



February 6, 2017

Ms. Malia Arrington  
Director of Ethics and SafeSport  
United States Olympic Committee  
1385 S. Colorado Boulevard, Suite A-706  
Denver, Colorado 80222

Ms. Shelli Pfohl  
Chief Executive Officer  
United States Center for SafeSport  
1 Olympic Plaza 80909  
Colorado Springs, CO 80909

Dear Ms. Arrington, Ms. Pfohl and the SafeSport Board,

The rising tide of child sex abuse and adult sex assault revelations across the United States and the globe has prompted many organizations to reform their policies to better protect victims. It is to the credit of the United States Olympic Committee (“USOC”) that it has taken up this issue with the drafting and re-drafting of SAFESPORT POLICIES AND PROCEDURES.

The undersigned are dedicated to improving the culture of club and Olympic sports for the protection of the vulnerable. We join with you and the SafeSport Board and USOC in wanting to change the culture of sport for the better.

We have reviewed the document, SAFESPORT POLICIES AND PROCEDURES, circulated on December 30, 2016 (“Dec. 2016 Draft” or “Draft”), and provide the following suggestions for the purpose of making Olympic sports—and eventually all sports in the United States—safe, wholesome, and successful endeavors for all involved. At the outset we note that the latest draft is far superior to the earlier drafts, and we commend the effort that has gone into producing this Draft. That said, there are still a number of issues that need to be resolved to achieve USOC’s and SafeSport’s goal of joining the broader society in the protection of children and the vulnerable generally.

**I. The new SafeSport, including staff, its Board, arbitrators, and investigators, must be independent from those working directly in the Olympic movement.**

The December 2016 Draft does not make clear that the SafeSport staff, Board and potential arbitrators will be independent from the USOC and the Olympic movement. One of the most challenging aspects of uncovering and preventing sexual abuse in *all* organizations is detangling the network of those in positions of power to create accountability to the children and others in inferior positions of power. Olympic and club sports are no different, with its inherently intertwined network of coaches and officials. For example, officers and directors in amateur sports governing bodies often are former coaches and athletes with close ties to those still within the coaching and administrative ranks. Additionally, coaches and administrators, but not athletes, often evaluate the job performance of the employees at the USOC/ NGB level.

As with all other organizations struggling with these issues, many factors have led to the failure to protect children and the vulnerable from sex abuse, assault, and harassment, such as; false assumptions about the prevalence of abuse and assault, denial, the desire to “get along”, the silent bystander effect, and a general preference to protect adults and the organization over children. Sport leaders have spent years working closely together, often successfully, and until now many have missed the signs that would have

indicated that their fellow coach, volunteer, or official posed a danger to the vulnerable. Moreover, these individuals, by virtue of their commitment to the sport, share a vested interest in protecting the image and integrity of the sporting institution.<sup>1</sup> These personal and professional relationships and uneducated assumptions can impede investigations into allegations of abuse. Even when these relationships do not actually interfere with investigations, the appearance of such conflicts can still undermine the public perception of safety in Olympic and club sports.

As a result, it is crucial that the new investigative entity can demonstrate clear independence from the USOC and the USOC's member NGBs. To that end, the governance and budgetary structure of the entity should be organized so as to ensure that the entity and its personnel are not subject to the control or influence of the USOC, any NGB, or coaching association. Such independence will safeguard against personal conflicts that will inevitably arise if the entity is asked to investigate longstanding, highly placed, or well-known members of the sports community. In addition, in cases where appropriate procedures were followed, it will help the USOC and the NGBs avoid the appearance that the governing bodies whitewashed allegations or attempted to silence bad press.

