1 Article type: Research 2 3 *Article category*: **Sports coaching—Youth sports** 4 Title: SafeSport in Overdrive to Overkill 5 6 Running head: SafeSport Overkill | Fleischli 7 8 Authors: Jack A. Fleischli 9 10 Corresponding with author: 11 Jack A. Fleischli 12 375 Redondo Avenue, PMB 320 13 14 Long Beach, CA 90814 hotshotattorney@gmail.com 15 Cellular: 310.402.8466 16 17 Jack A. Fleischli is an active USA Badminton-certified "National 1" level badminton Umpire. He graduated Cum Laude from Pepperdine University School of Law in May 1975 and 18 worked as a Deputy Public Defender for the County of Orange, California from December 1975 19 20 through mid-1981. Thereafter through the present, Jack has been in private practice in California.

21

SafeSport in Overdrive to Overkill

ABSTRACT

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

Federal legislation, PROTECTING YOUNG VICTIMS FROM SEXUAL ABUSE AND SAFESPORT AUTHORIZATION ACT OF 2017 (the "Act"), took effect January 1, 2018. The Act is intended to make youth participation in Olympic and Paralympic sports safe from emotional, physical and sexual abuse and neglect. The Act creates a class of persons ("covered individuals") who are both subject to its proscriptions and bear a personal responsibility to promptly (within 24 hours) report to law enforcement, and thereafter to the United States Center for Safe Sport (the "Center"), upon learning of facts creating a suspicion of certain defined categories of child abuse or neglect of a youth participant. In a federal District Court lawsuit filed by a purported victim, liability for child abuse may include attorney's fees, costs of suit, expert fees, exemplary damages and the greater of actual damages or \$150,000.00. Within the Act, Congress appointed the Center with exclusive jurisdiction to set policies and procedures, including training, for implementation of the Act. The Center, however, has created policies and procedures and a mandatory training video tainted by an overwhelming implicit bias against coaches, officials, athletes, promoters, administrators and medical personnel. The Act and its implementation should be promptly modified to: (1) recognize and acknowledge that the vast majority covered individuals consistently exhibit a high standard of ethics, generosity and talent in youth sports in America; (2) create a more balanced arena for both administrative arbitration and federal

litigation of disputed claims of child abuse and neglect;

61	(3) abandon the current SafeSport training video (and any derivative training
62	videos for parents and youth competitors); and,
63	(4) in lieu of the existing SafeSport training video, create a new training video
64	which is:
65	(a) free from <i>implicit bias</i> against covered individuals;
66	(b) fair and balanced in its presentation of the nature of child abuse and
67	neglect; and,
68	(c) clear in the proposition that the duty to report <i>only arises</i> and is <i>only</i>
69	appropriate upon learning facts which, after reasonable scrutiny, create a
70	"reasonable suspicion" of child abuse or neglect, as reasonable suspicion
71	is defined in federal constitutional law.
72	KEY WORDS
73	Coaches, officials, SafeSport, reasonable suspicion, child abuse, child abuse and neglect, implicit
74	bias, unconscious bias, fair arbitration, fair litigation, duty to report, reasonable scrutiny, United
75	States Center for Safe Sport, PROTECTING YOUNG VICTIMS FROM SEXUAL ABUSE
76	AND SAFE SPORT AUTHORIZATION ACT OF 2017.
77	INTRODUCTION
78	Effective January 1, 2018, every sport in the U.S. Olympic and Paralympic Movement
79	became subject to federally mandated controls which admirably attempt to make training and
80	participation safer for the child-athlete participants. Overbroad and misguided policies and
81	procedures, however, have been promulgated by the entity tasked with implementation and

enforcement of the federal legislation. What started out as a national outcry against the sexual abuses, and subsequent failures to report, in the Larry Nassar, M.D. debacle, has mutated into an omnibus throwing of officials, coaches, other athletes, administrators, promoters, medical personnel and the like under the bus.

National Governing Bodies (NGBs) of the 50 affected sports, overwhelmed with the absolute mandate to conform to the training and security screening requirements, or simply out of fear of standing up against "safety in sport," have overlooked the misdirection, shortcomings and long-term deleterious implications of the entire federal scheme. Meanwhile, *SafeSport* is in overdrive to overkill. Its training video casts a dark cloud of implicit guilt and unwarranted suspicion over *all* covered individuals.

Following the lead of the policies and procedures designed by the United States Center for Safe Sport (the "Center"), the training video literally mandates indiscriminate reporting of what often amounts to innocuous behavior, as constituting "misconduct." Unfortunately, implicit bias has real consequences. In addition to stretching the Center's resources beyond its limits¹, this *safety-at-any-cost* approach in youth sports is destined to set off a firestorm of administrative and criminal justice consequences against innocent covered individuals, without regard to the credibility or reliability of the underlying information and without regard to any consequences, on the alleged offender's life, of false or unfounded charges.

This paper is a not only a voice of reason and plea for change, but also a declaration of the valuable competing interests of those masses of innocent, dedicated, tireless and well-meaning "covered individuals" who have now become easy targets and defenseless scapegoats of unfettered and utterly undeserved *SafeSport* implicit condemnation.

METHODS

The author read and reviewed the subject federal legislation and its implementing policies and procedures, viewed the training video created by the Center, and undertook extensive research into implicit bias and social and legal issues pertinent to the paper.

OVERVIEW

The Center was initially developed by the U.S. Olympic Committee and first opened in March 2017 as a non-profit corporation in Denver Colorado. The Center's express purpose was to,

"respond to abuse claims and implement a unified set of policies for preventing,

"respond to abuse claims and implement a unified set of policies for preventing identifying and reporting misconduct among the 47 [at that time] national governing bodies (NGBs) that oversee USOC sports."²

Later, on February 14, 2018, Congress passed the PROTECTING YOUNG VICTIMS FROM SEXUAL ABUSE AND SAFESPORT AUTHORIZATION ACT OF 2017 (the "Act"). The Act (which is actually an *amendment* to the Victims of Child Abuse Act of 1990 and to the Amateur Sports Act of 1978) has essentially **three components**:

- (1) mandated administrative compliance by each affected NGB and independent sports organizations;
- (2) mandated witness reporting requirement, enforced by criminal sanctions; and,
- (3) civil remedies against offenders for non-compliance.

In the Act, Congress empowered the Center with exclusive "jurisdiction" over each NGB and each Paralympic sports organization,

127	"with regard to safeguarding amateur athletes against abuse, including emotional
128	physical and sexual abuse, in sports."3
129	Though nominally an "independent" entity, the Center appears to technically be a "federal
130	regulatory agency" pursuant to 5 U.S.C. Section 551,
131	"Definitions For the purpose of this subchapter—(1) 'agency' means each
132	authority of the Government of the United States, whether or not it is within or
133	subject to review by another agency, but does not include—[inapplicable
134	exceptions]"
135	As such, in constructing regulations, the Center is legally required to comply with the federal
136	Administrative Procedure Act, (2012) 5 U.S.C. Section 500 et seq. ⁴
137	The role of the Center, according to the Act, was to:
138	"maintain an office for education and outreach that shall develop
139	training, oversight practices, policies, and procedures to prevent
140	the abuse, including emotional, physical, and sexual abuse, of
141	amateur athletes participating in amateur athletic activities through
142	national governing bodies and Paralympic sports organizations."
143	(italics and bold added for emphasis)
144	The Act further mandated that the Center was responsible for setting policies and procedures for
145	the National Governing Bodies and Paralympic sports organizations in the prevention of abuse:
146	"The Center shall—(1) develop training, oversight practices, policies, and
147	procedures for implementation by a national governing hody or Paralympic

sports organization to prevent the abuse, including emotional, physical, and 148 sexual abuse, of any amateur athlete..." 149 150 While it is unknown to me whether full compliance with APA requirements occurred, 151 the Center did formulate and publish its policies and procedures rules (SafeSport Code for the U.S. Olympic and Paralympic Movement), discussed in detail below and attached hereto as 152 153 Appendix "A". The Act further set forth that, 154 "[the Center shall] maintain an office for response and resolution 155 156 that shall establish mechanisms that allow for the reporting, investigation, and resolution...of alleged sexual abuse in violation 157 of the Center's policies and procedures..." 158 159 The Center's website gives an idea of the *expansive* nature of its interpretation of its mandate from the Act. It reads that the Center is, 160 "committed to ending all forms of abuse in sport. This includes bullying, 161 harassment, hazing, physical abuse, emotional abuse, and sexual misconduct and 162 abuse." 163 **DISCUSSION** 164 **Origins of the Act** 165

Congress enacted the Act to address the horrendous abuses and failures to report which occurred within USA Gymnastics as perpetrated by Dr. Larry Nassar (sentenced to 40 to 175 years in prison for molesting young girls throughout the course of his career as a Medical Doctor

166

167

168

in U.S. gymnastics). Dr. Nassar's child sexual abuse was left unreported or otherwise mishandled by insiders for several years.⁵

Massive bi-lateral political support and celebrity endorsements arose for tough sanctions for child abuse in American youth sports and for new laws requiring reporting of *sexual* abuse. This community outrage and support led to the introduction in 2017 of Senate Bill 534 by California Senator Diane Feinstein (which *Bill significantly expanded* its focus well beyond sexual abuse). That Bill was then marched through the House with little opposition except as to funding issues.

The legislation, and resulting administrative arbitration procedures, however, are *flawed* and may create a high probability of false and unfounded allegations of "child abuse" against a national plethora of unsuspecting, largely volunteer, officials, coaches, athletes, administrators, promoters and medical personnel involved in American youth sports.

The Act's legislative purpose, repeated in several respects throughout the legislation, is "to promote a safe environment in sports that is free from abuse, including emotional, physical, and sexual abuse, of any amateur athlete." (Italics added for emphasis)

Simple enough, but the Devil, as it is said, is in the details.

Federal Jurisdiction

Federal "jurisdiction" (meaning, the right of the federal government to exert legislative control in these regards) for the Act is established by limiting its enforcement to any NGB, any

member of an NGB, and any amateur sports organization (collectively, "covered entity" or "covered entities"), which participates in *interstate or international* amateur athletic competition.

Use of the internet in marketing a sports tournament has long been held by federal Courts to constitute participating in interstate commerce for purposes of establishing federal jurisdiction.⁶ This jurisdictional basis alone would cover virtually every youth sports organization in the United States, considering the extremely widespread use of the internet for one aspect or another of marketing youth sports in America.

Scope of the Act's Proscriptions

As to those covered entities, the Act defines, "covered individuals" as:

"any adult who is *authorized* by a covered entity *to interact with a minor* at an amateur sports organization facility or at any event sanctioned by [the covered entities]." (italics and bold added for emphasis)

An "event," in turn, is broadly defined in the Act to include, "travel, lodging, practice, competition and health or medical treatment."

The term "child abuse" is defined, for purposes of the Act, as meaning,

"[P]hysical *or* sexual abuse *or* neglect of a child including human trafficking and the production of child pornography." 34 U.S.C. 20302(5). (italics added for emphasis)

The Act, unfortunately, is both vague and over-broad in its focus. In combination with the administrative policies and procedures promulgated by the Center, and with the Center's

SafeSport training video, the Act has excessively tipped the balance against covered individuals in sanctioned American Juniors sports.

The Act's Core Mandate

The core Mandate of the Act is as follows:

Any "covered individual" must immediately, within 24-hours, report to law enforcement and to the Center physical abuse, sexual abuse or "neglect" of a child if the covered person "learns of facts that give reason to suspect" such an occurrence. 8

An online magazine concerning the sport of competitive swimming published an article on this subject.

"We reached out to the Center to clarify some of the important details of this system: ... MANDATORY REPORTING ... Covered Adults must report to the Office [the Center] conduct of which they become aware that could constitute (a) sexual misconduct, (b) misconduct that is reasonably related to the underlying allegation of sexual misconduct and (c) retaliation related to an allegation of sexual misconduct. The Code goes on to note that allegations don't have to be assessed for credibility or validity before being reported to the Center—the rule is that allegations about conduct that 'if true, would violate the code' should be automatically reported, leaving the Center to assess and investigate the complaint." (italics and underlining added for emphasis)

This (inaccurate) interpretation of the Act is supported in neither the Act nor the Code, but if personnel at the Center *described* it as such, then that would be consistent with the arguably cavalier attitude in the SafeSport video as to when a story of misconduct must be reported.

Reasonable suspicion

In the United States, neither "suspicion" nor even "reason to suspect" are viable legal standards. "Reasonable suspicion," on the other hand, is a legal standard of proof in United States law that is less than probable cause (the legal standard for arrests and warrants) but more than an "inchoate and unparticularized suspicion or 'hunch'." *Terry v. Ohio* (1968) 392 U.S. 1, 27. It must be based on "specific and articulable facts", "taken together with rational inferences from those facts" (*Terry*, 392 U.S. at 21), and the suspicion must be associated with the specific individual. *Ybarra v. Illinois* (1979) 444 U.S. 85, 91. Reasonable suspicion is evaluated, moreover, using the 'reasonable person' standard (*Terry*, 392 U.S. at 21-22), in which said person in the same circumstances could reasonably suspect a person has been, is, or is about to be engaged in criminal activity. It depends upon the totality of circumstances, and can result from a combination of particular facts, even if each is individually innocuous.¹⁰

The risk of false or unfounded allegations of child sexual abuse is real:

"Findings of multiple studies performed between 1987 and 1995 suggested that the rate of false allegations ranged from a low of 6% to a high of 35% of reported child sexual abuse cases. [footnote deleted] Experts have argued that the reason for the wide range of differences in the rates resulted from different criteria used in various studies. In particular, a lower rate was found in studies that considered false allegations to be based on intentional lying, whereas the higher rates were

reported in studies that also added unintentional false allegations resulting from suggestive questioning."¹¹

It has been well-documented that false allegations of child sexual abuse can and do, on occasion, lead to wrongful criminal convictions and lengthy prison terms for completely innocent men and women.

Recounted memories of events, even for adults, are by no means consistently reliable.

"As a researcher, [Dr. Julia] Shaw [*The Memory Illusion*, Random House Books, August 1, 2017] studies how false memories arise in the brain and applies it to the criminal-justice system. Contrary to what many believe, human memories are malleable, open to suggestion and often unintentionally false. 'False memories are everywhere,' she says. 'In everyday situations we don't really notice or care that they're happening. We call them mistakes, or say we misremember things.' In the criminal-justice system, however, they can have grave consequences." ¹²

Covered individuals are neither unwitting conduits of information nor rubber stamps. A person who witnesses something, or receives information, about potential child abuse has an individual responsibility, in making the "reasonable suspicion" determination, to undertake at least a *prima facie assessment* of credibility and reliability of the purported facts and circumstances. And rest assured, instances of even intentionally false allegations of child abuse do occur, and with devastating consequences on the falsely accused, so-called "perpetrator."

