Report to University of Oregon President Michael H. Schill

Media Access to Student Athletes and Rights of Free Speech

Kevin S. Reed, Vice President and General Counsel
Hailey Czarnecki, University of Oregon School of Law, Class of 2017

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A report on the status of the rights of media access to student athletes and the rights of student athletes to free expression at the University of Oregon

"[A] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." 9 Writings of James Madison 103 (G. Hunt ed. 1910).

- *Leigh v. Salazar*, 677 F.3d 892, 897 (9th Cir. 2012)

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Introduction

This report contains our review of issues relating to the rights of student athletes to communicate with the media and the rights of the media to contact student athletes. In this report, we examine the practices of the university's Department of Intercollegiate Athletics regarding press access to student athletes and benchmark those practices with relevant legal standards and the standards of a sample of peer institutions. We find that the University of Oregon's practices align closely to those of other institutions and are consistent with law and university policy. We find that the university's practice, exercised on rare occasions over the past decade, of suggesting that the credential of a member of the media could be in jeopardy, is not a practice followed by all but a few of our peers

We interviewed the following people, in order:

- UO Head Football Coach Willie Taggart
- Daily Emerald Sports Editor and Reporter Kenny Jacoby
- UO Football Communications Director Dave Williford
- UO Senior Associate Athletic Director of Marketing and PR Craig Pintens
- UO Faculty Athletic Representative Tim Gleason
- Student Press Law Center Executive Director Frank LoMonte
- Former Oregonian Sports Editor Seth Prince
- Former Daily Emerald Reporter Victor Flores
- UO Athletic Director Rob Mullens
- Register Guard Sports Editor Mark Johnson
- UO Men's Basketball Coach Dana Altman
- UO Track and Field Assistant Coach Maurica Powell
- UO Assistant Athletic Director of Marketing Andy McNamara
- USC Sports Information Director Tim Tessalone
- Former LSU Sports Information Director and Senior Associate Athletic Director & Vice President of CoSIDA Herb Vincent
- Anonymous media strategist
- UO Track and Field Head Coach Robert Johnson
- University of Wisconsin Senior Associate Athletic Director for External Relations Justin Doherty
- UO Deputy Athletic Director Lisa Peterson
- Former UO basketball player Dwayne Benjamin
- Former Daily Emerald reporter Sam Stites
- UCLA Sr. Associate Athletic Director of Communications Josh Rupprecht
- UW Athletic Director of Communications Carter Henderson
- UO football player and former SAAC co-chair Juwaan Williams
- UCLA Faculty Athletics Representative Dr. Michael Teitell
- UO lacrosse player and former SAAC co-chair Erin Schilmoeller
- UO softball player and Be Oregon co-chair Cherish Burks

- Former UO football player Matt Wogan

The following people were also contacted but either declined to be interviewed or could not be reached:

- Oregonian sports reporter Andrew Grief
- Former Oregonian sports reporter Adam Jude
- Former UO basketball player Jalil Abdul-Bassit
- University of Arkansas Athletic Director of Communications Chris Freet

Student Athletes and Media Access

Precipitating Event: the Daily Emerald and Credentials for the Civil War Game

The predicate for this review was an incident from November 2016, arising out of a piece of investigative journalism by Kenny Jacoby, student reporter with the Daily Emerald, an independent, student media outlet at the University of Oregon. Jacoby's story looked into allegations of physical conflict among members of the University of Oregon's football team and has been widely acknowledged as a strong piece of investigative reporting.

There is substantial agreement among the parties we interviewed about the core facts surrounding Jacoby's interactions with the University of Oregon's Department of Intercollegiate Athletics, though there exists some disagreement regarding intention and interpretation of what was communicated by Athletic Department personnel.

In early November 2016, Jacoby requested an interview with a member of the football team whom Jacoby believed was the victim in an altercation with another football player. He made this request of Dave Williford, Sports Information Director for the football program. Williford, an employee of the Athletic Department for 19 years, routinely handles requests by the media for interviews with players and coaches of the team. Williford has been in the athletics communications industry for 32 years and at the University of Oregon for the past 20, and stated that Oregon's policies are not much different than other places he has worked. He follows a long-established practice of directing reporters to request such interviews through him. This practice does not appear to be memorialized in a formal written policy, but is communicated regularly by Williford to players, coaches and the media. Importantly, this is not communicated to the student-athletes as a directive to them, but merely as guidance. Williford also follows a long-established practice of directing the media to contact family members of football players only through his office, though this practice (which is also not memorialized in a formal policy) appears to be less frequently communicated or understood by members of the media.