We recommend that the entity create independence guidelines that are based on the USOC's own Bylaws and that follow the path established by the U.S. Anti-Doping Agency ("USADA") with respect to independence and board composition.<sup>2</sup> Specifically, we recommend that a director not be considered an "independent director" if, at any time during the two years prior to or during his or her service as a director:

1. The director was employed by or held any paid position or any volunteer governance position with the USOC, a USOC-member sports governing body, the IOC, the IPC, an OCOG, PASO or ANOC;
2. An immediate family member of the director was employed by or held any paid position or any volunteer governance position with the USOC, a USOC-member sports governing body, the IOC, the IPC, an OCOG, PASO or ANOC;
3. The director was affiliated with or employed by the USOC's outside auditor, consultant or outside counsel;
4. An immediate family member of the director was affiliated with or employed by the USOC's outside auditor, consultant or outside counsel as a partner, principal or manager; or
5. The director held a paid position or any volunteer governance or leadership position with, the AAC, NGB Council, or the Multisport Organizations Council.<sup>3</sup>
6. Moreover, the director should not at any time during the two years prior to or during his or her service as a director have served as a coach, trainer, manager, agent, team staff, doctor, or official for a USOC-member sport.

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<sup>1</sup> This is a pervasive phenomenon. Religious organizations, schools and universities, the military, and businesses all suffer from the same institutional bias. The Olympic movement should recognize this tendency to protect the organization over the victim, even when that individual is a child, and build an investigatory system designed to protect all members from abuse. This requires a dramatic shift in the culture of the organization.

<sup>2</sup> See, USADA History and Independence, available at: <http://www.usada.org/about/independence-history/>

<sup>3</sup> USOC Bylaws, Section 3.4. See also, "Non-Athlete Participant" is any coach, trainer, team staff, medical or paramedical personnel, administrator, official, or other athlete support personnel, employee, or volunteer who participates in amateur sports programs offered or sanctioned by an NGB or the USOC. Draft, p. 6.

**II. In order to preserve SafeSport’s independence from the USOC and NGBs, misconduct reports should be directed to SafeSport, and an ethical firewall should prevent defense counsel from participating in the SafeSport investigatory and hearing process.**

An impediment to frank misconduct disclosure is the fear of reporting to the USOC, NGB, or Coaching Association’s defense counsel in potential civil litigation, rather than to a person or entity that is neutral or a victim’s advocate. In the past, defense counsel has used reports to legally insulate the Olympic movement’s entities from liability, rather than to protect victims.

**III. SafeSport should require all NGBs and their Coaching Associations to establish one consistent set of sexual harassment and abuse policies and procedures.**

As written, NGBs are only *encouraged* to establish consistent policies and procedures.<sup>4</sup> This is a prescription for the confusion and misdirection that benefit perpetrators and endangers the vulnerable. The goal should be the creation of a shared culture of protection for the vulnerable, and that cannot be accomplished with dozens of different standards.

There are currently 47 NGBs and numerous Paralympic sports; differently nuanced or worded policies would be difficult for an independent SafeSport, its investigators, and arbitrators to master and enforce consistently across sport. In fact, conflicts with differing policies seem built into the current Draft of the SafeSport policies.<sup>5</sup> Policies and procedures should be uniform across sport, including consistent lettering and numbering. If additional rules or paragraphs are added for a particular sport’s policies, these additions should be explicit as only applying to that sport, with rationales to explain why they were written into the policy. Consistent policies among NGBs will ensure SafeSport and arbitrators try to resolve violations of policies in a predictable and effective manner, and create a culture of justice, fairness. Moreover, with consistent policies, a decision in one sport will carry precedential effects efficiently over to another sport, rather than 47 separate legal silos.

As an example, as written, a “Covered Athlete” or “Covered Adult” is a determination made by the NGB.<sup>6</sup> The Draft does not specify whether SafeSport policies apply to administrators, coaches, athletes and/or volunteers that are *members* of the NGB, or whether it only protects a small subset of athletes, like USADA. In either case, each NGB should not be able to make its own determination whether an individual or athlete is “covered” or not. SafeSport’s policies should provide a mechanism to report potential inappropriate relationships as soon as they begin – regardless of whether the athlete has reached the elite levels of sport or whether the observer or witness stands in a particular relationship with an NGB.

Because it is unclear who is protected by SafeSport policies, the balance of this letter will refer to “NGB members” and “coaching association members” to denote all those who should be subject to SafeSport requirements.

