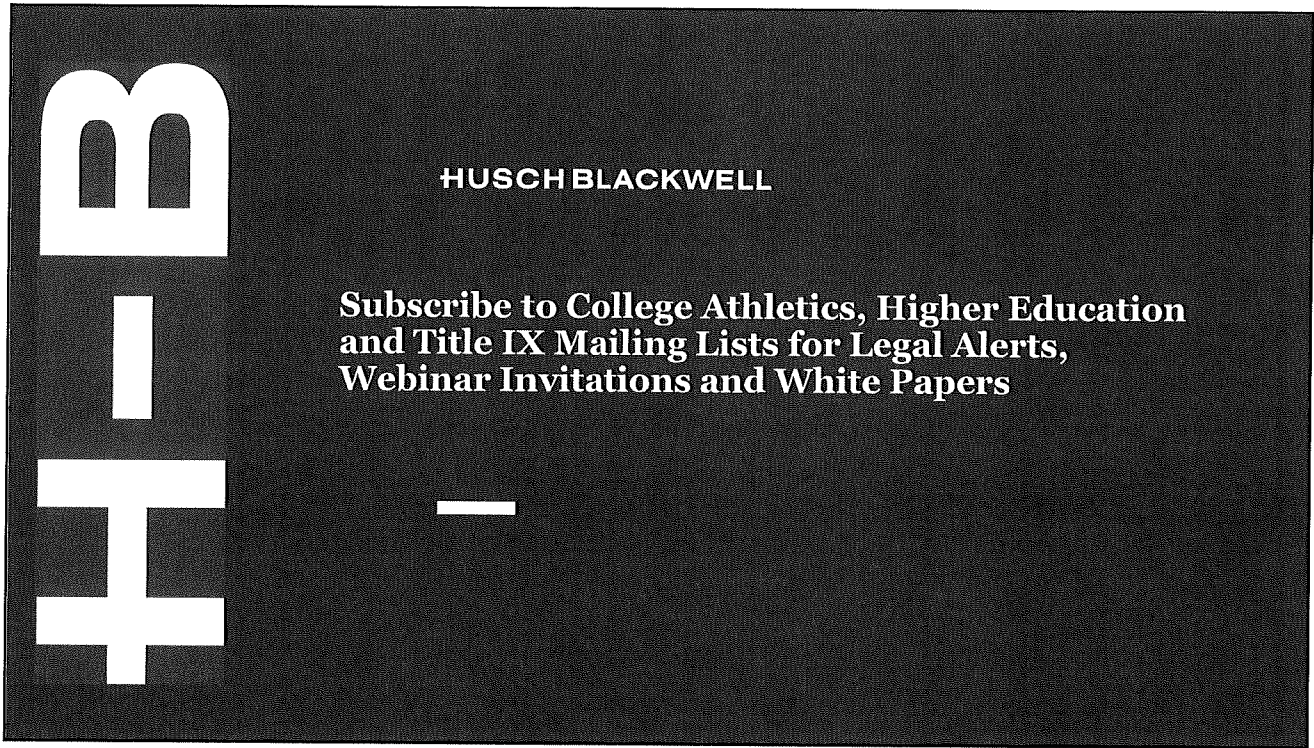


Follow institutional policy for all students with respect to academics – Involvement of others, erroneous declaration of eligibility, falsification can result in a separate NCAA violation.



Institution's own 10.1 statement.

HUSCH BLACKWELL

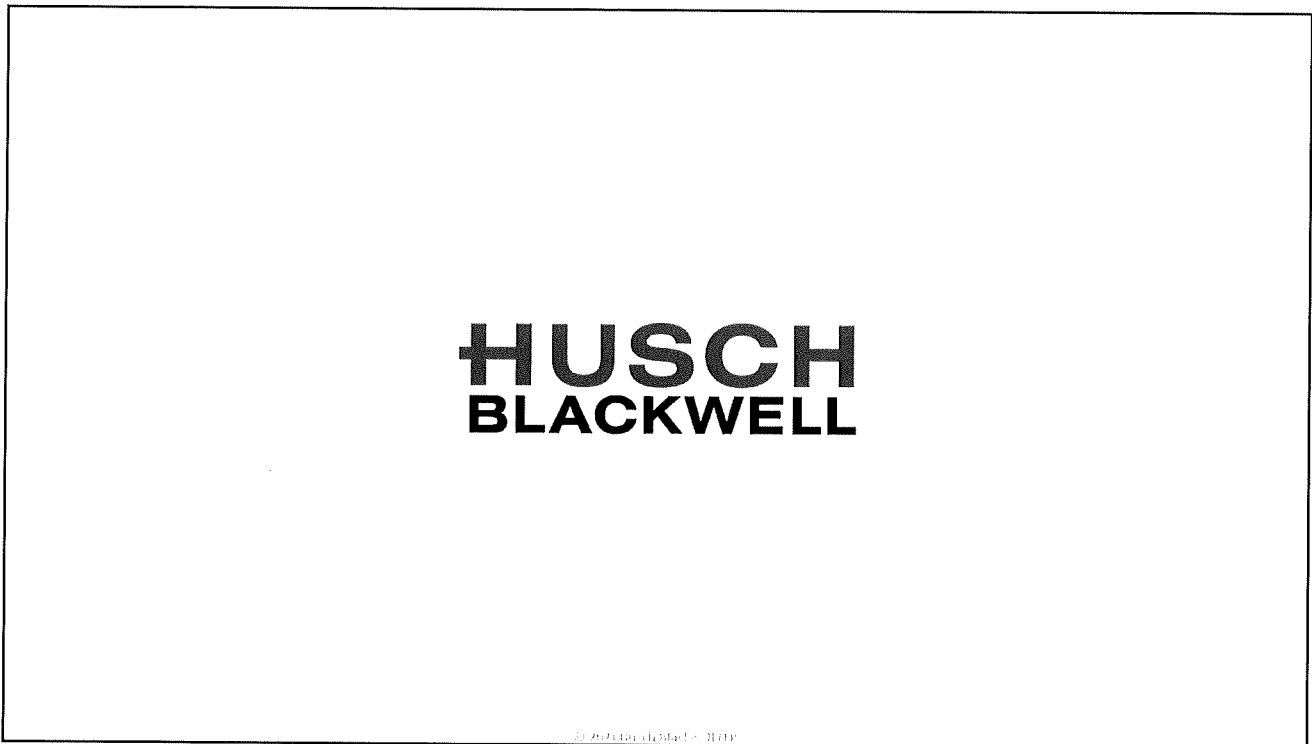


HUSCHBLACKWELL

**Subscribe to College Athletics, Higher Education
and Title IX Mailing Lists for Legal Alerts,
Webinar Invitations and White Papers**

—

37



**HUSCH
BLACKWELL**

38