Williford arranged for Jacoby's interview with the player, which took place in the lobby of the Hatfield-Dowlin Complex. Williford was present in the lobby area during the interview, but states that he could not hear what was being said. The student athlete does not believe that Williford could overhear their conversation, since he was on the other side of the lobby. Jacoby states that he believed that Williford was able to hear the conversation and, Jacoby believed, Williford's presence may have impaired the candor with which the student athlete was answering his questions. The student athlete states that, towards the end of the interview, Jacoby's questions turned toward topics he was not comfortable discussing, especially questions concerning the conduct of teammates and questions about injuries the student athlete had allegedly suffered. The student athlete stated that it was his personal choice not to discuss the conduct of teammates and, as someone with a potential professional career, he had concerns about news media reporting rumors about his alleged physical injuries.

Recognizing that the directive from Williford was to arrange any interviews with a student athlete through him, Jacoby nonetheless sought to contact the student athlete directly, after the in-person interview, in order to get confirmation on some elements of his story. According to Jacoby, he knew that his action violated protocol, but he felt it was justified in order to pursue his story without the interference he perceived could be coming from Williford. He contacted the student athlete, who did not wish to be interviewed further. According to the student athlete, Jacoby then attempted to contact numerous people close to the student athlete, including one of his best friends from high school (at his home on the East Coast) and his parents (also on the East Coast). The student athlete did not welcome Jacoby's attempts to connect with him and people close to him, so he reported his concerns to Williford. The student athlete's parents also called Williford to express their concern at being called directly by Jacoby. At around the same time, another football player featured in Jacoby's story contacted Williford and alleged that Jacoby had contacted his girlfriend for information for Jacoby's story and that, in that communication, Jacoby had failed to identify himself as a reporter.

In response, Williford sent Jacoby an email asking him to meet with him. Jacoby complied, bringing his editors with him to the meeting. Interpretations of what transpired at the meeting vary, depending on the participant. All participants agree that, at the meeting, Jacoby told Williford that he knew he was deliberately breaking the policy concerning direct contact with a student athlete and that Williford mentioned restricting the Emerald's access to the upcoming Oregon State University game.

According to Williford, he came to the meeting believing that Jacoby had violated three directives: first, he had contacted the student athlete outside of the media office; second, he had contacted the student athlete's family without going through the media office; third, Jacoby had allegedly contacted another student athlete's girlfriend for information without identifying himself as a reporter. At the meeting, Jacoby admitted that he contacted the student athlete outside of protocol. He stated that he did not understand that contacts with the families of athletes were to go through media relations and he denied having ever misrepresented his status as a reporter when conducting an interview. Williford states that he believed Jacoby did not know about his expectations regarding contact with athletes' families and that he accepted Jacoby's denial that he did not represent himself as a reporter when contacting an athlete's girlfriend. Regarding the admitted breach of protocol with respect to the direct contact with the student athlete, Williford told Jacoby that, in light of the blatant violation of a policy that no one else has a problem with "I thought about limiting your credential for the OSU game but I'm not going to do that." Jacoby states that, at that meeting, Williford stated that if the Emerald continued to break protocol, he would restrict all the Emerald's credentials for covering the OSU game, but that Williford had decided not to do so as of that time. Williford states that he did not intend to issue a "threat," but wanted to express his intention to enforce the department's protocols through whatever limited means at his

disposal. Jacoby perceived Williford's statements as a threat with profound implications to a media outlet that relies heavily on its access to Oregon football coverage for its revenues.

It is undisputed that none of the Emerald's credentials were taken away. While we learned of other instances in which reporters perceived their credentials were at risk, we could find no evidence that reporters covering UO athletics have ever lost their credentials.

Williford and Jacoby are in agreement that Williford's statements regarding a potential impact to the Emerald's credentials were related to Jacoby's admitted violation of protocol with respect to contacting a student athlete directly and were not a result of any concern over the content of the story Jacoby wrote based on his interviews. Indeed, many of those we spoke with, including Williford, praised the quality of Jacoby's journalism with respect to the story in question.

Senior Associate Athletic Director Craig Pintens states that he understood that WIlliford told Jacoby that Athletics had considered pulling one credential from the Emerald for the Civil War game as a means of enforcing the Department's expectation that reporters not contact players directly. He stated that, in a subsequent conversation, he told Jacoby that the Emerald was creating issues for itself and he criticized Jacoby's decision to include reference in his story to an email Williford sent saying that the head coach and a football player featured in the story did not want to be interviewed. Pintens stated that he simply explained to Jacoby that it wasn't a good way to keep good connections.