"The human cost of false accusations

Petitions and guidelines do not capture the human suffering that caused a rebellion against the imperative to #BelieveWomen. For that real stories are

required. Consider the <u>Flood family</u> of Pennsylvania and their teenage son, whom the media identifies as T.F.

According to a local newspaper five girls at T.F.'s high school "terrorized" him with accusations of sexual molestation. T.F. was fired from his part-time job, "tortured in school by the other students and investigators," expelled and "forced to endure multiple court appearances, detention in a juvenile facility, detention at home, the loss of his liberty and other damages."

Finally, the girls confessed to lying. Why did they? One explained, "I just don't like him...I just don't like to hear him talk...I don't like to look at him." The girls have not been punished. Meanwhile, the boy is under the care of a psychologist and being schooled at home. Devastated by the experience, his parents are suing." 13

Flawed Legislation

With regard to reporting to law enforcement, the Act itself (as distinguished from policies and procedures of the Center) does not expressly limit the threshold standard of proof to the concept of "reasonable suspicion," nor does it specifically dictate any level of independent inquiry or investigation, nor does it require any input by the suspected offender, nor does it appear to require any aspect of first-hand knowledge by any person involved in recounting the story, nor does it expressly require any level of reliability whatsoever in the information "learned" by the covered individual which may operate to create a mandate of reporting. Regardless of these ambiguities and arguable deficiencies, the Act then mandates that if a covered person fails to report that accusation to law enforcement within 24-hours of receiving

the information, he or she risks prosecution for a federal crime with a maximum of 12 months jail and a fine. 18 U.S.C. 2258.

Virtually all, if not all, administrators, promoters, athletes, medical personnel and sports officials, plus some coaches, in USA amateur Juniors sports *are volunteers* (some of whom, but not all, may receive a small stipend for gasoline reimbursement for their hours of effort). Some, but not all (golf being a notable exception), NGBs *certify* their officials through an expertise training and certification program. Except for the *rare person* who has a criminal ulterior agenda, these volunteers participate and spend countless hours in doing so because they desire to help children in the particular sport and wish to work to aid the sport to improve, expand and flourish within the USA.

Even prior to the Act, these volunteers endured the possibility of being targeted in civil lawsuits for negligence in the performance of their official duties, but they nonetheless persisted in participating and donating their time, expertise and efforts, because of the overwhelming resulting beneficial effect on youth sports in America. Now, as a direct result of enactment of the flawed (albeit well-intentioned) Act, these masses of volunteers across the country essentially have acquired a large and distinct **target** on their backs. Instead of protecting the vast majority of volunteers from false and unfounded claims of abuse, the Act arguably makes them all potential and even likely victims of *unwarranted and unfounded accusations*.

The Code

As noted above, the Act requires that a covered individual report the facts to the (Response and Resolution Office of the) Center as well as to law enforcement. Once reported to the Center, a set of rules known as the **SafeSport Code for the U.S. Olympic and Paralympic**

Movement (the "Code") control the ensuing administrative procedures. Pursuant to the Code, the case is investigated by investigators hired by the Center leading to a *Director's Decision* by the Director of the Center on whether the allegations are true and as to the appropriate disciplinary consequences. Upon request of either side, an appeal may be taken, which appeal results in Mandatory Arbitration. The Arbitration Rules are attached as Appendix B to the Code.

Arbitration R-25 Rules of Evidence, reads in pertinent part as follows:

"R-25...b. Any party may introduce the Director's Decision into evidence, and the arbitrator shall give it appropriate weight."

The Director's Decision, in turn, was the result of policies and procedures promulgated by the Center in its Code. Under the Code, a finding of "true" in a Director's Decision can be based solely upon a Criminal Disposition—even if the Criminal Disposition simply amounts to the unsubstantiated allegations of a pending criminal Complaint. The Code defines a "Criminal Disposition" as follows:

"II G Criminal Disposition Any disposition in a criminal proceeding other than an adjudication of not guilty, including an adjudication of guilt or an admission of a criminal violation; a plea to a lesser included offense; a plea of no contest; the disposition of the proceeding through a diversionary program, deferred adjudication, disposition of supervision, conditional dismissal, or similar arrangement, or the existence of any pending charges." (italics added for emphasis)

Section III PROHIBITED CONDUCT of the Code then provides that,

"A. Sexual misconduct ... 4. Criminal Disposition It is a violation of the Code for a Covered Individual to be convicted of or *subject to a Criminal Disposition* for a crime involving (a) any form of sexual misconduct or (b) a Minor."

Accordingly, simply the fact that a formal Complaint of alleged criminal conduct against a minor has been filed and is pending will *itself* constitute a violation of the Code. In other words, according to the express policies and procedures of the Center, a *pending, unresolved, criminal charge* is *in itself* a violation of the Code. Moreover, no disposition other than an adjudication of Not Guilty will prevent charges from constituting a Criminal Disposition, and thus, constituting a violation of the Code.¹⁴

While the Code and its implementing arbitration procedures may well violate State and federal constitutional guarantees of procedural and substantive due process of law, who will be the unlucky litigant tasked with pursuing that issue through appellate courts for years on end? Moreover, although the Act purports to require, "fair notice and an opportunity to be heard," the *mechanisms* of the Center "for the reporting, investigation, and resolution" of the accusations must only provide, "privacy and safety *of complainants*." (italics added) In the Code, there are no similar privacy safeguards provided for the benefit of alleged offenders such as officials, coaches, athletes, administrators, promoters, medical personnel or the like.

Immunity

In the meantime, any covered entity, its officers, employees, agent or members, as well as "any individual *participating* in a proceeding pursuant to" [italics added for emphasis] the Act, are specifically granted by the Act *full immunity from liability* for damages in any civil action for defamation, libel, slander or damage to reputation arising out of their false or unfounded

reporting.¹⁵ (italics and bold added for emphasis) But damage to reputation and being openly stripped of his or her entitlement to interact with minors in the particular sport are *not the only detriment* to the falsely accused. The Act actually operates like the full-employment Act for predatory litigation attorneys.

Oppressive Civil Litigation

In this regard, as to certain categories of accusations (relating to sex-related abuse and to forced labor), the minor may, in addition to all other available civil remedies, cause to be filed on his or her behalf a federal District Court lawsuit against the accused. Attorneys are already advertising and creating website content to attract and pursue these federal civil lawsuits against American Juniors sports administrators, coaches, promoters, officials, athletes and medical personnel on behalf of minors who have allegedly suffered personal injuries, including "emotional" damage, from child "neglect" in a litany of federal crimes enumerated by the SafeSport Act. Why? Surely, at least in part because the Act incorporates and perpetuates an *undeniably uneven* playing field, benefiting the minor, in such lawsuits.

The Act allows for *a lengthy statute of limitations* (meaning, many years of unexplained and unreasonable delays) which appears to be the greater of 10 years from the time of the alleged abuse (when the claimant was a minor) or 10 years from the person sustaining injury from the abuse, with a possible (it is ambiguous in the Act) limitation of 10 years after the minor turns 18. So, for example, if the requisite-something "suspicious" occurs when the minor was 10 years old, the accused is in jeopardy of a federal civil court damages-action filing at any *time over the next 18 years*!

The statute further provides that,

"The court may also award punitive damages..."

Also, pursuant to express terms of the Act, a successful litigant in such a federal District Court lawsuit will be entitled to collect, in addition to damages,

"the cost of the action, including reasonable attorney's fees and other litigation costs reasonably incurred."

Regarding recovery of reasonable attorney's fees, it is likely that a *dual standard* would likely apply. Whereas a prevailing victim/plaintiff would be entitled to an award of attorney's fees unless special circumstances would render an award unjust, a prevailing *accused/defendant* would recover attorney's fees only upon a finding that plaintiff's action was, "frivolous, unreasonable and without foundation." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 417, 421 (Title VII action); *Hughes v. Rowe* (1980) 449 U.S. 5, 14 (Civil Rights Attorney's Fees Awards Act of 1976); and, *Independent Federation of Flight Attendants v. Zipes* (1989) 491 U.S. 754, 755, 761 (Title VII action).

The stakes are high, but perhaps the most egregious aspect of such a federal civil lawsuit, is that the purported victim is entitled to recover the *larger of actual damages* (which may be slight), *or* \$150,000 in "liquidated damage." So, even if actual damages sum from the alleged personal injuries is slight, the *minimum* compensatory damages award would be \$150,000.

Now, some may react, "If an accused has sexually molested a minor at any stage of sanctioned American sport, why not *throw the book at him or her* and force covered individuals to report?" And this is almost surely what motivated Congress to *precipitously enact* the Act. However, without a strong and continuing base of administrators, coaches, promoters, athletes,

technical officials and medical personnel, there *would be no forum* for developing future Olympic athletes in the USA.

Over-reporting of misperceived "misconduct"

Unless significantly amended by further legislation, the Act may arguably *undermine* the very youth sports programs and athletes it was designed to protect, as more and more informed volunteers are compelled to reconsider any participation whatsoever in this virtual mine field. This should not so much "spark outrage" as to the SafeSport conundrum as be a *seed for prompt substantive changes* in the federal law and its implementing policies, procedures and training methodologies. Examples of innocuous and completely innocent conduct which fit precisely within the definition of "facts that give reason to suspect that a child has suffered an incident of child abuse, including sexual abuse" are easy to imagine.

For example, in a **soccer game**, an official gives a yellow card to a youth player for unsportsmanlike conduct, admonishing the child for an illegal hard hit and causing the player to break into tears and fall into depression. In a **tennis match**, an official forcefully pulls a youth player off of a Line Judge after a squabble breaks out over a series of questionable line calls. In a **Taekwondo match**, a medical assistant places her hands on a youth competitor's leg to try to assist with a leg cramp, which the minor interprets as offensive. During the course of a **badminton match**, a player slips on sweat left on the court, injuring their ankle badly and causing that player to retire from the match. In a **soft-ball game**, an umpire and youth player are seen leaving a restroom together with the umpire consensually touching the player's shoulder. In a **snow-skiing practice session**, a coach helps warm a youth skier in devastatingly cold conditions by pressing his or her body against the youth skier's body and rubbing the skier's legs. In a **table tennis regional tournament**, a coach harshly and openly remonstrates a youth

competitor from his training academy for missing practice repeatedly, causing the player to be ill-prepared for the match and lose. In a **gymnastics event**, a gymnastics youth student is expected to assist for hours on end in the process of checking youth athletes into their respective events.

Assume, for purposes of illustration, that *all* of these referenced examples are actually innocent in both intention and effect. Nevertheless, under the Center's policies and procedures, covered individuals who learn of those facts, first-hand or through even multiple layers of hearsay, creating a mere suspicion of child abuse, MUST, within 24-hours of the observation, report such incidents to law enforcement or themselves risk prosecution for a federal criminal offense of non-reporting. Once the Center has also been informed of the inflammatory (and yet unproved) allegations, the Center itself MUST determine, through its policies and procedures, and potentially including binding arbitration, whether the alleged child abuse or neglect actually occurred and what administrative consequences, if any, are to be imposed. The predictable backlog of cases at the Center is already underway. ¹⁶ The adverse consequences of overreporting are manifest.

"People falsely charged with sexual abuse often face numerous problems of their own. The nature of the crime leveled at them often evokes an overwhelming sense of betrayal. In highly publicized cases, the general public has a strong tendency to summarily assume the accused is guilty, leading to very serious social stigma. The accused, even if acquitted, risks being fired from their job, losing their friends and other relationships, having their property vandalized, and being harassed by those believing them to be guilty." ¹⁷

Balanced against the huge risk of false or unfounded accusation, non-compensable damage to reputation, stress, interruption of youth sports participation and the overwhelming financial burden of defending a criminal Complaint, an administrative proceeding and also, potentially, a federal District Court civil lawsuit, a legitimate question arises:

Who would *knowingly* choose to continue to volunteer in sanctioned American youth sports programs today?

SafeSport Code for the U.S. Olympic and Paralympic Movement

The Code is the official word on how the Center will operate, how the Center views such things as definitions of sexual misconduct and of other misconduct, and how the arbitration of misconduct claims proceeds. The Code admirably prefaces itself by assuring that,

"The U.S. Olympic and Paralympic Movement is committed to creating and maintaining a sport community where all persons who participate in sport programs and activities can work and learn together in an atmosphere free of all forms of emotional, physical and sexual misconduct."

A copy of this 10-page Code is attached as Appendix "A" to this paper. 18

However, there are *legal limits* on what a "regulatory agency" (whether a governmental entity or a private, nonprofit, corporation tasked to implement federal legislation) may do under the guise of "policies and procedures." First, foremost and obviously, it is black letter law that the regulations *cannot contradict* the enabling federal statute itself.

Also, if the Code promulgated by the Center is *not* a regulation adopted pursuant to the rules of the APA, but instead is a mere "guidance document," then, pursuant to a recent directive

by the Trump Administration, the Code is *no longer enforceable at all* by or on behalf of the federal government.¹⁹

The Center's SafeSport Training Video Program

Following the lead of the policies and procedures as enumerated in in the Code, and as part of the Center's mandated training procedures, the Center produced a **training video** (the "SafeSport video"), organized into three "modules." Viewing and testing within the SafeSport video is *required curriculum* for all officials, coaches, administrators, medical personnel and tournament promoters in any of the 50 U.S. sports currently included within the Olympics or Paralympics. A "Certification" of compliance is issued by the SafeSport.org website hosting the SafeSport video, and this certificate must then be sent by the covered individual to his or her NGB.²⁰

The SafeSport video pertains primarily to contact by those regulated persons with amateur athletes under 18, but also purports to pertain to young adult "victims" up to the age of 20 years of age.

The three "modules" which comprise the substance of the SafeSport video are:

- (1) Mandatory Reporting—Understanding Your Responsibilities;
- (2) Emotional and Physical Misconduct; and,
- (3) Sexual Misconduct Awareness Education.

While the modules are certainly consistent with the Code *as written by the Center*, each of the three modules is patently flawed as confusing, misleading, arbitrary and not in accord with State or federal law. Moreover, far from a neutral voice, the SafeSport video is infused with

implicit bias against covered individuals as a class, painting them all with a virtual presumption of misconduct.

Implicit (or Unconscious) Bias

The Perception Institute describes Implicit Bias and its adverse impact on decision-making:

"What it is:

Thoughts and feelings are 'implicit' if we are unaware of them or mistaken about their nature. We have a bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people. Thus, we use the term 'implicit bias' to describe when we have attitudes towards people or associate stereotypes with them without our conscious knowledge. A fairly commonplace example of this is seen in studies that show that white people will frequently associate criminality with black people without even realizing they're doing it.