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<sup>4</sup> “National Governing Bodies (NGBs) and Local Affiliated Organizations (LAOs) are *encouraged* to establish proactive policies...” Draft, p. 2 (emphasis added)

<sup>5</sup> “When at the request of an NGB the Office exercises discretionary authority over other SafeSport Misconduct, the Office shall apply the definitions of the NGB if they differ from the definitions herein.” Draft, p. 3

<sup>6</sup> See e.g., “When at the request of an NGB the Office exercises discretionary authority over Other SafeSport Misconduct, the Office shall apply the definitions of the NGB if they differ from the definitions herein.” Draft, p. 3.

<sup>6</sup> “Covered Individual” is any individual who: .... (c) an NGB identifies as being within the Office’s jurisdiction.

#### **IV. The USOC and SafeSport should articulate the powers and jurisdiction of the new entity on members.**

The independent entity can only be effective if it is vested with clearly defined and sufficiently broad powers and jurisdiction that enable it to conduct thorough investigations, impose sanctions with deterrent effects, and require the participation of the USOC, NGBs, clubs and member entities in creating an environment that is unified in its efforts to rid amateur sports of sexual abuse. To that end, we recommend that, in addition to the powers already granted, the organizing documents of the new entity specifically grant SafeSport, as a condition of membership, the power to:

1. Investigate allegations of sexual abuse and sexual harassment against athletes reported by athletes, non-athlete participants, parents/guardians of minor athletes, or other individuals, amateur sports organizations or clubs, or law enforcement.
2. Compel, as a condition of participation in USOC-member sports, an individual to provide information, appear, and/or testify before the investigative entity, either as a respondent or a witness.
3. Require USOC member organizations to adopt and implement recurring education programs designed to prevent or facilitate reporting of sexual abuse or harassment for all involved including but not limited to athletes, coaches, officials, parents and volunteers.
4. Develop and implement a program to provide counseling, health, mental health, or other holistic and comprehensive victim services to all athletes affected by sexual abuse or sexual harassment.
5. Impose appropriate reporting requirements to appropriate authorities on the USOC, NGBs, their member clubs, as well as individual members, when anyone suspects child sex abuse.<sup>7</sup>
6. Establish NGB and Coaching Association unified policies and procedures for investigating and arbitrating decisions regarding culpability of individuals accused of sexual abuse or sexual harassment against athletes.
7. Provide precedent-value for SafeSport arbitration decisions; make decisions available on a searchable database, redacting the victim's name if necessary.<sup>8</sup>
8. Impose sanctions against individuals and amateur sports organizations or clubs, and require members to comply with the sanctions.<sup>9</sup>
9. Investigate and sanction those organizations or members that engage in retaliation for reporting or cooperating with SafeSport.

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<sup>7</sup> Many states do not have broad mandatory reporting laws, and would not include coaches, administrators, organizations or other third-parties. In cases involving a child victim, of course the child should be referred to a Child Advocacy Center before any investigation or questioning is undertaken by SafeSport. At the appropriate time, SafeSport can assure that the child is not in contact with the responding party.

<sup>8</sup> *See*, Section XIV on Rape Shield protections.

<sup>9</sup> It is not clear whether SafeSport is intending the reach of its decision to apply to its member clubs. *See*, e.g., “*Jurisdiction limited to individuals and non-employment matters*. The Office’s jurisdiction extends only to the conduct of individuals. The Office does not regulate, investigate or audit (a) the supervision, management, employment or (b) SafeSport practices and policies of the USOC, NGBs or Local Affiliated Organizations. The Office’s response and resolution proceedings are independent of any employment decisions made by the USOC, NGBs or Local Affiliated Organizations, which have the sole responsibility for any employment actions.” Draft, p. 11.

**V. Policies should be crystal clear; coaches should not have sexual contact with their athletes.**

**a. SafeSport should remove the term, “where the age difference exceeds three years.”**

As written, the Draft states, “Sexual Behavior Involving Minors. Covered Adults. Regardless of any purported Consent, a Covered Adult shall not engage in any Sexual Conduct, Sexual Acts, Sexual Exploitation, or Non-touching Sexual Behavior with a Minor where the age difference exceeds three years.” Bright-line rules between coaches and athletes are less likely to cause confusion.