We find that it is undisputed that Williford suggested to the Emerald that their credentials could be at risk if they continued to violate protocols. We further find that Jacoby credibly perceived Williford's statement as a threat to the Emerald's valuable access to Duck athletics. As explained further below, we also find that the Oregon Athletic Department's resort to this tactic is not used often in collegiate athletics, though it is not unheard of. We find that Williford's statements that there "will be consequences" have been made on numerous occasions to different media outlets but that such statements are more likely to have a chilling effect on the actions of student media than on those of other media outlets. We find that there is no evidence to establish that the Department's suggestion that the Emerald's credentials could be at risk was in any way related to the content of Jacoby's story, which story was not published until 10 days after the meeting in question (and the specific content of which did not appear to have been shared with Williford until a day or so before publication). Finally, we find that the action, while ill-advised, did not violate law or policy since it was not related to the content of the media's reporting.

We determined that the Athletic Department's policy governing access to student athletes is directed at the media and that student athletes regularly make their own decisions to talk with the media without invoving the SID, without any adverse consequence from the Department. It is clear from our interviews that student athletes are not restricted from contacting the media directly. Indeed, the outline SID Williford shared from his regular

orientation with football players reinforces the finding that the SIDs role is not to restrict student athlete's from speaking with the media, but to enable it. Williford's outline for his presentation to the football team provides:

"Role of Communications Office

a) Liaison between athletics department and the news media
    1) Our office to arrange all media interviews
        i) work to coordinate around your schedule
        ii) we will never give out your home phone number or phone numbers of your family members
        iii) strongly suggest you never give out YOUR cell number
b) We're employees of the University
    1) We're accountable to you and your coaches
    2) Always work in your best interests"

From our interviews, we conclude that most student athletes appreciate the media access rules and perceive them as being enforced with the media in order to protect student athletes. We find no evidence to support the allegation that the Athletic Department restricts student athletes' ability to address the media. Rather, the media relations professionals in the Athletic Department seem to serve the interests of student athletes by helping them manage the media's access to them.

Other Reports of Threats/Restricted Access of Media

As part of our review, we inquired of other recent incidents in which the press perceived that their access to information in the Athletic Department was restricted for punitive purposes. We received claims of several instances, none of which can be readily corroborated.

Victor Flores, a former Emerald reporter, stated that his credential was threatened after he published a report regarding an on-campus snowball fight that involved an Oregon football player. Flores said he arranged for an interview with that player through the Oregon football Sports Information Director. He said it was difficult to arrange this interview. When the interview happened, the Sports Information Director (SID) was not listening but was in the same room. Flores was able to obtain the player's phone number, though, he does not remember how he got the number and cannot confirm that it was the player who gave it to him. After the interview, however, Flores texted the player to confirm some facts from an initial interview. The player did not respond until Flores had sent three unanswered texts. When he did respond, Flores said that the player said he was not interested in talking and told Flores to go through a SID if he wanted an interview. The player then told Williford that Flores was texting him. When Flores tried to get a second interview, this time by utilizing Williford, he said that the player was "coached up." Williford warned Flores not to continue to breach protocol regarding directly contacting players. Flores said the threat from Williford was along the lines of, "you know better" and "there will be consequences." Flores said he understood

this as a threat to the Emerald's credentials, even though those words were not expressed directly.

Former Emerald reporter Sam Stites claims to have had a similar encounter with Williford. Stites conducted an interview with a football player who, Stites believed, was restricted from talking freely to the Emerald. Stites said when he did get an interview, Williford sat with the player the whole time and told Stites that some topics were off the table. After the interview, Stites called the player's cousin in an effort to contact the player. Stites invited the player to the Emerald's office where Stites and the player talked about a range of topics. After that interview, the Emerald's former Editor Andy Rossbeck and former Sports Reporter Matt Walks received emails from Dave Williford that said if the Emerald did that again, talking about bringing a player into the Emerald's office, then the Emerald would lose all access to the games. Stites said Williford used the word "credentials" in that email. Stites took that email to be a threat.

Senior Associate AD Pintens stated that there was only one time when the Athletic Department thought about pulling a credential from a reporter. That incident involved a camera crew from a TV station who managed to gain entry into a locked Matthew Knight Arena during a men's basketball practice. The reporters (who were news reporters, not sports reporters), sought to interview the head coach on camera about a player's alleged shoplifting charge. Pintens said no credentials were pulled but that the coach refuses to talk to that outlet.

Refusals to talk to a specific reporter or outlet appears to be a more common way for coaches and athletes to act on their concerns about the conduct or reporting by particular writers. One example cited by several witnesses we interviewed involved a period of time when a former Oregon head football coach refused to allow an Oregonian reporter into the media "scrum" after the reporter allegedly reported on the coach's specific strategy involving switching a player's position in the week before an important game. Several coaches at the university decline to speak with an Oregonian columnist due to their belief that the columnist's reporting is biased.