Why it matters:

The mind sciences have found that most of our actions occur without our conscious thoughts, allowing us to function in our extraordinarily complex world. This means, however, that our implicit biases *often predict how we'll behave more accurately than our conscious values.*"²¹ (italics added for emphasis)

Scientific American also describes the mechanism and impact of implicit (or "unconscious") bias:

"When is the last time a stereotype popped into your mind? If you are like most people, the authors included, it happens all the time. That doesn't make you a racist, sexist, or whatever-ist. It just means your brain is working properly, noticing patterns, and making generalizations. But the same thought processes that make people smart can also make them biased. This tendency for stereotype-confirming thoughts to pass spontaneously through our minds is what psychologists call implicit bias. *It sets people up to overgeneralize, sometimes leading to discrimination even when people feel they are being fair.*" (italics added for emphasis)²²

Cheryl Staats is a Senior Researcher at the Kirwan Institute for the Study of Race and Ethnicity, housed at Ohio State University. Ms. Staats provides valuable cautionary insight:

"This unwavering desire to ensure the best for children is precisely why educators should become aware of the concept of implicit bias: the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Operating outside of our conscious awareness, implicit biases are pervasive, and they can challenge even the most well-intentioned and egalitarian-minded individuals, resulting in actions and outcomes that do not necessarily align with explicit intentions."²³

Implicit, or unconscious, bias is a *real menace* in society and has rightfully been criticized for causing well-meaning people to make decisions (such as whether to report suspected misconduct in youth sports) based not on the objective evidence but instead based on

preconceived, unconscious, and unfounded bias and false stereotypes against a particular class of persons (such as all "covered individuals" under the Act).

The SafeSport video, three modules

Module: Mandatory Reporting

The introduction of this module suggests that child sexual abuse is the subject-matter of the mandatory reporting requirements of State and federal law:

"The information that follows in this section was designed for use by mandatory reporters, although anyone who suspects child sexual abuse is strongly encouraged to report it to the proper authorities."

From the outset in this module, the concept of "reasonable suspicion" is ignored and the *focus of reporting* has been narrowed to child sexual abuse.

The <u>first</u> scenario involves a 16-year old female athlete who reports to you that, "one of your team volunteers" kissed and fondled her "in the hallway outside the locker room after practice the other day." The scenario adds that you previously noticed this volunteer being "flirtatious" with the minor. You've known the volunteer "for years" and you "can't believe they would do something like this." Then, as the viewer of this scenario, you're given choices as to your action, if any: (1) embark on some fact-finding investigation; (2) report the incident to "your organization;" (3) contact law enforcement; (4) wait for the next shoe to drop; or, (5) unsure what to do.

In this first scenario, if anything, option #5 is correct insofar as there is inadequate specificity to form a reasoned response. We are not informed whether the contact was voluntary

and consensual between the two parties. We do not know the age of the "volunteer." We do not know if the conduct previously occurred between the parties (which may in fact be indicative of "consent" regardless of how the Code treats this factor). We are not told whether the athlete and the victim were in an existing relationship. We do not know whether this "volunteer" had any contact, within his or her status as a volunteer, with the athlete. We are uninformed as to what the policies of "your organization" are in these regards. So, unless consensual, peer-to-peer "fondling" is a proper subject for making youth sports "safe," this scenario appears to be pointless.

Despite these shortcomings, the scenario seems to suggest that the viewer acknowledge that he or she *should* report the incident to their organization and "contact" law enforcement (with a complaint of criminal conduct). But if the Act requires reporting of such an event to law enforcement and/or to the Center, the result would be the substantial *over-reporting* by laymen in possession of inadequate bases for any such reports.

Later in the module the viewer is informed that undertaking any kind of substantive investigation, prior to or even subsequent to any reporting, is wrong and should always be left to the authorities. However, the factual deficiencies of above-described scenario constitute a perfect example of the fact that some form of investigation at the pre-reporting stage is exactly what is needed, in order to flush out missing pertinent facts.

Under the heading of "Unit 1: When to Report Suspicion of Abuse," the module states,
"You don't have to be certain that sexual abuse is occurring to make a
report.

Never attempt to conduct your own investigation.

Don't question the person accused or anyone else.

Don't extensively question a child who discloses abuse to you.

Leave the investigating and questioning to the authorities."

Unfortunately, delegating complete responsibility to authorities is contrary to common sense, human nature and, most importantly, the terms of the Act itself. The Act speaks of learning facts which give "reason to suspect" and as discussed previously, *mere suspicion* is not a viable American legal standard for instituting any investigation of criminal conduct. *Terry v. Ohio, supra.* Accordingly, a requirement of reporting may *only* be enforced when a covered individual is endowed with *reasonable* suspicion. The notion of the suspicion being "reasonable" necessarily means that the covered individual must himself or herself exercise a certain level of judgment and discretion in assessing whether the suspicion is reasonable. In other words, if "reasonable" is given any meaning whatsoever, it requires *a level of judgement* by the covered individual as to whether to report, and hence, a level of *discretion*.

It is common experience that any parent knows it is often unwise to take action based on what a young child reports *on its face* without some digging as to details and credibility. It is no answer for the SafeSport video to claim that it is extremely rare for children to make "false" claims. First of all, general statistics of this nature have absolutely nothing to do with a "reasonable suspicion analysis in any *specific* case.

Also, if there are indeed "studies" that make such a specific claim that false reports by children are extremely rare, then those studies are flawed and contradicted by the experience of criminal defense attorneys across the globe. False or unfounded reporting of sexual abuse by

minors is absolutely *commonplace* and occurs with *disturbing regularity*. In her book, *The Memory Illusion*, Dr. Julia Shaw observed,

596

597

598

599

600

601

602

603

604

605

606

607

608

609

610

611

612

613

614

615

616

617

618

"This knowledge [that people can report events which never occurred or didn't occur as recalled, as a result of misremembering] also informs us about how those involved with the legal system, including victims, witnesses, suspects, and even the police themselves, can get their memories muddled. It makes us critical of accepting accounts as reliable and true when they are not corroborated with independent evidence. As the world's single most influential false memory expert Elizabeth Loftus said in her fantastic TED talk in 2013, 'Most people cherish their memories, know that they represent their identity, who they are, where they came from. And I appreciate that. I feel that way too. But I know from my work how much fiction is already in there. If I've learned anything from these decades of working on these problems, it's this: just because somebody tells you something and they say it with confidence, just because they say it with lots of detail, just because they express emotion when they say it, doesn't mean that it really happened.' This knowledge has the power to revolutionize the legal system and to help prevent miscarriages of justice."24

Moreover, even as to reporting *by an adult* of sexual abuse, triers of fact are routinely instructed to make credibility determinations based on *all of the evidence* before them. In 1975, in *People v. Rincon-Pineda*, the California Supreme Court held that *in every criminal case* in which no corroborating evidence is required, the jury must be instructed as follows:

"Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact to be proved solely by the testimony of such a single witness, you should carefully review all of the testimony upon which proof of such fact depends."²⁵

A fortiori, when dealing with children making allegations of purported sexual misconduct, it is essential that prior to making the decision to report, a person scrutinize the child's story and attendant circumstances carefully in order to determine whether a reasonable person would find that suspicion of the misconduct by the particular alleged offender is, in fact, "reasonable."

In the <u>second</u> scenario, the viewer is presented with second-hand information about a coach, after "a particularly tough practice a couple of weeks ago" giving a "rub-down" to an athlete after helping the athlete remove his shirt. The athlete giving this information to the "friend" (we later find out that the friend is a teammate) described that the rub-down "made him feel 'weird'" and that "it was maybe sexual but he wasn't sure." Later we find out that the friend begged his teammate to not mention the athlete's experience to anyone.

. If the purpose of the second scenario is to inform us that it *lacks* adequate information to form a reasonable suspicion of sexual misconduct, it fails to so-inform the viewer. Instead tthe scenario virtually *invites* the viewer to conclude²⁶ that this "rub-down" was, in fact, sexual in intention and substance and that therefore the coach should be prosecuted and stripped of his right to ever coach again. Unfortunately, the SafeSport video in this manner encourages viewers to report completely innocuous conduct from second-hand sources with virtually **no evidence** of any actual misconduct. Dr. Shaw addressed this "where there's smoke, there's fire" mentality:

"Another problematic attitude that we see influencing cases involving alleged abuse is the logical fallacy that 'Where there is smoke there is fire.' I shudder at the blithe certainty contained in that statement every time I hear it I cannot help

but wonder at the mental gymnastics the person in front of me must be doing to reconcile such a view with modern notions of justice. They are twisting innocent until proven guilty into guilty until proven innocent; the assumption of that statement clearly being that when individuals are accused of a crime they are probably guilty. Even when a person is exonerated, popular notions that the alleged crimes must have occurred often persist. Even if no evidence is found, no scars are revealed, and alibis are solid, accusations can override our better sense of justice." ²⁷

The second scenario is a classic "where there's smoke, there's fire" fact pattern but is almost certainly included within the Safesport video to illustrate when information as to an incident *should be reported* to authorities.

The third scenario posits a "rumor" that a 15-year old girl athlete "had sex" with one of the coaches, who is 20. The scenario attempts to tarnish the credibility of the possible victim by asserting that she, "is known for being difficult and a bit of a drama queen." The scenario then asserts that your "colleagues and other athletes" have somehow formed a "consensus" that "the story was probably made up to get attention." By the terms of this scenario, there is **by definition** *no specific source* of the information, since it is a "rumor." The scenario further implies that the purported rumor was *thoroughly discussed and considered* by you, by your colleagues and by the athletes, and that after such dialogue a "consensus" developed that the rumor was "probably" untrue.

It is a mystery why this scenario was included in the Safesport video. First of all, the nature of a "rumor," as noted above, is that there is *no specific source* of the information.

Accordingly, without more, there can be no way of determining the "credibility" or reliability of

a mere rumor. A rumor cannot as a matter of law constitute "reasonable suspicion" since it could never constitute "specific and articulable facts" as required by *Terry v. Ohio*, cited earlier. Also, studies have cautioned against basing reports of sexual abuse on rumor.

"The influence of rumour on false allegations by young children

False allegations of sexual abuse are also likely to arise in contexts where numerous children regularly intermingle, such as sports teams, day care centres and schools. In this case, the allegations are spread by rumour, which, according to Rosnow (1991), serves to explain an otherwise unexplained event that generates uncertainty and personal anxiety. Rumour circulates as a function of the credibility of its source. Until more extensive research can be conducted regarding the potential impact of rumour on the development of false allegations, it would be wise to consider this possible impact in cases where several children say that they know one of them is being sexually abused."²⁸

A rumor could be the basis for starting *an investigation* however, but in later stages of this module we are informed that investigations should be left to "authorities." The fact that an athlete can be "difficult" and is somewhat of a "drama queen" is nothing more than a deliberately inflammatory and irrelevant statement. In the philosophy of logic, this is an example of the logical fallacy of "poisoning the well." Whatever being "difficult" is and whatever imagined transgression the expression of "drama-queen" emotion characterizes, it has *nothing* to do with a person's credibility and reliability. And yet, this vague and inflammatory observation is thrown out there for what purpose? Presumably to prejudice the viewer against the possible victim? A legitimate concern becomes whether the SafeSport video is trying to teach, or is trying to misdirect, the viewer? Finally, the whole notion that the coaches and athletes apparently formed

a "consensus," that a "rumor," of no-specific-source, is probably false is both preposterous (there is no way to assess "probabilities" from the given information) and contrary to the later advisement in this module which discourages self-investigation.

Moreover, the fact that an allegation may or may not "probably be true" is *not the*standard for whether to report child abuse and neglect. The standard is "reason to suspect" or

(preferably) "reasonable suspicion." If a covered individual learns of facts which, under all of the
circumstances, would cause a reasonable person to have a (reasonable) suspicion that some
particular person has committed child abuse or neglect, then the Act requires the covered
individual to report the purported misconduct or neglect to law enforcement and to the Center. It
is immaterial whether the "reasonable suspicion" rises to the level of a "probability." Thus, even
if the facts of misconduct are "probably not true," if the covered individual nevertheless
determines that a "reasonable suspicion" exists that the reported facts are true, then the reports
must be made. Perhaps most importantly, by not informing the viewer what he or she should
probably conclude from this scenario, the module simply creates confusion and thereby
promotes false or unfounded claims of misconduct.

The module recommends that in making a report, one should, "be prepared to provide authorities [with] as much specific information as possible. The name of the suspected offender, victim(s)³⁰ name, dates and places of possible offenses and other details" so that the events may be "thoroughly" investigated by "authorities," in order "to prevent the offender³¹ from abusing more athletes."³² Later in the SafeSport video, a former prosecutor speaks of the "basic information" that should be provided in a report of misconduct: the name of the child, how to locate the child, the name of the child's parents or guardians, the basics of what you've been told,

"what information were you given that makes you feel you need to make this report. So, what did the child tell you happened and who the offender is, if you know. So, just the basic information: the who, the what, the where if you can get it. Ideally, you will give them your name and your contact information."

Then the module makes some remarkable, irrelevant or utterly unsubstantiated claims:

"Only one in 10 child victims of sexual abuse report it."

What are we to make of this assertion? If a victim of child sexual abuse never reports it, how is it that anyone knows of that unreported child abuse in order to place it into a statistic? And even if that highly doubtful statement is *factual*, what is the *significance* of such a revelation in the training module? Should the video viewer be *more inclined to report* questionable information as "child sexual abuse" because only 1 in 10 victims actually report it to anyone? In other words, since it is purportedly unusual for a child to actually report sexual abuse which has occurred, is the module suggesting that we should *relax the standard* of "reasonable suspicion" and routinely make reports based on evidence amounting to *less* than reasonable suspicion?

The module also asserts that,

"Studies show false reports are extremely rare, particularly from children."

The statement does not differentiate "false" reports from "unfounded" reports. The statement does not specify the meaning of "extremely rare." Also, the statement is not limited to false reports of sexual misconduct. It is simply, that "false reports" are "extremely rare." What possible "studies" could arrive at this global assertion! And even if, by "false reports," the module actually means "false reports of sexual misconduct" are extremely rare, then as indicated above, that assertion is both highly subjective (as to the meaning of "extremely rare"), arguably

absurd and contrary to professional experience of many persons within the forensic field relating to sexual misconduct claims.