In his interview, Jacoby stated that he was told of instances in which the Register Guard (RG) and the Oregonian were threatened by people associated with Oregon Athletics. By and large, those reports were not confirmed by the journalists from those publications who accepted our requests to talk with them.

The Register Guard's Sports Editor Mark Johnson said that the Register Guard has not received any formal threats after violating UO Athletic Department policies. He said that there was one incident with a photographer who was banned from campus after the Register Guard published photos of the inside of the new Hatfield-Dowlin Complex despite the university's attempt to give Sports Illustrated an exclusive first look. The photographer in question works with the Register Guard, but was also hired by Sports Illustrated to take the photos. When Pintens saw that the Register Guard had the same photos as Sports Illustrated, Johnson

believes that Pintens thought that the photographer had snuck into the building to take the photos. Johnson reported that the RG published the photos with the consent of Sports Illustrated and only after Sports Illustrated had posted them first. In the end, according to Johnson, the photographer never had trouble obtaining credentials. Johnson confirmed that it is the RG's understanding that the Athletic Department asks all requests for interviews with players and coaches be directed through the SID. He stated that the Register Guard rarely contacts a student athlete directly. He believes that the Athletic Department overreaches when it attempts to block media from contacting families, and because he thinks that rule is overreaching, he knows the Register Guard does not abide by that policy. However, the Register Guard still does not reach out to families often.

Former Oregonian Sports Editor Seth Prince said the Oregonian had only experienced two incidents with the UO Athletic Department seeking to enforce its policies on contacting student athletes. Prince called Marcus Mariota's parents when he was reporting about Mariota competing for the quarterback position in 2012. Prince said that Williford called Prince to tell Prince that interview requests for parents have to go through a SID. Prince told Williford he had never heard that rule and would not follow it. Williford had told Prince that "there could be consequences" if the Oregonian continued to go around the SIDs. When Prince asked Williford what he meant, Williford said they would cross that bridge when they got there. Prince said he thought this to mean that Williford would limit the Oregonian's access to interviews on special requests, but not about credentials. Prince further stated that this recourse wouldn't be unreasonable. Prince said it was his understanding that Williford did not mind if a student agreed to be contacted outside the SID protocol. Prince also pointed out that he and Williford could "yell at each other" about a disagreement but then continue doing business like nothing had happened.

The University of Oregon's Media Policies

Everyone we interviewed had a consistent understanding of the university's policies and expectations regarding press access to student athletes, their families and coaches.

At the beginning of each football season, Williford sends out a reminder email to media. That email states the procedures of the Athletics Department regarding media contacts. Part of that email says, "As has been the case in the past, all interview requests for players and coaches are to be funneled through the Office of Communications. This has seldom been a problem with media who cover the University of Oregon athletics on a regular basis. But we ask that you also relay this information to individuals within your media organizations who may not be as familiar with Oregon athletics department policies as most of you." At the same time, Williford communicates with members of the football team consistent with the information related earlier: they are told that media is to connect with them through the SID and that the SID is there to support student athletes. We found no evidence to support an allegation that the Atheletic Department or the SID try to control athletes' access to the media as opposed to media's access to athletes.

Williford explained that the interview policy is a time management mechanism to benefit the student athletes and their class schedules. He also said that the policy acts as a vetting process that helps the student athletes know who they are talking to in the interview. By many accounts (from administrators and reporters alike), the rule governing contact with student athletes benefits the athletes and the press alike. Often, student athletes are reluctant to speak with the media and the SIDs help to encourage and guide them, while some of our more famous student athletes would be deluged by the media without the help of the SIDs in traffic control. While it seems clear that the SIDs counsel students with respect to how to protect themselves when being interviewed, we could find no instance where media relations told student athletes what they could or could not say (though it is clear that many coaches set expectations with their athletes regarding the need to maintain privacy concerning game strategy, to maintain loyalty to the team, to refrain from disparagement of fellow teammates or opposing teams and to keep in confidence information concerning player's health and injury status).

We looked carefully for any instance in which a student athlete at UO faced some sort of negative consequence as a result of his or her choice to speak directly to a reporter. While limitations on media contacts to student athletes appear universal, any indication that a student athlete was disciplined for his or her choice to talk to the media would raise serious legal and policy concerns. Nobody we interviewed, student, staff, coach, or member of the media could identify an example of such a negative consequence, though we were made aware of numerous instances of student athletes contacting the press directly.

Further, from our interviews we determined that the SIDs do not tell the student athletes whom they can or cannot talk to. Each interview request is just a request and the athlete has the option to turn it down. The athlete can also tell a SID if he or she is unwilling to discuss certain topics. The SID then relays that information back to the reporter. If the athlete agrees to the interview, that athlete has the option to talk with a SID first to go over what the athlete wants to say and how the athlete can state his or her message. Williford also hosts a meeting with the new football players to discuss the interview policy and about the media that covers Ducks Athletics.

Most media members understand the policies and why the policies are in place. Seth Prince said it's not uncommon for SIDs and journalists to not see eye-to-eye. He also said that Williford is an experienced professional trying to do his job in difficult circumstances and, for the most part, he had positive contacts with Williford. Prince believes Williford carries the message that the coaches ask him to carry. Mark Johnson said that access has become more controlled over the years, but that something similar could probably be said for anywhere else. Johnson said he understands that UO might want to limit the access to student athletes and understands that SIDs are the funnel for access.

However, Prince stated that he believes it is easy for student journalists to feel pushed around by SIDs, because student journalists can get intimidated more easily than professional journalists. Athletics is an exceptionally important beat for student media, as well, since it drives readership, and a threat to media's access to the athletic program is not to be taken lightly. Student media, too, are unique with respect to their ability to contact student athletes directly, since the athletes are frequently peers and classmates with whom the student reporters interact and socialize. Finally, student media are somewhat more vulnerable in their interactions with the media relations arms of the programs they cover since they are often relatively inexperienced. As a result, media relations staff sometimes feel empowered to call them on their perceived missteps. There can be a fine line between a media relations professional counseling an inexperienced student reporter and behavior that is perceived by the student journalist as threatening.

That said, multiple current and former members of the media expressed appreciation for the professionalism of the SIDs at UO. Victor Flores, for example, gives Williford credit because, in Flores' experience as a student journalist, Williford often gave the Daily Emerald interviews and was kind to the student journalists. As stated above, Flores didn't always feel like Williford was fair, but still believes that Williford gave the Emerald a lot of access. Sam Stites had more negative feelings about the SIDs. He said that as a student journalist, it was confusing to see professional journalists violate the interview policy and, apparently, not get in trouble.

Benchmarking with Peer Schools

As part of our review, we interviewed media relations professionals from five of our peer institutions, as well as media relations experts working with one of the Power 5 conferences, UO's Faculty Athletics Representative (himself a professor of journalism with a scholarly focus on journalistic ethics), the Student Press Law Center's Executive Director, and communication consultants who advise athletic programs around the country.

We were unable to identify a single Division 1 athletics program that allows media to access its student athletes without arranging that contact through its media relations office or without the express consent of the student. Reasons for having a policy that directs media contact through a media relations office include: (1) as a means to keep a sense of control by the school or coach, (2) as a means to protect student athletes, (3) as a means for media relations people to handle volume. All institutions appear to allow head coaches substantial discretion over which student athletes are made available to the media, and a large number of the schools in the Power 5 conferences appear to restrict freshman football players from speaking to the media.[1] Every school we reviewed had some sort of team rule that prohibited

[1] Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. Marshall Rev. Intell. Prop. L. 509, 515 (2013).

public discussion of teammates' injuries, and the vast majority had team rules that proscribed derogatory comments about teammates or opposing teams.

Practices Among Conference Peers: In our review, we interviewed media relations leadership in three of UO's peers in the Pac-12 Conference. There were many common themes in the interviews.

With each school, student media is treated as all professional media and all are asked to go through SIDs. Each tells coaches and athletes to please direct interview questions through SIDs. Each stated a belief that it is important to let the student athletes deal with the media as a learning experience, especially given that college is a learning environment. If student athletes err when talking to the media, it allows that athlete to learn. Each asks the media to not contact family members, though none have an effective mechanism for enforcing such a rule.

One school we interviewed stated that it has, on occasion, threatened to pull credentials from traditional (though not student) media. As an example, one school related an incident where a reporter violated a directive to not report on injuries that occur during football practices. In this instance, the coach was upset and wanted the athletics communication staff to pull the reporter's credential. Communications staff said they had to talk the coach down and ultimately did not pull the credential but did restrict the reporter's access to practices for two days. That same school stated that it once pulled the credential of an internet sports-fan site due to the offensive nature of the blog's reporting. The other two schools were clear that they would not have issued a credential to such a web-based outlet in the first instance.

The common theme for our conference peers confirmed active management of athlete/media interactions. If media continually disobey the rules, the best the school can do is restrict interviews with the consent of the proposed interviewees. Media relations leadership understands that the media will go around the rules, but then makes sure the offending media knows that media relations offices are likely to restrict their help to that media outlet in obtaining interviews in the future. One school stated that, on occasion, it will make the point of giving desired interviews to outlets that follow the directives over the outlet that keeps going around the rules. This tactic, paired with encouraging the athletes to direct all requests to SIDs, tends to limit an outlet's ability to report. A consistent theme in the conference is that mutual respect works best for all concerned.