Nevertheless, this module of the SafeSport video makes these assertions with impunity and exhibits an inherent bias against covered individuals. This "bias" within the Safesport video—known in psychology as "implicit bias"—is intended to result in, or may have the *practical effect* of resulting in, *an over-reporting of suspected child sex abuse*. This is because, for example, viewers have been assured by the authority figure spokespersons and by the SafeSport video itself that reports of child sexual reports are both *rare* (only 1 in 10 child victims of sexual abuse actually report it) and *extremely unlikely to be false* (false reports are extremely rare).

The module suggests that the reporting person should *not be concerned* for the reputation of the alleged offender, since the report will be thereafter dealt with by investigators who are, "trained to uncover information to corroborate a report" and "also work to protect the identity of the alleged offender." No mention is made of protecting the identity of the *alleged offender*. Moreover, the statement does *not* say the investigators are trained "to corroborate *or to refute* a report." Again, this failure to acknowledge that the story and ensuing report might be false and unfounded reveals a *harmful implicit bias* in this training module against coaches, officials or any other object of a report of suspected misconduct. Moreover, reputation is not the only concern for someone who is wrongfully charged with sexual misconduct against a minor. As anyone knows who has ever been wrongfully investigated or charged with a crime can attest, the stress, expense of defense in time and money, and risk of a false finding of guilt in questionable charges are also *serious potential deleterious results* of making an unwarranted report against an individual.

Equally important is the fact that because of the arbitration rules and presumptions put in play by the USOC and adopted by the Center, the *mere allegation of criminal conduct in a criminal complaint*, regardless of any subsequent dismissal, reduction in charge or even a plea of *nolo contendre* will constitute *evidence of guilt* in the binding arbitration of the charged offending conduct. Not only is there no "presumption of innocence" here, to the contrary, the unproven allegations in a criminal complaint are themselves evidence of the offense. This bootstrap policy and procedure adopted by the Center is in clear violation of constitutionally protected due process of law. Whistles are sounding and red flags are being thrown by all referees on the playing field!

Thus, telling viewers that they should not be constrained by consideration of the effect on the alleged offender, *is grievously misguided and callously oblivious* to the horrendous effect of unwarranted reports against innocent alleged offenders. Moreover, it would come as no surprise that the essential content of such "reports" would somehow work its way through the rumor-mill and rapidly be leaked within the particular NGB or organization. Thus, false or unfounded reports of child abuse and neglect, even if ultimately adjudicated in favor of innocence, would likely cause *indelible harm* to an innocent alleged accused. It's true, as they say, that it is virtually impossible to "un-ring" the bell of an accusation of child abuse.

Under a heading of "The alleged offender would never do this," the module makes the interesting proposition that,

"Sexual abusers spend time in advance protecting themselves against suspicion in order to gain access to young people."

At first blush, the importance of this *misleading statement* seems plausible: criminals like to cover their tracks before they perpetrate their crime of choice. But then, that assumes that the alleged offender is *actually* an offender. It assumes that the person to whom we are referring is actually, *factually guilty* of sexual abuse. This biased assumption is yet another example of an implicit bias in the module *against* officials, coaches and the like, and *in favor* of reporting suspected misconduct against them.

Consider the fact that while it may be true that *some* criminals take steps to cover their tracks before they do the deed, *most criminals do not cover their tracks*. This is one reason why, as an experienced criminal defense attorney, I can assure you that the vast majority of all defendants charged with criminal offenses are either proven guilty or accept plea bargains. If most criminals covered their tracks, "protecting themselves," as the above-proposition suggests, there would be a much higher incidence of Not Guilty verdicts in criminal courts after a full-blown jury trial. Any veteran criminal defense attorney, moreover, will assure you that across-the-board Not Guilty verdicts after a full-blown jury trial comprise an *extremely small percentage* of the totality of cases reaching the level of a filed Criminal Complaint.

Moreover, not only do *some* criminals attempt to cover their tracks prior to commission of a crime, but *completely innocent people* may also act in a manner which could, in retrospect, be viewed from the outside as being an effort to conceal a future crime. Remember the proposition set forth above:

"Sexual abusers spend time in advance protecting themselves against suspicion in order to gain access to young people." (italics added for emphasis)

First of all, access to young people is *not an issue* in the case of coaches, officials, medical personnel, athletes and organizers *in youth sports*. In youth sports, *all* of the potential "offenders," both innocent and guilty, have already gained "access to young people." And, if you are one of those persons, you presumably know that by participating and volunteering or even working in youth sports, you naturally get to know, on a casual personal basis, large numbers of minors. In the badminton community, for example, it is not only *common* for officials, coaches, medical personnel, organizers and athletes to be "Friends" on Facebook and other social media, it would be *highly unusual* to *not* be friends, both on Facebook and in person with the young athletes and their parents that you see over and over in social media, at the badminton courts, at training sessions and in tournaments.

The fact is *that all of those categories* of potential "offenders"—meaning *all* covered individuals—could be accused of *spending time in advance to protect themselves against suspicion*; but that conclusion would not only be *patently false* but also would *add nothing* to corroborate or otherwise support a conclusion that any of them had sexually abused a minor.

The module then asserts that,

"Reporting abuse allows the abused athlete to get help, contributes to keeping other athletes in your program safe and maintains the integrity and reputation of your sport organization."

Recall that this statement is within the module entitled, "MANDATORY REPORTING: UNDERSTANDING YOUR RESPONSIBILITIES." While the statement *may* be true, at least some of the time³³, it assumes that the report of abuse is factual, not imagined or misconstrued. If the report is inaccurate or misleading and the alleged "victim" is not a victim at all, then that

report will decidedly *not* enable the athlete, "to get help" and will *not* contribute to, "keeping other athletes in your program safe" and will *not* help to maintain, "the integrity and reputation of your sport organization." The result of these over-generalizations, of course, is to *indirectly encourage over-reporting* based upon less than adequate information coupled with little or no investigation prior to the reporting. The implicit bias against covered individuals is both palpable and unrelenting in the SafeSport video.

The module states in narrative that,

"It's estimated that more than 1 in 10 children will be sexually abused before the age of 18."

While, *if true*, that is a shocking revelation, the module gives no information as to whether that statistic pertains to the United States (where we all are who are governed by the Act and over whom the Center has jurisdiction) or is inclusive of data from other countries where sexual abuse of minors is arguably much more commonplace. Also, that statistic says nothing as to what portion of this sexual abuse comes from a child's parents or relatives, as opposed to from outsiders such as "covered individuals." If indeed 1 in 10 children will be sexually abused before the age of 18, how much of that is happening in the context of the Olympic or Paralympic sports movement? The result of this statistic being thrown out there by the SafeSport video is simply to further its implied bias against covered individuals.

Then, a spokesperson in the module describes that,

"Each jurisdiction is a little different, but every State requires that an adult who believes something has happened, or has a reasonable suspicion—not that you even believe, but that you have a suspicion—you need to report it."

This statement, although hopelessly vague, is simply untrue as applies to an adult's suspicion of criminal activity. Although the Act creates a category of "covered individuals" who must report if they learn of facts giving them reason to suspect that child abuse or neglect has occurred, that is not what Ms. Smith has said. Her statement is that every State has laws requiring (all) adults who have a "suspicion" (or even a reasonable suspicion) that "something has happened" (assume she means child abuse or neglect) to report it. If that is true, then we have millions upon millions of non-reporting adults in the United States every year.³⁴

A few months ago, while on a bike ride, I overheard a small child inside a nearby condominium crying out (in a language other than English) hysterically and in tears,

"No, mommy, I don't want to do that, I don't want that. Stop, stop, please! I don't want that." (to the best of my translating capabilities in that language)

It was alarming enough that I stopped my bike to hear what was happening. I could not see inside as to what was occurring. Did the cries of protest create in me "suspicion" of child sex abuse? It certainly was *consistent* with what a child, who was a victim of child abuse, would scream out. A suspicion of, "that's child abuse going on in there" could arguably have been reasonable in that regard. But on the other hand, the screams and pleading were *also consistent* with a mother requiring the child to eat his or her vegetables, or take medicine, apply painful medicine to a wound, wear clothing that the child did not like, or any number of other things that cause a small child to scream bloody murder. I continued with my bike ride. Was that a crime? Based upon that incomplete and insubstantial evidence, absolutely not.

The SafeSport video states, "If you know about child abuse, report it." This oversimplification of the entire subject matter of this module **is** *very troubling*. Of course, it goes without saying that if you, as a covered individual (or otherwise) *know for a fact* that actual child abuse has occurred, then as a moral imperative alone, you should report it. But repeating the simplistic mantra of "If you know about child abuse, report it," is not particularly helpful. In fact, the statement,

"If you know about child abuse, report it"

has a natural tendency to encourage people *to over-report*, without adequate consideration of the adverse consequences on the accused, based upon information which fails to bear the earmarks of reliability, and based on behavior and events which do not rise to the level of *reasonable* suspicion.

The narrator announces,

"If you're concerned that sexual abuse has occurred, it must be reported."

A short while later, this "being concerned" theme is repeated,

"If you have a concern about abuse, follow through and *make* a report. It's the *right* thing to do."

These generalized proclamations are *off-target*. A person's "concern" has nothing to do with whether something should or should not be reported. Moreover, simply being "concerned" as to whether or not sexual abuse has occurred between two or more people (the alleged victim and the alleged offender), is *not a proper legal standard* for determining whether one should or must "report" such abuse. However, this deliberately chosen language evidences a clinically obvious, persistent and deleterious implicit bias within the SafeSport video in favor of potential victims and against potential offenders (i.e., *every* official, athlete, medical personnel, coach,

organizer and other persons having contact with minors in youth sports within the 50 Olympic and Paralympic sports).

The module then proceeds to discourage anonymous reporting,

"The downside is that if more information is needed or there's confusion about the information, then the agency that took the report has no way to go back and clarify."

This purported "justification" against anonymous reporting is an overgeneralization and mainly applies to a situation where the reporting party was a percipient witness to the offending conduct or to a statement by the accused. If a percipient witness is anonymous, then obviously, reporting anonymously could impair the investigation. But in the scenarios commonly portrayed in the SafeSport video, where the reporting party is simply *told* of the evidence of misconduct, then the anonymity of this second or third-hand source of information would *not* typically impair a competent investigator in gaining "more information" or unraveling a confusing aspect of the report.

The module arguably attempts to *intimidate* reporting parties into revealing their identities within the report? The spokesperson continues,

"The downside for the reporter and their organization is that if that person is a mandated reporter, and they don't provide their information, there's no record that they actually complied with their obligations under the law."

Spoken like a true former prosecutor. The quoted statement, however, is *false or egregiously misleading*. First of all, since the law *permits* anonymous reporting, then there MUST be a viable way to report anonymously and simultaneously have acceptable proof of such reporting. That

proof can be through photocopying the anonymous letter, envelope and stamp, having a trusted friend witness the mailing or other delivery of the report, emailing a copy of the report to yourself with a notation as to the fact of reporting, or through countless other methods, constituting *actual evidence* of the fact that a report has properly and timely been made to law enforcement and to the Center. Again, the SafeSport video exhibits a detrimental implicit bias against alleged offenders, since it may cause reporting persons to also report their own identities and contact information in lieu of anonymous reporting.

A coach spokesperson concludes that,

"Many times, when coaches or administrators see things that they think are inappropriate, they really feel like they need to protect their own...But what we really find is that the the athlete's the one that needs to be protected and and we need we need to be willing to stand up and and make sure that we get that taken care of. But it's not about protecting others [coaches, schools and so on] it's about protecting the person who's being harmed."

Certainly a well-intended speech and not without some validity. Of course, protection of minors in sports is the reason the Act became federal legislation in the first place and why the Center was tasked with implementing and enforcing the Act. However once again, this module exhibits a pronounced implicit bias against everyone who is not the alleged victim. Without mentioning the interests of the alleged offenders, the speaker focusing only on consideration of interests of the alleged victim. But why? Why would the interests of one person or category of persons (i.e., alleged child victims) be superior to the rights and interests of another person or category of persons (i.e., everyone else)? That is not the way the system of justice is set up in the

United States. From the U.S. Constitution, the right to due process of law and the presumption of innocence apply to everyone.

Deciding who to favor is like putting the cart, before the horse. Instead, let's wait until there is evidence creating a reasonable suspicion before deciding that "it's not about" protecting the alleged accused. Until that point, it IS about protecting the alleged accused. The reporting requirement should kick in only once evidence exists to create a *reasonable* suspicion, based on reliable and credible evidence, of child abuse. *Then*, it's about getting that report to law enforcement and to the Center, but not before.

This module of the Safesport video brings to mind the Crusade, or a resurgence of the Inquisition, where there should be little, if any, concern for over-reporting on unwarranted or unfounded claims of misconduct. This blatant backlash against coaches, officials, athletes, medical personnel, administrators, promoters and the like may well, if left unchecked, *result in grievous harm to youth sports* in the United States, as more and more talented and generous individuals simply elect to opt out of participation in youth sports in America.

A Social Worker speaking in this module makes an interesting point that when receiving a report from an alleged victim of sexual abuse, you should,

"be the best listener you can be, not giving feedback, honestly, of *any* kind in terms of questioning or even reassurance."

Ms. Miller Aron states that,

"They need to simply be listened to and then, in a sense, *triaged* to the correct person for further help and assistance."

Here, the speaker treats the alleged victim's statement as being adequately factual and reliable and that the result of the "triage" will therefore be, "help and assistance."

Notably, the Social Worker indicates that the child should *not* be given "reassurance." This is perhaps the *first and only time in the entire SafeSport video* (other than occasional reference to the notion of reasonable suspicion) where the possibility is directly or indirectly alluded to that the *accused may be innocent* and the child may be lying or mistaken in their story of abuse.

Nevertheless, the implicit bias seeps back in when she concludes that the objective of the triage (a euphemism for the criminal justice system and mandatory binding arbitration with the Center) is help and assistance to the victim. However, if the person complaining of misconduct is misinformed, mistaken or lying, then clearly the "triage" in no way helps or assists a victim. Passing false or unfounded reports on to law enforcement and to the Center helps no one.

Another speaker remarks that,

"If an athlete comes forward and you're their coach and they say this is what happened, [it's] not your job to do the investigation. Um, and that's so critical because the next things you do can impact any type of criminal investigation that may need to happen. Because again, your job as a mandatory reporter is to then to move forward with that information to the right persons after that, to say now it's up to them to investigate this."

The point of view expressed consistently in this module is that the responsibility to report is essentially a mindless obligation as a mere conduit of information to law enforcement and to the Center. If "it's not your job to do the investigation," any investigation, does that mean that it's

also not the viewer's "job" to make a reasoned determination of whether the information is reliable and credible enough to rise to the level of a reasonable suspicion in the reasonable man test?