Our interviews with other Power 5 Conference member institutions media relations offices revealed very similar treatments. At one Big 10 school, student athletes are instructed to tell all media to work through a contact in the communications office and informs athletes' families that the SIDs prefer the media call the communication offices (though they don't have a rule on family contact). The SIDs try to be proactive about potentially negative stories. The SIDs anticipate requests and prepare a few athletes and make those athletes available to

media. The school related one instance in which a reporter went around the SIDs to interview a student athlete. The school responded by denying the reporter access to a practice.

Our interview with a media relations person within the SoutheasternConference revealed similar practices. When discussing the particular issues of working with student media, that media relations leader noted that he would regularly address concerns regarding student media with the faculty advisors to that media. At this institution, when a student athlete talked to media outside of SIDs, that athlete would be called into the coach's office to be reminded of the rules. The school had no stated policy regarding media contact with athletes' families, but it is understood that media shouldn't contact families out of common courtesy.

Consulted Experts: As part of our review, we interviewed Tim Gleason, UO's Faculty Athletic Representative (FAR), and an expert in journalistic ethics, as well as Frank LoMonte, Executive Director of the Student Press Law Center, a nationally prominent organization that advises student media in secondary and post-secondary institutions.

Both of these experts expressed the view that rules that restrict media access to student athletes are very much the norm in collegiate athletics and, in and of themselves, do not pose a threat to press freedoms. They also stated that threatening to pull the credential of a media outlet (student or otherwise) for violating a rule governing media access is unusual and inconsistent with common, or best practices, in the field.

Gleason noted that all reporters will violate the interview policy if they need to get a story and they believe the policy is preventing them from reporting. However, the more comfortable a reporter feels about breaking the policy depends on the reporter's experience. Any reporter who breaks the policy should expect to hear from a SID, but student media is more likely to perceive a correction or a reprimand as a threat. Indeed, both Seth Prince (from the Oregonian) and Victor Flores (from the Emerald) quote Dave Williford as stating that "there would be consequences" if they continued to ignore protocols. Flores understood the statement to be a threat, while Prince did not.

Gleason said most athletes aren't looking to speak with the media. That makes the policy a defensible guideline. However, in Gleason's view, an athletic department should not punish a reporter for not following the guideline. In his view, Oregon Athletics probably provides more access to football players than the vast majority of other schools. Gleason says student athletes should learn to say they are not interested in answering questions outside of the interview policy if an athletic department wants the guideline to work. Gleason said there are legitimate pedagogical reasons to not allow freshman to speak with the media.

LoMonte stated that UO's policy directing media to access student athletes through a SID was common. He noted that the alleged threat to the Emerald's credential in the situation at UO poses risks of violation of student athletes' rights and not the rights of the media whose

credentials were threatened. LoMonte said that if an athlete is punished for talking to the press outside of the interview policy, then that athlete's rights were violated. However, if the athletic department takes a reporter's credential away because the reporter violated the interview, no rights were violated because the reporter never had constitutional rights to access the athlete.

While referencing the important right of student athletes to express themselves freely to the media, LoMonte noted that such rights were not absolute, and limited restrictions on communications on topics such as teammates' injuries, team secrets, or NCAA violations could be legally justified. Also, LoMonte believes that a blanket rule that does not allow freshman to talk to media is dubiously unconstitutional.

Student Athlete Perspective

We interviewed a number of student athletes to get their perspective on the university's media access policies, including the two most recent co-chairs of the UO's Student Athlete Advisory Committee (one a football player, the other a lacrosse player), the former football player whose contact by Jacoby sparked this inquiry, a former men's basketball player, and a softball player who currently serves as co-chair of the "Be Oregon" campaign within the Athletic Department.

While the student athletes offered a variety of insights about the special status of Duck athletes when it comes to freedom of expression, the student athletes had a universally positive perspective on the practice of the athletic department directing press inquiries to go through the media relations office. One football player noted that he felt free to talk to media from his (remote) home town without clearing those interviews with a SID, and that he relied on and appreciated Williford's role in managing the media for athletes. He perceived the policy as one that protects athletes. He counted on Williford to identify whom he needed to talk with and giving players guidance on how to handle themselves with reporters. Another football player noted that he has been directly contacted by the media. In that situation, he asked the media member to ask Williford to set up an interview. He believes this is for the student athlete's benefit. He said Williford will protect the student athletes at any cost. Further, he said that no one forces the athletes to talk; the athletes have the choice. Although there are rules that do not allow the player to speak about injuries on the team, he said he does not feel restricted to express himself. The former basketball player expressed appreciation for the SID in controlling media access. As to the interview policy, he said he likes the SID filter because he thought it could get overwhelming if the filter was not there. He said that the interview policy gave him time to prepare for interviews. The softball and lacrosse players similarly expressed no concern about media relations staff funneling access from the media. We asked each student athlete we interviewed if they had ever heard of a student athlete facing any sort of negative consequence as a result of having spoken directly with the media without working through a SID, and they each said they had heard of no such instance.