The former prosecutor then advises,

"Don't ask a lot of questions. And only ask very open-ended questions—tell me about that. What happened? Do not ask a leading question. Don't say, 'He hurt you, didn't he?' Or even, 'Did he hurt you?' All of that will be done by a trained forensic interviewer who knows how to let the children talk in their own language."

This may well be sound advice for dealing with *very young* alleged victims. Studies show that younger children are particularly susceptible to being influenced, either as to detail, accuracy or truthfulness by yes or no questions, leading questions and even detailed inquiries by nonprofessional recipients of their information. However, as to older children, say 8 to 17 years of age (i.e., the age group that is most likely to be in organized sports) detailed questioning poses less of a risk of affecting the truthfulness and accuracy of the responses, and has more of a chance of exposing the truth.

"The child's age

As few studies have considered what role the child's age plays in false allegations, it is difficult to draw definitive conclusions regarding this variable.

The available data seem to suggest that adolescents are more likely than children to deliberately formulate false allegations. However, when very young children

are insistently asked leading questions by a parent, in the context of a divorce for example, they may make allegations of sexual abuse that never occurred."35

Concern about memory contamination and resulting false reporting by children is not without basis, but is more problematic with younger children than with adolescents.

"Questioning and children's suggestibility

Questioning a child about sexual abuse in a socio-legal context or more specifically during a police investigation interview is a complex task involving several factors related to the child's suggestibility and to communication and memory. Most studies have focused on interview-related factors, and guidelines have been suggested on the basis of several consistent findings.

- Children are more susceptible than adults to influence, and young children are more susceptible than older ones.
- Interview-related factors such as interrogation style (open, direct, leading, suggestive), the interviewer's emotional attitude (intimidating, judgmental, supportive), and the child's understanding of the task at hand can all influence the accuracy of the answers provided by children about events they have experienced.
- As source monitoring of information is poorly developed in young children, any discussion of, or questioning about, sexual abuse before an official investigative interview can etch itself in their memory. The same holds true of any other questioning that occurs

outside the official investigative process, whether during or after.

This phenomenon, commonly referred to as memory

contamination, is difficult to prevent, evaluate and measure."³⁶

Unfortunately, this module of the SafeSport video gives *virtually no deference* for the interests of a wrongfully accused person. To the contrary, it repeatedly exhibits a strong tendency to create the false impression that virtually *any* information about child abuse, without further inquiry, constitutes adequate cause to require mandatory reporting by covered individuals pursuant to the Act.

As concluded in the Quebec Study of False Allegations,

"The question of false allegations by children is a complex one for which we have only partial answers. Although research to date suggests that false allegations are rarely made intentionally and are more often made by adolescents and adults than by children, it is important to always consider that sexual abuse allegations may be untrue. It is also important to bear in mind that children who have been sexually abused are not always prepared to disclose the abuse." (italics added for emphasis)

Some reports of child abuse, of course, will constitute reasonable suspicion, but *some* reports of child abuse will *not* rise to the level of reliability, credibility and substance so as to create a reasonable suspicion of child abuse. Moreover, some questions and "investigation" (if that is the way the Center wishes to label it), *will be appropriate* prior to determining whether a story of misconduct does, or does not, rise to the requisite level of reasonable suspicion of child abuse or neglect.

A speaker in the SafeSport video then revealingly admits,

"I don't ever want somebody to be accused of something they didn't do. But I'd rather that we report it, and let that decision be made by the entities that are responsible for that, than let a child or a teenager, youth go home and have that abuse continue."

So, what do we have here? The speaker does not want an innocent person to be accused wrongfully. But as between that and not reporting, she would prefer that it be reported to the authorities. Then she backtracks and states that she would not want the "youth [to] go home and have that abuse continue." But to what abuse is she referring? A moment ago she was speaking of an innocent accused and a false or unfounded accusation. Then in effect she changes her statement to,

In the *abstract*, of course it is bad for an innocent person to be accused; however, in THIS case, the accused is factually guilty and I don't want the child victim to go home and have the abuse continue.

The speakers in the module simply cannot allow themselves to admit that *factually innocent alleged offenders have rights and interests to be protected* and that the reasonable suspicion standard is more than, in effect, a *rubber-stamp* for mandatory reporting.

The very next section states, in part:

"Remember: If a minor tells you a friend has reported abuse, you must make a report."

As you can see by now, this too is an incomplete and misleading statement. The truth is: If a minor tells a covered individual that a friend of the minor has reported abuse, and if and only if this information, together with any appropriate inquiry and limited investigation, creates a reasonable suspicion that child abuse or neglect has in fact occurred, then, and only then, you must make a report. In persisting to misinform and mislead the viewer as to reporting responsibility, the SafeSport video is wrong, misguided and not acting in the best, long-term interests of youth sports in America.

Even the chart in this module refers to the "Offender" and to the "Offender's identity" instead of referring to the "Alleged Offender" and "Alleged Offender's identity." Sadly, evidence of this bias against the accused and in favor of the alleged victims is rampant. The Reporting to Authorities section chart concludes by stating,

"Tell the authorities ... Whether the victim is or will soon be around the offender This will allow authorities to take steps to ensure the victim is safe."

Apparently, whether the story of child abuse or neglect is real and whether the alleged perpetrator is the responsible party, has already been decided. After all, there is a "victim" and an "offender." Case closed.

In a "perfect world" where accounts of child abuse were always true and the consequences of false or unfounded reports were utterly negligible, the concept of no inquiry for details as to reliability or credibility would seem to be a workable plan. After all, why bother? Why not simply receive information and make reports to law enforcement and the Center? But this is *not* a perfect world we live in. With disturbing regularity, children and their young friends give false and misleading accounts pertaining to everything from surreptitiously taking a cookie

to sexual assault. The real-life consequences on the alleged, but innocent, child sexual abuse "perpetrator" are extreme, even if he or she is ultimately vindicated. Accordingly, in the real world, *before* deciding to make a report, it is *essential* in the reasonable suspicion determination for the mandated reporter to undertake *some preliminary assessment of the reliability and credibility* of the child's story.

Remember, reasonable suspicion cannot be based simply upon an inchoate and unparticularized suspicion or "hunch'. Rather, reasonable suspicion, assessed with the reasonable person standard, must be based on *specific and articulable facts*, taken together with *rational inferences* from those facts. *Terry v. Ohio* 392 U.S. at 21-22 and 27. And of course, the suspicion must be associated with the specific individual. *Ybarra v. Illinois* 444 U.S. at 91.

Module: Emotional and Physical Misconduct

This module focuses in part on "bullying" behavior, as being an attempt to exclude someone from a group. It indicates that,

"8% of adolescents report being bullied every day."

And if this is true, and if we are to assume that this level and frequency of bullying constitutes the kind of emotional misconduct to which the Act applies, then are we to assume that, on average, 8 out of every 100 youth athletes experience bullying every day? Considering the vast numbers of youth athletes participating within the 50 NGBs, the reporting to law enforcement, to the Center or even simply to any of the NGBs of this level and frequency of *bullying* would create an impossibly astronomical burden on enforcement resources. While bullying is undoubtedly a societal problem, the typical *bullying situation simply cannot feasibly constitute* the kind of emotional abuse for which a covered individual could face federal prosecution for

failure to report it within 24 hours of learning of facts creating a suspicion of the conduct. Yet, according to this module, bullying misconduct must not only be discouraged by covered individuals, *it must be reported*.

Indeed, the Center must have realized how voluminous the mandatory reports about bullying would be, since in the Code, the Center undertakes exclusive jurisdiction only over complaints of *sexual* misconduct, and refers all other forms of misconduct complaints to the NGBs.³⁸ These remaining forms of misconduct (including, notably, bullying) are left for the various NGBs to investigate and determine. So now, apparently, the NGBs get to withstand the crushing burden of having to deal with bullying reports, *every day*, concerning approximately *8% of all of the youth participant members within the particular sport*. The resources of NGBs are already notoriously thin, and now this? Of course, satisfying this burden would be literally impossible for NGBs, and if it *is* impossible, then it should not be the subject of mandatory reporting by covered individuals.³⁹

"Harassment" is also dealt with in the module. We are instructed that the SafeSport definition of harassment is "repeated and/or severe conduct,"

"that causes fear, humiliation or annoyance, offends or degrades, creates a hostile environment, or reflects discriminatory bias, in an attempt to establish dominance, superiority or power over an individual athlete or group based on age, gender, sexual orientation, gender expression, gender identity, race, ethnicity, culture, religion, national origin, or mental or physical disability."

To me, you could simply cut from this definition everything starting with "based on..." since it seems superfluous to the notion of "harassment." But in any event, harassment at some level

occurs *constantly* in youth culture and if it ever rises to the level of "repeated and/or severe" then that would be a rare event (assuming that "repeated" does not include relatively innocuous ribbing or chiding by one athlete to another). According to the module, harassment calls attention to "differences," but many forms of conversation and criticism legitimately call attention to "differences." Moreover, regardless of how harmful, repeated and severe comments or conduct may be, they apparently do not constitute "harassment" unless they are "based on" the enumerated suspect classifications of age, gender and so on.

The module gives examples of harassment which do not appear to *rise to this level* of requisite harm. This, in turn, evidences an implicit bias in favor of "victims" and against all other covered individuals. One example in this module suggests that proscribed harassment has occurred where a coach berates a male athlete for poor performance and compares him to a girl who needs a tampon, and where the next day *someone* marks the athlete with a girl's name. Since the scenario does not identify who battered the athlete with a marking pen, the remaining conduct in itself, while offensive, would not be adequately severe so as to require change. The example certainly does not contain facts which are sufficient to mandate reporting to law enforcement and to the Center by a covered individual. Must a coach be handcuffed in this manner as to his remarks? If a school doesn't like a coaching style, it can fire him or her. If parents don't like this treatment from a private coach, they can switch clubs. Of course, the age of the child would have some bearing on this. If that scenario applied to a 7-year old it would be a different story than if it applied to a 17-year old athlete.

The SafeSport video then reports that,

"As many as 75% of elite athletes report that their coaches emotionally abuse them during their athletic career."

That is an *astounding* statistic, considering that "emotional abuse" is actionable under the Act and that we are talking about "as many as" (whatever that means) *3 out of 4* youth elite athletes suffering emotional abuse at the hands of their coaches. There is no scientific basis cited in the module for this astonishing statistic and it simply does not conform to common experience. Of course, "up to" 75% of elite Juniors decidedly do **not** suffer actionable "emotional abuse" from their coaches. The speaker follows up this statistic with her comment that,

"Fear gets lots of results. If our safety is at stake, or our survival is at stake, we may over-achieve."

She then concludes that,

"it's possible to get the same kind of result without that kind of mistreatment."

So, apparently, (1) fear can result in achievement, but if that level of achievement can be obtained without instilling fear, then (2) a coach should not use fear tactics to achieve her or his aims. So, no push-ups, sit-ups, repeated drills or laps for bad performance or focus? Coaches are to ask nicely, and give lots of praise, for elite-level performance? The module posits that,

"creating a positive environment, where athletes can train and compete *without* fear of emotional distress, helps athletes thrive and accomplish more, and prevent situations of emotional misconduct between coaches and athletes and among peers." (italics added for emphasis)

While the module purports to be about *helping coaches make better decisions* in their methods, it also warns that "emotional abuse" from coaching strategies can constitute "misconduct."

Apparently, those push-ups, sit-ups, repeated drills and laps can, after all, result in a covered individual being required to report a coach for child abuse involving emotional abuse.

Another example scenario calls into question whether a coach committed emotionalabuse misconduct where he "pulls an athlete aside," raises his voice and asks the player what
went on out there during a particularly egregious loss. One has to ask whether this is a serious
example in the module? Obviously, that described scenario *cannot* constitute any form of
misconduct, regardless of whether the coach raises his voice and unless by "pulls an athlete
aside" we are to read into that some *forceful ripping* of an athlete out of a group (which
interpretation would be an absurd stretch in the scenario). The mere fact, however, that this
innocuous level of coach-player interaction is used as a scenario strongly suggests, again, that the
training module is decidedly biased against coaches in independently exercising their discretion
in selecting and utilizing coaching techniques.

The same analysis applies to the very next example of how a coach deals with a player gaining weight. Using peer pressure or peer influence to help an athlete maintain optimum weight or conditioning or strength is not only acceptable, it is *effective*. Essentially the team is working as—well, as a "team" in helping each other *maximize their genetic potential* in their sport. But the module, by selecting this as an example, strongly infers that the coach's efforts constitute emotional-abuse misconduct.

The speaker later states,

"Any behavior where the coach is out of control is problematic. ... Children model adults."

She seems to illustrate "being out of control" with an example of a coach reacting to a disappointing situation by yelling at an athlete, throwing a chair, or hitting a table. Is she inferring that anger and frustration are now prohibited emotions in the coaching profession?

Does she suggest that adult coaches refrain from *expressing anger* even in ways that do not endanger a youth athlete? What *would* be the acceptable manner of a coach expressing anger, frustration and disappointment in his or her team's performance? Is a coach slamming his hand down on a table the kind of "out of control" behavior and "misconduct" which must be reported to law enforcement and to the Center? Are we telling coaches that they cannot raise their voices or even "yell" at an athlete and that if they do, they are out of control and we will *report them to law enforcement* and to the Center for emotional abuse of a minor? The *module* is vague on whether a report to law enforcement would be required or suggested, except that it does categorize these kinds of scenarios as emotional-abuse misconduct. That sounds like conduct that *must* be reported to both law enforcement and to the Center.

The module announces that,

"Denying an athlete medical attention and forcing them to play through an injury, or denying them necessary water or rest are also forms of physical misconduct." Apparently, then, the Laws of Badminton and Instructions to Technical Officials, each promulgated through the Badminton World Federation, need a *serious revision*, since in the sport of *badminton*, players are routinely given a limited amount of time to deal with medical issues and resume play, or forfeit their match. Badminton competitors *cannot drink water* during a game unless permission is first obtained from the Umpire, and umpires have the express discretion to *deny* an athlete's request for hydration. And "rest" is *specifically never allowed* during a badminton match, except at designated, timed intervals within a game (60 seconds whenever a score of 11 has been first reached by either player in a game) and between games

So, are badminton matches *inherently* forms of "physical misconduct" requiring reporting by covered individuals of the Umpires? If you are familiar with badminton, as I am, the answer *should* be a resounding: "No." But anyone else watching and listening to the SafeSport video might reasonably interpret this module as a *reprimand to badminton officials and rule makers* and a call for reporting this intrinsic, badminton official misconduct to law enforcement and to the Center for prompt administrative discipline.