Other Conference Schools' Written Policies

UCLA: The Athletics Department requests that student athletes make themselves available to news media. The student athlete handbook reminds athletes to not give out their personal numbers. Further, athletes are told to ask any media who contacts the athlete directly to request an interview through the SID.

Stanford: The Athletic Department tells student athletes that they have a responsibility and an obligation to cooperate with the media. Athletes are also reminded that they should only participate in interviews that have been arranged by a SID. Any phone interview is to be done at the communications office on communications phones. The Athletic Department asks student athletes not to give out their personal numbers. Athletes are also reminded that they have the right to refuse to answer questions they don't feel comfortable answering.

USC: USC also tells student athletes that they have a responsibility to cooperate with the media. All interviews with the media are arranged through a SID and conducted at the communications office. Student athletes are told that they do not have to answer every question or agree to every interview request. USC also requires student athletes to sign an agreement regarding the social media policy. The social media policy is on a three strikes system. Parents of student athletes are also given a document that addresses the policies that students must adhere to.

UW: The Athletics Communication staff arranges all interviews for student athletes. Student athletes are asked to not give out their personal phone numbers.

Arizona: The Athletics Department tells students that the media may contact the student directly if the student athlete gave the reporter approval. Student athletes are reminded that they are not obligated to answer questions they are uncomfortable with.

Arizona State: All interview request must go through the Media Relations representative for the team the student athlete is on. ASU specifically states that injury reports will be disclosed at the discretion of the athletic director, administration, or head coach. Any question about legal issues or campus policies will be directed to the Public Affairs office.

Washington State: The Athletics Department states that all interview requests must be arranged through the communications office.

Oregon State: OSU tells its student athletes that they have a responsibility to cooperate with the media. All media requests for interviews are coordinated through the communications office. Further, all interviews are done at the communications office. Athletes are reminded to

not give out to their personal phone number or their parents' phone numbers to the media. Athletes are also instructed to not accept an interview through social media.

Legal and Policy Standards

We could find no judicial decisions that directly addressed the right of the media to have unmediated access to collegiate athletes, including athletes at a public university like the University of Oregon. That said, any restriction on the freedom of the press by a governmental entity has constitutional dimensions. "The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment."[2]

In numerous contexts, courts have made clear that the First Amendment rights of a free press include rights of access to observe the workings of a governmental entity. For example, the Supreme Court ruled that the media had the right to observe and report on a murder trial.[3] Other decisions and other courts have noted the rights of the media to cover civil trials and arbitrations, executions and planning commission hearings. The courts recognize the right of the press to access the activities of government is often broader than the rights of the public at large to access such activities, but it is a qualified, as opposed to an absolute right, and is subject to a balancing test set forth in *Press–Enterprise II*. [4]

The Ninth Circuit Court of Appeals recently reinforced the rule set forth in *Press-Enterprise II* when it remanded to the trial court for application of that test a challenge brought by a news photographer who sued when she was restricted by the Bureau of Land Management from photographing a horse "gather" in Nevada.[5] That court found that the district court below had erred by failing to apply the test set forth in *Press Enterprise II*,

> "In *Press–Enterprise II,* the Supreme Court articulated a two-part test for right of access claims. First, the court must determine whether a right of access attaches to the government proceeding or activity by considering 1) "whether the place and process have historically been open to the press and general public" and 2) "whether public access plays a significant positive role in the functioning of the particular process in question." 478 U.S. at 8–9, 106 S.Ct. 2735. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9, 106 S.Ct. 2735 (internal citation omitted).[6]

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[2] *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir.1978); see also *Branzburg v. Hayes*, 92 S.Ct. 2646, 2656 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").
[3] *Richmond Newspapers, Inc. v. Virginia,* 100 S.Ct. 2814 (1980).
[4] *Press–Enterprise Co. v. Superior Court,* 106 S.Ct. 2735 (1986).
[5] *Leigh v. Salazar*, 677 F.3d 892, 894 (9th Cir. 2012).
[6] *Leigh,* 677 F.3d at 898.

Applying the *Press-Enterprise II* test to the situation at hand, we do not believe that there is a protected right on the part of the press to have unfettered access to student athletes. There appears to be no history of openness to the press or the public of unfettered access to student athletes at the University of Oregon or, for that matter, at all but a handful of peer institutions. Therefore, a First Amendment challenge to the Athletic Department guideline fails at the first juncture. It would appear to fail at the second question as well, since there does not seem to be a serious argument that public access plays a significant positive role in the function of interviewing 18-22 year old student athletes.