1212

1213

1214

1215

1216

1217

1218

1219

1220

1221

1222

1223

1224

1225

1226

1227

1228

1229

1230

1231

1232

1233

While we're on the subject of badminton, in virtually⁴³ every USA Badminton-sanctioned Juniors badminton tournament played in the United States, youth players are required to work as line judges for the match following their matches. 44 Players are used as line judges because line judges in badminton are *very* important to ensure a fair match so that the actual players in the match are not "calling" their own "lines." Without players (not the competitors in the specific match) acting as line judges, the tournament organizer would need to find volunteers (which is not practical) or to *hire* line judges (not financially feasible [or even possible] in American youth badminton tournaments). Moreover, the players are given no option but to comply, and to my knowledge, no child has ever contested the right of organizers to force them to line judge without pay. 45 Thus, technically, this seems to constitute forced labor where the youth players have no choice but to work, over and over throughout the tournament, as line judges for no compensation. So, the question arises: Is this systemic, forced, unpaid child labor in badminton tournaments the kind of forced child labor which is expressly prohibited by federal statute, punishable as a federal criminal offense, mandated for reporting by covered individuals and the basis for federal civil damages of a minimum of \$150,000 against the offending badminton officials? Let's hope not.

Another example of supposed physical misconduct questions the "coaching technique" of when a *player* intentionally trips an opposing player, resulting in a "twisted ankle." The (thinly) veiled innuendo of this example is that the player's misconduct was directed by the coach, but that inference is a completely unsupported proposition in the example. Nevertheless, one "answer" provided to the question about this scenario is,

"In bounds. This is a reasonable coaching technique."

They may as well ask, "When did you stop beating your wife?" The scenario illustrates a legal objection of "Assumes facts not in evidence" (that the coach was somehow involved in orchestrating the tripping). But beyond this obvious deficiency in the example, it starkly reveals an *implicit bias against coaches*, when it manufactures the unfounded impression that the "trip" had been directed by the coach.

Moreover, *many* contact sports *inherently involve* physical contact that is strictly and expressly outside of the rules of the game. This is why there is a "Penalty Box" in hockey and players are not simply sent to the showers or banned for life for physical misconduct. In water polo, physical rule-incursions underwater are not only commonplace, they are *an inherent part* of every single game of water polo ever played in the history of the sport (I should know, since I played point guard in water polo for three years for his high school), and typically simply result in a change of ball possession if detected by an official. In badminton, if a player physically attacked another player, the offending player would likely be banned from the sport for a long period of time (one year, in the case of a professional Thai Men's Singles player a few years back). Nevertheless, it would be unusual to consider that the *coach* was responsible, much less a promoter. Umpire or medical trainer. The module, again, appears to focus on the coach as being

the responsible party, which is an implicit bias and continuing short-coming of this training module.

Module: Sexual Misconduct Awareness Education

This module is expressly intended to promote "a more positive environment" for youth athletes and to instruct as to what constitutes sexual misconduct, how offenders may "groom" their targets and why victims might not report sexual abuse. It gives a "pre-test" and purports to "grade" the viewer with a given % of "correct" answers. In the first video, the narrator informs that,

"If your sport's National Governing Body is part of the Olympic or Paralympic movement, then policies around misconduct are also governed by the SafeSport Code."

This preamble to the module is to remind the viewer that the Center has been mandated to establish "policies and procedures" for the implementation of the Act as to NGBs which are part of the Olympic or Paralympic movement. The module points out that,

"Keep in mind that SafeSport and organizational policies may also prohibit behavior that is not criminal."

But the SafeSport video fails to distinguish between "misconduct" that must be reported to law enforcement and to the Center, "misconduct" that only must be reported to the Center or appropriate NGB, and "misconduct" (if any) that need not be reported to any entity.

Sexual Misconduct

In "Unit 2" of this module, "Sexual Misconduct" is defined as,

1277	" [A wide range of behaviors and actions involving behaviors of an intimate or
1278	sexual nature[, including all of the behaviors that someone can experience],
1279	whether or not physical violence is involved [And] any non-consensual
1280	sexual conduct"
1281	That is a confusing definition, unless it meanseverything of a sexual nature constitutes Sexual
1282	Misconduct. Then, the module seems to categorize the "everything" notion into various subparts:
1283	• Sexual harassment;
1284	 non-consensual sexual conduct;
1285	• intimate relationships involving a "power imbalance;" and,
1286	• child sexual abuse.
1287	Since we are presumably always dealing with children as the potential victim, the fourth
1288	category seems superfluousuntil you realize that the Center has, without legal authority,
1289	unilaterally increased its purported control over conduct involving adult "victims" under the age
1290	of 20 years old. Then, the module warns the viewer that, "this section includes some explicit
1291	terms and may be emotionally triggering." Apparently, society has arrived to the point where you
1292	need to warn people about what they are on the verge of reading.
1293	Sexual Harassment
1294	As to sexual harassment, the module advises that included would be,
1295	"Sexual advances, requests for sexual favors, or other verbal or physical
1296	behaviors of a sexual nature; or is sufficiently severe, persistent or pervasive and
1297	objectively offensive that it negatively affects an individual's performance."
1298	(italics added)

Presumably, this over-inclusive phraseology is straight out of the Code as developed by the Center. Recall that we are dealing with words and behaviors in the context of minors as the potential victim and adults as the potential offender. Apparently, *any* mention or discussion of a sexual topic, and *any* physical behaviors of a "sexual nature" are considered to be sexual harassment. Accordingly, any discussion of a People Magazine article about the sexiest man or woman could constitute sexual harassment. Watching a Miss Universe pageant in the presence of a minor would constitute sexual harassment under these policies. Physical behaviors of a sexual nature could include, for a woman, applying lipstick in the presence of a minor, or a man looking into a mirror while lifting weights in the presence of a minor.

Another separate category within the quoted definition of sexual harassment is conduct that,

"is sufficiently severe, persistent or pervasive and objectively offensive that it negatively affects an individual's performance."

In this category, it is *not the conduct itself* that is key, it is simply the *negative effect on the purported "victim's" performance* that vaults ordinary conduct into the realm of "sexual harassment." As to this category of harassment, a covered individual needs to be on a *particularly vigilant lookout* when dealing with an unusually sensitive athlete. As to the unusually sensitive athlete, *any conduct whatsoever* which "negatively affects" that athlete's performance, constitutes, by definition, "sexual harassment." Is this a fair or even manageable burden to place upon coaches, or is it simply a trap for the unwary?

In the area of constitutional law, the *problem* evidenced by these standards is that, as a matter of due process of law, the standards would be "void for vagueness." Courts have

generally determined that vague laws deprive citizens of their rights without fair process, thus violating *due process of law*. The void for vagueness doctrine was described in *Connally v*.

General Construction Co. by U.S. Supreme Court Justice Sutherland:

"[T]he terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."⁴⁶

Moreover, laws or rules which are vague and over-broad may result in enforcement which is inherently "selective" and ripe for persecution of a disfavored "offender." Thus, *Skilling v. United States* held that a,

"penal statute must define the criminal offense (1) with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminatory enforcement."⁴⁷

The same principles make these "sexual harassment" standards unworkable. In addition, the vague and over-broad description of "sexual harassment" will naturally result in extensive "over-reporting" as covered individuals attempt to comply with these shotgun standards.

Stalking

The module defines prohibited "stalking" as,

1341	"Conduct directed at a specific person that would cause a reasonable person to
1342	fear for his or her safety or the safety of others, or to suffer substantial emotional
1343	distress."
1344	Thus, within the scope of this category of misconduct would be conduct directed at a specific
1345	person that would cause a reasonable person to suffer emotional distress. Let's assume for the
1346	moment that this would <i>not</i> include,
1347	"two or more acts, involving persistent and frequent unwanted in-person contact,
1348	surveillance or unwanted telephone and/or other electronic contact."
1349	If it did, it would be superfluous to a second, stand-alone definition of stalking within the
1350	module.
1351	So, apparently, the following example that I have created could fall within the "emotional
1352	distress" definition and constitute the proscribed "stalking":
1353	Following try-outs, a coach tells a minor, who desperately wants to play in the
1354	league, that she does not currently have the skill to make the team and is being
1355	cut. The minor is emotionally devastated and quits playing the sport.
1356	The coach's conduct is directed at a specific person, who is a minor, and it arguably would cause
1357	a reasonable person to suffer substantial emotional distress (which it did). Thus, according to the
1358	definition of stalking as set forth in the module, it constitutes "stalking".
1359	Let's take another example created by me for illustration purposes:
1360	An umpire verbally warns an 8-year old player, Sara, for delay following her
1361	drinking water without permission during a game and not during a designated

interval. Thereafter, the Umpire issues a Yellow Card Warning for Misconduct to Sara when she again leaves the court briefly for a drink of water without permission and not during a designated interval. Then, toward the end of the Final Game (the first two games were split) a line judge mistakenly makes a wrong call which is not corrected by the Umpire and which call costs Sara a critical point in the match, bringing the score to "Match point" for the opposing player. Sara slams her racket to the floor, breaking the racket. The umpire declares a "fault," gives a Red Card to Sara and awards a point (Match point) to the opposing player, resulting in the match being won by the opposing player. Sara crumples into convulsive tears on the court and immediately has an asthmatic episode requiring emergency protocols.

Under the Center's policies, the umpire's conduct constitutes the prohibited misconduct known as stalking, since it is *conduct directed at a specific person that would cause a reasonable person to suffer emotional distress*, which it did in fact do. In the example, the "reasonable person" suffering emotional distress was an 8-year old girl who happens to have asthma and a normal 8-year old's penchant for crying in the face of these circumstances. The module, and the Code, makes no exception for an official simply adhering to, and applying, the rules of his or her sport during a match.

Power Imbalance and Close Personal Relationships

The module speaks of the "Power imbalance" factor that comes into play with misconduct under the Code. Although several factors are cited which have a bearing on whether a power imbalance occurs, the module nevertheless creates a "presumption" that a power imbalance exists as follows:

"Once a coach-athlete relationship is established, a power imbalance is *presumed* to exist throughout the coach-athlete relationship (regardless of age) and is presumed to continue for minor athletes (under age 18) after the coach-athlete relationship terminates and until the athlete reaches 20 years of age." (italics added for emphasis)

So, whereas it looked as if several factors (nature and extent of authority over the person, relationship between the parties, respective roles, nature and duration of the relationship, respective ages) would be important in determining the dreaded "power imbalance," a *presumption* controls instead. In the law, presumptions, by definition, are "rebuttable." If they were not rebuttable, they would not be "presumptions," they would be absolutes, or mandates. For example: all red bicycles are "cool," as opposed to all red bicycles are presumed to be "cool."

But in this case, how could such a "presumption" be rebutted? Once an athlete is coached, at all, by a coach, a "coach-athlete relationship" has occurred. Correct? Once the coach-athlete relationship has occurred, it is "presumed" to exist "throughout the coach-athlete relationship." That makes sense, since if a power imbalance exists at the start, why would it lessen at any time during the continuing coach-athlete relationship? And that power imbalance, again, is "presumed" to continue for minor athletes (which is what we are speaking of in the first place) ... until the athlete turns 20 years of age.

Recall, that the definition of power-imbalance applies, "regardless of age." So, imagine a coach is 18, the athlete turns 18 shortly after the coaching commences. The coaching stops. The athlete and the coach start dating and have sex. The athletes marry at age 19. The coach has married under a power-imbalance, unless the presumption has been overcome. But if power

imbalance is regardless of age, and the presumption continues after the coach-athlete relationship has ended, why would the presumption be considered rebutted?

And if this were not enough, the power imbalance definition appears to pertain *only to coaches*. Other categories of covered individuals are not mentioned—such as tournament organizers, medical personnel, officials, promoters and even other athletes who have senior status on a team?⁴⁸ An example in the module mentions a doctor scenario, but the *definition* of power imbalance definitely does not include anyone but coaches.

The module also dictates that any coach or person in a similar position may not participate in a close personal relationship ("intimate or sexual") with *any* athlete (*regardless* of whether the athlete is a minor). "Identity as a couple" and "ongoing physical contact" are given as factors in an intimate relationship. Such a relationship,

"is considered a serious breach of the SafeSport Code, when the athlete is being instructed by that coach or whose performance is being supervised or evaluated by that coach."

This policy of the Center, would appear to be both a violation of due process of law and a violation of the constitutional Right of Privacy. Certainly, if a man coaches his adult wife track star in preparation for the Olympic games (still an *amateur* sports activity) that cannot, as a matter of law constitute, "a serious breach of the SafeSport Code." If a middle-aged sports manager gave managerial advice to his 30-year old fiancée who was a top volleyball amateur, could that be an "intimate relationship" breach of the Code? Or if a 30-year old soccer coach were dating an 18-year old male athlete in her program, is that a serious breach? The last

example is, in fact, given in the module as being an actual example of a serious breach. That example, however, is itself simply an example of age-discrimination.

Once a person is no longer a minor, he or she is *an adult*. Adults make their own choices and they each possess a "fundamental right" of Privacy under the U.S. Constitution as to their personal, "independently and outside of the sport relationship," decisions relating to personal relationships with other adults.⁴⁹ And if it is appropriate to penalize the coach, then as constitutional law matter of Equal Protection of the law, it *must be appropriate* to penalize the adult athlete for the same conduct, but of course: The Code does *not* treat athletes and others equally in these regards. As discussed previously, there is an implicit bias throughout the SafeSport video in favor of athletes and *against all other covered individuals*.

Unit 3 of this module makes an odd and legally deficient "sexual misconduct" exception for sex between an adult and a minor where the age difference is less than three years: "Sexual conduct between an adult and minor [where the age difference is three or more years] (is sexual misconduct)." (bracketed words were in the text). Thus, the module is saying that sexual contact between an 18-year old athlete and a 16-year old athlete would not be sexual misconduct. Sexual contact between a 19-year old athlete and a 17-year old athlete would not be sexual misconduct. This contradicts an earlier portion of the SafeSport video that described that legal consent cannot be given by a person under the jurisdiction's statutory "Age of Consent." Thus, where a jurisdiction, such as California, places the Age of Consent at 18 years of age, a 16-year old or a 17-year old is legally incapable of giving consent to anyone, much less to an adult, for sexual contact. Yet, so long as there is no more than 2 years difference in age between the minor and the adult, the SafeSport video unilaterally announces that this would NOT constitute sexual misconduct.

Again, where that scenario constitutes a criminal act, this policy description contradicts an earlier portion of the SafeSport video. The video simply declines to define criminal sexual abuse and refers the viewer to "the laws of your jurisdiction." Although knowledge of the law is deemed to exist in all of us, understanding the detailed and complicated State laws pertaining to juveniles and to adults in the broad area of sexual misconduct is extremely difficult, even for lawyers specializing in criminal law. Referring covered individuals (laymen) to the "laws of your jurisdiction" is of minimal assistance.

Child Sexual Abuse, again

Unit 3 of this model finally addresses the subject of "child sexual abuse." In order to set the stage, the SafeSport video informs us, without further elaboration,

"It's estimated that 1 in 10 American children will be sexually abused before they turn 18."

Then, under "Common Abuse Myths" the SafeSport video assures us,

"Myth:

A lot of child sexual abuse accusations are made up.

Truth:

False reports, especially among children, are extremely rare."

Thus, according to these proclamations, on average, 1 in 10 of *your child athletes* (with no differentiation between genders, ages, or whether and to what extent they are involved on the Olympic or Paralympic sports movement) will be sexually abused prior to turning 18, and false reports (with no differentiation from "unfounded" reports) of sexual abuse are extremely rare.

Run for cover, because the video has already informed us that sexual predators are naturally attracted to participation in positions of authority in sports.

How many athletes do you coach, supervise, officiate or interact with in the course of your participation in an NGB or Paralympic sports organization? But you have no such tendencies and do everything within your power to make people around you feel at ease and safe, correct? Not good enough, you're still suspicious. That conduct is consistent with predatory "grooming" behavior.

Grooming Potential Victims

Unit 3 points out,

"Myth:

People who sexually abuse children make everyone around them feel uneasy.

Truth:

Offenders are very skilled at deception. Many are well-liked and highly trusted, not only by victims, but by their colleagues as well."

This is undoubtedly the ultimate *sports-Catch 22*. Look like a predator, you're probably a predator. Look like an ordinary, well-liked and highly trusted official, you're probably a predator.

Unit 3 spends time in discussing "grooming," where "an offender seeks out a vulnerable child who has emotional, familial or social voids in their life," earns "the trust of the child (and potentially their family)…," "isolates the child from family and friends," "then sexually abuses the child and engages in behavior to maintain control over the child." While all of this, in rare

instances, may sometimes be true, it also describes, until the point of "then sexually abuses," completely innocent conduct by covered individuals. However, at no time does the SafeSport video ever caution the viewer that conduct which may appear to be "grooming" is almost always not grooming—it is normal behavior of covered individuals who are doing their best to aid a child or children in benefiting from the sports program in which the child or children are involved.

In making it appear that grooming-type behavior is a *dead-giveaway* for criminal conduct, the SafeSport video causes viewers to see predatory conduct *virtually everywhere they look* in the Olympic or Paralympic sports movement. Again, this is reflective of an implicit bias inexorably infused within the SafeSport video in favor of youth athlete purported "victims" and against all other covered individuals. It has often been said that, "Beauty is in the eye of the beholder." Perhaps, from the SafeSport video, it can now *also* be said that, "Predatory conduct is in the eye of the beholder."

In Unit 3, the former prosecutor solemnly observes that,

"Unfortunately, there's professions like coaching, teaching, things like that, where it involves kids where our subject perpetrators *gravitate to that*, and so I think obviously sports is one of those. Now, it's time to say, enough's enough. We need to start putting in education, precautions for coaches, for parents, to say here's the things to look for, here's how we keep our kids safe. Because, our kids shouldn't live without sports, right?"

Then, she opines further that,

"The first thing is that they want to appear to be someone who cares about children, who is trustworthy and reliable and responsible. And, they wanna gain the trust of the adults around the child. Then, they get access to the child."

The Social Worker then adds,

"We have an athlete who doesn't have a lot of self-esteem, maybe there's issues at home with their family. Ah, that 'grooming process' really is to start to bring them along in this relationship and get their trust, get our victim's trust, get the parent's trust—all of those things *that lead to the sexual abuse eventually*." (italics added for emphasis)

The highly unfortunate effect of this onslaught of negativity against volunteers is that it paints all coaches, administrators, promoters, athletes, officials and medical officials with the same broad brush of being likely "perpetrators" and turns all "vulnerable" minors into likely "victims." As a result, the SafeSport video is *anything* but a neutral and unbiased source of information. To the contrary, it has created a veritable *national forum for indoctrination* that strongly implies that any or all coaches, officials, medical personnel and the like have "gravitated" to youth sports, are *gaining the trust* of children and their parents and are inexorably headed toward *sexual abuse* of those children. It's only a matter of time. Moreover, the experts selected for the Safesport video present their biased accounts in a calm setting as if they were teaching undeniable truths.

But the fact is, these speakers voice "truths" which apply only to a *tiny fraction* of the adult (and youth) participants in organized sports. And yet, viewers are to led to believe that this situation of undiagnosed child abuse is running rampant throughout sports in the United States to

the point where covered individuals must become what amount to *knee-jerk conduits* of all suspicions to the Center and to law enforcement against the legions of "perpetrators."

Moreover, to ensure that we cover *all* ages in this blanket of victimology, the former prosecutor then adds,

"With teens ah, and and older children, then it's more likely that they start by building that relationship with the teen. And *then*, it can also divert into becoming the friend of the child at the expense of the parent. So, the child now becomes more of a *peer* and 'I take you into my confidence and you're now my buddy, and I understand that your parents don't realize how mature you are."

The video cuts back to the Social Worker,

"When parents are excluded purposely from things, I worry. Or when somebody else steps up that says, you know, 'If you can't make it, I'll sleep in the room with them,' or, 'we'll be together on the travel.' And then that starts to elevate more towards, 'Maybe, um, a *dinner* or a movie, I'll give you a break and take them out.' Or, 'we wanna work on some extra things late at, ah, gym. Ah, I'll bring them home after that.""

The former prosecutor then warns,

"...Any time that there appears to be a relationship that is different than the relationship that that coach shares with all the other teammates—I would start to be concerned. Maybe this adult becomes the person that the child can turn to, the mentor, the *friend*, the 'cool adult.' And then the 'cool adult' is going to provide

other things like pornography, drugs, alcohol, cigarettes, things that the child shouldn't be having." (italics in the original emphasis)

So, according to these experts, *any* time that say, a coach, has a "relationship" with one or more athletes in any manner which is "different" than the "relationship that that coach shares with all the other teammates," that coach is then going to provide to the subject athlete with pornography, drugs, alcohol and cigarettes. This preposterous jump in logic is both false and misleading; yet it is handed off so calmly and authoritatively as if it were the absolute and irrefutable gospel.

Over and over, the Safesport video takes the position that once *trust* is established, the "child" is even more vulnerable to becoming the unwitting sexual abuse victim of "the offender, the perpetrator" in the evil plan. **But what is the purpose of this guidance in the context of** *this video*? If the purpose were to say that sexual abuse of minors is extremely rare within youth sports in America but should be reported when it comes to our attention, then the video would presumably make *that* assertion. It does not. If the purpose were to say that the overwhelming majority of covered individuals are well-intentioned and free from any ulterior purpose of abuse, then the video would presumably make *that* assertion. It does not. Discriminating viewers are left to assume then that the actual, ignominious purpose of the SafeSport video is to simply intimidate and indoctrinate viewers into *erring on the side of "misconduct"* when deciding whether to communicate a report.

The "grooming" conduct described in Unit 3 of the SafeSport video is virtually all within the realm of perfectly normal and innocuous behavior, right up to the point of... and then that leads to sexual abuse of the athlete by the perpetrator. Whereupon, the video jumps feet first into the acts of "touching" youth athletes.

Touching

The former prosecutor informs us,

"...[T]hen it becomes even easier for the offender, the perpetrator, to get the child to progress to physical touching and contact."

The Social Worker gives further detail on the enormity of this "touching" problem in youth sports,

"Touching starts as very innocuous and then starts to build up to more of a sexual nature. And then by that point, ah, kids don't *know* what to say. They don't know how to stop it because they've 'allowed,' for lack of better word in *their* mind, the other things to happen. Kids just feel like they're responsible for that, and maybe the perpetrator's saying that, 'You know, if you tell anybody, you're gonna get in trouble for this because you've liked what's been happening.'"

Appeal to Fear

Keep in mind that by federal mandate, ALL covered individuals under the Act MUST view this SafeSport video and become certified as having supposedly passed its tests. The video content is literally being *forced* on each and every covered individual within the U.S. Olympic and Paralympic movement. A derivative version of the SafeSport video is available for parents to view. The SafeSport video essentially calls into question *the motives and actions* of all covered individuals regarding their involvement in the Olympic and Paralympic sports movement. The SafeSport video will *result* in a large share of its viewers concluding that if we simply take time to look, sexual predation and other grievous misconduct is *all around us, every day, all the time*,

as to every coach, official, athlete, medical personnel, promoter and administrator involved in youth sports.

Of course, that view is simply NOT TRUE. Sexual predation and grievous misconduct by adults against youth athletes is extremely rare. For example, in my entire lifetime of some 65 years' participation as a competitor, coach official of such youth sports as water ski racing, water polo, baseball, karate, badminton, basketball, sailing, surfing and golf he has never on any occasion whatsoever, personally witnessed, nor directly heard from a victim or from anyone on his or her behalf about any form of sexual abuse of a minor, in such sports, nor of other similar grievous misconduct as depicted in the Safesport video. Am I miraculously the one and only person who has somehow been insulated over the past 70 years from the landslide of sexual abuse in youth sports? No, since child sexual abuse is extremely uncommon in organized sports. Child sexual abuse most often occurs, in fact, within the context of contact with a parent or close relative.

Of course, through the Media, we have all *heard or read* of several instances of sportsrelated sexual abuse occurring in the context of sports over the years, ⁵⁰ but these are the rare
exceptions that happen by their inflammatory nature risen to national prominence—events that
become notorious and over which the public becomes rightfully incensed. Even as a Deputy
Public Defender for nearly six years in California and a private-practice attorney handling
criminal defense and family law matters (among other areas of litigation) over some 37
additional years, I neither saw nor heard of *a single case whatsoever* dealing with sexual
predation of a minor athlete by a coach, official, medical personnel, promoter, other athlete or
administrator. And yet, the SafeSport video paints a *far different picture*, shamelessly pandering
to the fears of the public, and in turn, setting the stage for inexcusable injustice through the *over*-

reporting of false or unfounded accounts of supposed sexual predator and grievous misconduct actions.

Social Media Content

The SafeSport video permits the "publishing" (meaning, in social media) of "photography of individuals under the age of 18 only with notice and caretaker consent." This advice ignores the common practice multitudes of photos being taken at tournaments and unilaterally being published by competitors and covered individuals alike on Facebook, Instagram and other various popular social media formats. These include both candid and posed photographs of and by competitors, officials, coaches, medical personnel, athletes, administrators and promoters with youth athlete competitors. The covered individuals are proud of their participation in the youth sports. The youth competitors are often their casual friends on and off the court or field, on Facebook and even in recreational play in the sport (for example, in badminton). This attempted to control over publishing photos in media is nothing more than a misguided attempt to meddle in the lives of covered individuals and in their normal interactions with youth competitors.

Interaction Protocol

Under "Do's and Don'ts," the SafeSport video states,

"When someone reports being victimized:

Assure them you will do what you can to help.

Tell them they have done the right thing by reporting.

Let them know the abuse was not their fault."

This is not only extremely poor advice but also is *directly contradictory* of what was earlier represented in the SafeSport video to warn against reassuring an alleged victim.

If someone reports to you having been victimized, then you, are a *receiver* of that information but presumably are *not* a percipient witness to anything to which the alleged victim has referred. As a mere recipient, at the outset you do *not* know whether the received information is reliable, accurate or true. Thus, it is *wrong* to assure the child that you will do what you can to help, since you are *not* in a position to help other than to determine whether you have learned of facts which would lead a reasonable person to harbor a reasonable suspicion of child abuse or neglect by a particular person or persons.

Moreover, *it is not your place* to tell a child they have or have not "done the right thing by reporting," since it has yet to be finally determined through either the criminal justice system or administrative proceedings, or both, what the true facts are. And perhaps most importantly, it is certainly wrong for you, as the receiver of this information about alleged abuse to, "Let them know the abuse was not their fault." That statement assumes there was, in fact, "abuse." Remember, at this point, you are simply receiving information for the first time and it has not been finally established whether there was "abuse" at all.

The very next card *contradicts* their own advice when it cautions to not, "make promises to someone who reports being victimized." However, telling a child that, "The abuse was not your fault," is in effect a promise that you believe that abuse did occur and that others will also believe that abuse did occur. Since you do not **and** *cannot* **know** that the stories and accounts are true, it is clearly improper for you, as a receiver of information, to promise the child that other people will later determine that abuse occurred.

CONCLUSIONS

It is beyond the scope of this paper for me to, in effect, *re-write the Code*, to *re-write the script* for the SafeSport video, or even to *re-draft the Act* to make it even clearer in its well-intended mandate to protect young athletes in sports within the Olympic and Paralympic movement in the Unites States.

It is *within* the scope of this paper, however, to spark outrage at, and encourage conversation and debate regarding, *the grossly misdirected and mistaken policies*, *procedures and training methods* currently implemented by the Center. Those policies, procedures and training methods (i.e., the SafeSport video and its progeny) *wrongfully denigrate* the masses of "covered individuals" in American sports, in effect throwing them under the proverbial bus, in deference to the relatively rare instances of child abuse, including sexual misconduct, and neglect which occasionally may occur in youth sports.

NGBs in the United States Olympic and Paralympic movements *must step up and speak out* against the current policies, procedures and training video of the Center. The Code *must* be re-drafted to eliminate the *insidious implicit bias* against covered individuals. The SafeSport video must be *abandoned and re-worked* in order to present a *fair and unbiased view* of the value of the covered individuals to youth sports in America, of the rare instances of child abuse and neglect, and of the grave responsibility of covered individuals to report suspected child abuse and neglect, but only when suspicion of misconduct is credible, reliable and reasonable. The legal standard of suspicion in the Act itself should be clarified in amended federal legislation to reflect a necessity of "reasonable suspicion" pursuant to the reasonable man test and upon reasonable scrutiny, prior to any duty to report arising. Finally, the Act must be amended to even

the playing field, so to speak, in arbitration and federal civil litigation of disputes over liability and responsibility for alleged instances of child abuse and neglect in youth sports.

APPLICATIONS IN SPORTS

SafeSport in Overdrive to Overkill is intended for reading and consideration by lawyers, youth sports coaches, officials, promoters, administrators, medical personnel and athletes in youth sports within the USA Olympic and Paralympic movement, by officers and managing agents of each National Governing Body of the 50 sports within the USA Olympic and Paralympic sports movement, by officers and managing agents of the sports organizations affiliated with such NGBs, by federal legislators and their staff, and by parents of youth sports participants

ACKNOWLEDGEMENTS

None. Publication of this paper was offered to USA Badminton and ignored without the courtesy of even a "no thank you" response.