Of course, the university's Athletic Department could have transgressed the First Amendment in a separate manner were it to restrict a media outlet's credentials (or threaten to do so) in response to the viewpoint of the media outlet's reporting. However, we did not find that this happened in the Jacoby/Williford issue, nor did we learn of any instance of that occurring at the University of Oregon. Constitutional protections of free speech prohibit government from restricting a journalist's access to areas otherwise open to the press based upon the content of the journalist's publications.[7] In the only reported decision we could find that addressed the constitutional ramifications of limiting press credentials, a district court in New York enjoined the New York Racing Association (NYRA) from limiting a photojournalist's access to horse racing facilities that were accessible to other members of the media, finding that the limitations on the plaintiff's credential were due to objections by NYRA officials to the content of plaintiff's reporting.[8] The court stated "[w]hen some members of the press are given access to cover an event, the state cannot arbitrarily impose limits on other press representatives' access to the news," noting "restrictions based on the content of communication are especially disfavored."[9]

In the circumstances here, we find no basis to conclude that the actions of Williford or the Athletic Department in "suggesting" that the Daily Emerald's credential for the Civil War game could be restricted were motivated by a dislike of the content of the Emerald's reporting. Indeed, the story Jacoby wrote was published some 10 days after the meeting where the credential was discussed. Jacoby himself stated that he understands Williford's "threat" to be a result of the Emerald's acknowledged violation of the no-direct-contact policy and not due to the content of the story that resulted (or any other story, for that matter). We found no evidence that would lead us to conclude that the content of the Emerald's reporting put their credentials at risk in any way.

Our review included examination of whether the actions of the Athletic Department staff violated University of Oregon policies protecting free speech or the protections of speech contained in Article 1, section 8 of the Oregon Constitution. Our review of those provisions

[7] See, *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C.Cir.1977); *Daily Herald Co. v. Munro*, 838 F.2d 380, 389 (9th Cir. 1988).

[8] *Stevens v. New York Racing Ass'n, Inc.*, 665 F.Supp. 164 (1987). It is not at all clear why equines seem to factor prominently in press-access jurisprudence.

[9] *Id*. at 175 (citations omitted).

does not change our ultimate conclusion that there were no violations by department personnel. The university policies in question, while expressing important support for freedom of expression, offer no guidance with respect to press access at the university. As to the Oregon Constitution, the Oregon Court of Appeals clarified (in a decision later overturned on other grounds) that Article 1, section 8 provides no greater right of the press to access the functions of government than that contained within the First Amendment protections.[10] Again, were there facts to support the conclusion that university personnel threatened to take away a credential from the Emerald due to the content of its reporting, university policies and the Oregon Constitution, like the First Amendment, would be offended. In the absence of such evidence, we do not make such a finding.

Recommendations

Based on our review and findings, we recommend the following:

1. Media relations staff in the Department of Athletics should continue to work with student athletes to guide them on protocols for handling contact with the media and should expand its work with the families of student athletes to support their decisions to avoid direct contacts with the media, but should not try to enforce a rule that prohibits the media from attempting to contact families.

2. Media relations staff in the Department of Athletics should continue to promote its practice of empowering student athletes to make their own choices about whether they wish to speak to the press or refrain from doing so.

3. Media relations staff in the Department of Athletics should counsel reporters who violate the protocols governing direct access with student athletes in ways that do not state or imply that the media's credentials could be restricted. Mutual respect and cooperation between SIDs and the media are important to all concerned and should be the avenue through which the SIDs seek to enforce the protocols.

4. In the event student media violate protocols, media relations staff should consider communicating their concerns to editor in chief of the student media and, depending on the circumstances, might consider involving the adviser to that student media. (Ironically, when we asked the Emerald who that adviser was, we were informed that

[10] *Oregon Newspaper Publishers Ass'n v. Oregon Dept. of Correction***s**, 156 Or.App.3d 115 (1999) (rev'd on statutory grounds, 329 Or. 115, 988 P.2d 359 (1999) (Article 1, section 8 does not create a broader right than that of the First Amendment to witness an execution).

any contact with the adviser must be initiated through the Emerald's Editor in Chief and not directly with the adviser.)

5. The Athletic Department should consider augmenting the Student Athlete Handbook to include an affirmative statement affirming the rights of athletes to express themselves on matters of public concern and confirming that the guidelines governing media access to student athletes are not intended to, and wil not be used to, impinge on a student athlete's choice to communicate directly with the media.