REFERENCES

¹ Shellie Pfohl, who had been head of SafeSport since November 2016, four months before the center opened its doors, notified the Center's board on December 7, 2018 that she intended to step down at the end of the year. Her initial contract was supposed to run through the end of 2019. Pfohl's departure came two weeks after a USA TODAY investigation found there is *little to no enforcement of sanctions for sexual misconduct*. USA TODAY found six coaches who had continued to coach despite being permanently banned. Of the 40 governing bodies who responded to a USA TODAY survey, only 17 said they can punish clubs or members that ignore the bans. And despite pressure from Congress and the USOC, a universal banned list still does not exist. USA TODAY, *SafeSport CEO Shellie Pfohl will step down at year's end*, December 28, 2018, Rachael Axon and Nancy Amour, https://www.usatoday.com/story/sports/olympics/2018/12/28/shellie-pfohl-safesports-ceo-stepping-down/2438229002/

² USA Today, *USOC CEO provides details on initiative to protect athletes*, September 27, 2016, Stephen Meyers, https://www.usatoday.com/story/sports/olympics/2018/12/28/shellie-pfohl-safesports-ceo-stepping-down/2438229002/

³ Elsewhere, the Act limits the purview of the Center to *amateur* athletes, "to promote a safe environment in sports that is free from abuse, including emotional, physical and sexual abuse of *any amateur athlete*." (italics added for emphasis)

⁴ With federal regulatory agencies, there are safeguards to assist the agency in creating regulations designed to implement federal legislation. The agency researches the issues at hand and proposes a regulation in a Notice of Proposed Rulemaking (NPRM) which is published in the Federal Register for a period of time. This gives the public an opportunity to consider it and send their comments to the agency. Once the comments are received and considered, the regulation may be revised and a final rule issued. This final rule is then published in the Federal Register. Thereafter, the regulation is "codified" when it is published in the Code of Federal Regulations ("CFR")

⁵ The New York Times, *Larry Nassar Sexual Abuse Scandal: Dozens of Officials Have been Ousted or Charged*, October 22, 2018, Christine Hauser and Karen Zraick, https://www.nytimes.com/2018/10/22/sports/larry-nassar-case-scandal.html.

⁶ Use of the internet has been held to constitute the use of an instrumentality and channel of interstate commerce. *U.S. v. Sutcliffe* (9th Cir. 2007) 505 F.3d 944 (as both the means to engage in commerce and the method by which transactions occur); and *U.S. v. Faris* (11th Cir. 2009) 583 F.3d 756 (Congress has the right, pursuant to the Commerce Clause of the U.S. Constitution, to regulate the internet in order to protect against its use for harmful or immoral purposes.) Voicemails stored in providers' out-of-state servers were held to have constituted interstate commerce. *U.S. v. Prince* (11th Cir. 2009) 333 Fed.App.x 400, cert. den. 558 U.S. 921. Telephones and cellular telephones have been held to constitute instrumentalities of interstate commerce for purposes of the Commerce Clause. *U.S. v. Evans* (11th Cir. 2007) 476 F.3d 1176, *cert den.* 552 U.S. 878; *U.S. v. Corum* (8th Cir. 2004) 362 F.3d 489, *cert. den.* 543 U.S. 1056. The federal Computer Fraud & Abuse Act was held to have lawfully applied to a computer which was *connected* to the internet, regardless of the fact that the employee's communications on that computer were limited to *intra*state commerce. The Court reasoned that the internet is a system inexorably intertwined with interstate commerce. *NCMIC Finance Corp. v. Artino* (SD Iowa 2009) 638 F.Supp.2d 1042.

⁷ Neglect is not defined in the Act and this deficit is remedied neither by Senate Bill 2961 nor by House Bill 5955.

⁸ Inexplicitly, the Act jumps to *different verbiage*, when discussing policies and procedures required for the Center (as opposed to being required by the Act itself), for the applicable standard as to *whether* a reporting is required to the Center and to law enforcement. Pursuant to the Act, policies and procedures *of the Center* must include a requirement that allegations of covered misconduct are to be reported to the Center and to law enforcement, "whenever such members or adults learn of facts leading them to *suspect reasonably* that an amateur athlete who is a minor has suffered an incident of child abuse" (italics added for emphasis) Although there may be an arguable distinction between a requirement of "reason to suspect" and "suspect reasonably," the real question there is what legal standard applies when it comes to the federal criminal consequences for a *failure* to report.

⁹ Anderson, Jared, "U.S. CENTER FOR SAFESPORT: UNDERSTANDING THE NEW STRUCTURE OF SAFESPORT," SwimSwam, April 11, 2018, https://swimswam.com/u-s-center-for-safesport-understanding-the-new-structure-of-safesport/.

¹⁰ Wikipedia, *Reasonable suspicion*, https://en.wikipedia.org/wiki/Reasonable_suspicion.

¹¹Wikipedia, False allegation of child sexual abuse,

https://en.wikipedia.org/wiki/False allegation of child sexual abuse.

¹² Wired, False memories and false confessions: the psychology of imagined crimes, Bryce, Emma, https://www.wired.co.uk/article/false-memory-syndrome-false-confessions-memories

¹³ The Hill, *Is it time to punish false accusers?*, October 17, 2018, McElroy, Wendy, Research Fellow at Independence Institute, https://thehill.com/opinion/civil-rights/411905-is-it-time-to-punish-deliberate-false-accusers.

¹⁴ However, even an adjudication of Not Guilty on the criminal charge *should not* abdicate an alleged offender, since a Not Guilty verdict merely eliminates the Criminal Disposition itself from constituting a

violation of the Code. The standard of proof in the administrative proceeding is merely the *preponderance* of evidence standard (Arbitration Rules, Rule 24), whereas a Not Guilty verdict in a criminal prosecution simply means that the prosecution failed to carry its burden of proof against the alleged offender beyond a reasonable doubt.

- ¹⁵ The wholesale immunity from liability applies unless the wrongfully targeted person can prove "actual malice." Malice, however, is largely a state of mind and course of conduct and is *notoriously* difficult to prove.
- ¹⁶ In September 2018, it was announced that 50 NGBs had agreed to provide approximately \$2 million each year to the Center. The Center operates on a \$4.3 million budget, more than \$3 million of which comes from USOC. The top 11 NGBs will give ¼ of 1% of their revenue, with a \$90,000 cap, to the Center, annually. The Center currently has 24 full time employees and has been criticized by not processing claims quickly enough. **The Center receives 20 to 30 new claims** *per week* and is reportedly struggling to hire private investigators with the right skill set to investigate the sex-abuse cases. USA Today, *Sports Organizations Double Funding to SafeSport Center*, September 21, 2018.

 ¹⁷ False Allegation of Child Abuse, Wikipedia, ibid.
- ¹⁸The *full text* of a pdf-format copy of the Code may be accessed at the following link: https://77media.blob.core.windows.net/uscss/1488581091937.2017-03-03---safesport-code---final.pdf. ¹⁹ New York Times, *Administration Imposes Sweeping Limits on Federal Actions Against Companies*, February 10, 2018, Pear, Robert.
- ²⁰ The Center also has available, for parents of youth competitors, an *abbreviated* version of the SafeSport video, the "Parent's Guide to Misconduct in Sports." "Designed for the parents of athletes of all ages, this course explains the issues of misconduct in sport and helps parents ensure their children have a positive and safe sport experience." The Center.
- ²¹ "IMPLICIT BIAS," Perception Institute, <u>www.Perception.org/research/implicit-bias/</u>
- ²² Scientific American, "How to Think about 'Implicit Bias'," March 27, 2018
- ²³ Scientific American, "Understanding Implicit Bias—What Educators Should Know," Staats, Cheryl, AFT, Winter 2015-2016 https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/
 ²⁴ Dr. Julia Shaw, *The Memory Illusion*, Random House Books, August 1, 2017, at pp. 254-255.
- ²⁵ People v. Rincon-Pineda (1975) 14 Cal.3d 864, 885 (internal quotations omitted).
- ²⁶ Regardless of your response, the SafeSport video feedback is "Thanks for your response As you learn more about reporting in this section, consider whether you would change your actions in this situation." ²⁷ Shaw, *The Memory Illusion*, *Ibid*, at p. 233.
- ²⁸ Cyr, Mireille, PhD, Department of Psychology, University of Montreal and Guy Bruneau, Ecole Nationale de Police du Quebec, "FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE," Institut National de Sante Publique Quebec ("Quebec Study of False Allegations"),
- https://www.inspq.qc.ca/en/sexual-assault/fact-sheets/false-allegations-child-sexual-abuse.
- ²⁹ "Poisoning the well (or attempting to poison the well) is a type of informal logical fallacy where irrelevant adverse information about a target is preemptively presented to an audience, with the intention of discrediting or ridiculing something that the target person is about to say." Wikipedia, *Poisoning the well*, http://en.wikipedia.org/wiki/Poisoning_the_well.
- ³⁰ Here, they do not say "suspected victim." Apparently, there is no issue that there is in fact a "victim."
- ³¹ He or she is neither the "suspected" nor "alleged" offender, and instead, this terminology infers that it is beyond question that the person is, in fact, "an offender."
- ³² Again, this description assumes without proof, that the bottom line is that the "offender" has *already abused* at least this athlete and one object is to prevent him or her "from abusing more" victims.
- ³³ While accurate reporting of actual child abuse may well have a tendency of enhancing the safety of other athletes in the program, *inaccurate*, *false or unfounded reporting* of suspected child abuse will clearly have a tendency of causing athletes, officials, promoters, medical personnel, coaches and anyone else who is or could be wrongfully targeted *to leave the sport and refrain from continuing their participation*. However, because of the implicit bias of this training video, this *flip-side to the coin* is neither revealed nor articulated.

³⁴ Later in the module, the narrator seems to contradict the spokesperson by stating, "*Some* jurisdictions and organizations require all adults to report suspicions of child abuse."

³⁵ Quebec Study of False Allegations, Ibid.

³⁶ Quebec Study of False Allegations, Ibid.

³⁷ Quebec Study of False Allegations, Ibid.

³⁸ The Code, Section IV ENFORCEMENT AUTHORITY A. Exclusive authority—sexual misconduct.

³⁹ The module also focuses on "hazing" as a rite of passage to include someone into a group, and is described as being, "a dangerous form of abuse." No issue here: hazing should now be a thing of only historical interest. Its heyday is long past. Today, "hazing" should be virtually synonymous with "abuse." ⁴⁰ Badminton World Federation, Laws of Badminton, Law 16 CONTINUOUS PLAY, MISCONDUCT & PENALTIES, "16.3 Suspension of play 16.3.1 When necessitated by circumstances not within control of the players, the umpire may suspend play for such a period as the umpire may consider necessary." ⁴¹ Badminton World Federation, Laws of Badminton, Law 16—Continuous Play, Misconduct & Penalties. "16.1 Play shall be continuous from the first service until the match is concluded, except as allowed in Laws 16.2 and 16.3," "16.4—Delay in Play. 16.4.1 Under no circumstances shall play be delayed to enable a player to recover strength or wind or to receive advice. 16.4.2 The umpire shall be the sole judge of any delay in play." "16.5 Advice and leaving the court ... 16.5.2 no player shall leave the court during the match without the umpire's permission, except during the intervals described in Law 16.2." "1. COURT AND COURT EQUIPMENT 1.1 The court shall be a rectangle marked out with lines 40 mm wide as shown in Diagram A." "17.6 An umpire shall 17.6.1 uphold and enforce the Laws of Badminton..." http://www.worldbadminton.com/rules/ And, see, BWF Statutes, Section 4.1.1: INSTRUCTIONS TO TECHNICAL OFFICIALS (1/1/2018) "5.00 INSTRUCTIONS TO UMPIRES ... 5.10. Players leaving the court 5.10.1 The umpire shall ensure that players do not leave the court without the umpire's permission (Law 16.5.2) except during the intervals described in Law 16.2, or that when doing so they do not delay play. ... 15.10.3 During a game, if play is not unduly held up, the players may be allowed to have...15.10.3.2 a towel and drink, at the discretion of the umpire." https://system.bwfbadminton.com/documents/folder 1 81/Statutes/CHAPTER-4---RULES-OF-THE-GAME/Section%204.1.1%20-%20Instructions%20to%20Technical%20Officials%20(ITTO).pdf ⁴² Badminton World Federation, Laws of Badminton, Law 16—Continuous Play, Misconduct & Penalties. "16.2 Intervals 16.2.1 not exceeding 60 seconds during each game when the leading score reaches 11 points; and 16.2.2 not exceeding 120 seconds between the first and the second, and between the second and the third game shall be allowed in all matches."

⁴³ The very first round of matches in such badminton tournaments often use no line judges, since the other players are warming up for their matches, or are already playing. Also, some non-sanctioned tournaments for non-ranked badminton players simply do not utilize line judges in any of their matches.

⁴⁴ Actually, as to a Singles match, *both* players are required to line judge immediately or soon after their match concludes. As to a Doubles match, the *winning pair* of players is required to perform the line judge job and the losing pair of players would not be asked to line judge. Typically, the Umpire calls the inside lines (service court boundaries) and the near sideline, and each of the two player-line judges calls both the "baseline" (the back line on either end of the court) and the far-sideline on their respective ends of the court. The line judges may also call the back service-court line in Doubles if permitted by the Umpire.

⁴⁵ Occasionally, a parent or friend will voluntarily substitute themselves in for the child as the line judge.

⁴⁶ Connally v. General Construction Co. (1926) 269 U.S. 385, 391.

⁴⁷ Skilling v. United States (2010) 12-cv-00331 (U.S. District Court, Southern District of New York [Manhattan] May 16, 2012).

⁴⁸ Under the Child Sexual Abuse card, the module appears to recognize this deficiency when it acknowledges that, "For example, one athlete might be significantly older and have much more experience on the team, creating an imbalance of power to the victim"

⁴⁹ *Griswold v. Connecticut* (1965) 381 U.S. 479 (fundamental right of privacy under the U.S. Constitution embodies the right to access to contraceptives); *Roe v. Wade* (1973) 410 U.S. 113 (fundamental right to privacy implied within the Due Process clause of the 14th Amendment to the U.S. Constitution extended

to a woman's choice to have an abortion); and *Lawrence v. Texas* (2003) 539 U.S. 558 (Due Process and a right of privacy cited as the basis of striking down a Texas criminal statute which had penalized samesex sodomy. The *Lawrence* case is also credited with invalidating age of consent laws which differed based on sexual orientation).

⁵⁰ For example, Yahoo Sports, *KU Volunteer volleyball coach accused of stealing underwear from female players*, February 21, 2019, Liz Roscher, https://www.yahoo.com/sports/volunteer-volleyball-coach-accused-stealing-underwear-female-players-141147509.html.