**b. SafeSport should affirm the professional expectations of coaches over all the athletes they coach, when there is a power-differential.**

While much emphasis is rightly placed on identifying and banning individuals who amount to nothing more than child molesters, sexual or romantic relationships even among “consenting” adults compromise the integrity of sport, undermine the professionalism of individuals involved, and are directly and indirectly injurious to athletes. The USOC,<sup>10</sup> the IOC,<sup>11</sup> and the NCAA<sup>12</sup> have embraced this position. In particular, the USOC has already determined that sexual or romantic relationships between coaches and athletes are “likely to impair judgment or be exploitative.”<sup>13</sup> As such, the independent entity should be changed with the duty to review, investigate and adjudicate all alleged sexual or romantic relationships between an athlete and any individual in a position of power or authority over the athlete, not just relationships that may be illegal.

**VI. All USOC, NGBs and Coaching Association personnel and members should be required to report suspected criminal child abuse to SafeSport and to the authorities.<sup>14</sup>**

A robust reporting regime is critical to the investigative entity’s ability to review and investigate alleged instances of sexual abuse or harassment. Few states name coaches or organizations like a national governing body as mandated reporters. The USOC and SafeSport should require the individual to report violations of SafeSport and crimes to the police or appropriate child protective services, regardless of whether the reporter is a mandated reporter under the relevant state’s law.

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<sup>10</sup> USOC Coaching Ethics Code, available at <http://usars.info/misc/USOCCoachingEthicsCode.pdf> (as reprinted by USA Roller Sports). For example, Ethical Standards 3.4, 3.5, and 3.6 provide that coaches should not engage in sexual intimacies with current or former athletes because such relationships are “frequently harmful to the athlete, and because such intimacies undermine public confidence in the coaching profession.”

<sup>11</sup> International Olympic Committee, Consensus Statement, “Sexual Harassment and Abuse in Sport” (Feb. 8, 2007) (finding that “[s]exual harassment and abuse in sport stem from power relations and abuses of power”), available at <https://www.olympic.org/news/ioc-adopts-consensus-statement-on-sexual-harassment-and-abuse-in-sport>

<sup>12</sup> See Deborah L. Brake, J.D. & Mariah Burton Nelson, MPH, CAE, NCAA, “Staying in Bounds: A Model Policy to Prevent Inappropriate Relationships between Student-Athletes and Athletic Department Personnel,” (2012), available at <http://www.nacwaa.org/advocacy/diversity-equity-initiative/partners-resources> (prohibiting sexual relationships, even if “romantic” or “amorous,” between student-athletes and athletic department personnel and coaches).

<sup>13</sup> USOC Coaching Ethics Code, *supra* note 10. Ethical Standard 1.14(b) provides that “[c]oaches do not engage in sexual/romantic relationships with athletes or other participants over whom the coach has evaluative, direct or indirect authority, because such relationships are likely to impair judgment or be exploitative.”

<sup>14</sup> *Supra*, note 7, in the case of criminal behavior involving children, the timeline of actions taken should be worked out in conjunction with child protection authorities, so as not to interfere with any criminal investigation.



## **VII. Third-Parties should be able to report violations of the SafeSport policies.**

As written, the Draft implies that Third-Party reports<sup>15</sup> alone are insufficient to trigger an investigation into alleged sexual abuse, without the consent of the victim. In fact, as written, the only time a Third-Party reporter is mentioned is in conjunction with a Reporting Party. The current Draft reads that, “Review the evidence provided by the Third-Party Reporter, the Reporting Party, and the Responding Party, and will also make a good faith effort to interview relevant witnesses with direct knowledge of the allegations whose names have been provided by any of those individuals.”<sup>16</sup> The *IndyStar* recently reported that USA Gymnastics has not been forwarding complaints of child sexual abuse to authorities, including the police or child welfare agencies, when the reports did not originate from a victim or victim’s family.<sup>17</sup> The Catholic Church, Orthodox Jews, elite prep schools, the military, and many other organizations compounded their sexual abuse problems by adopting a policy prohibiting others in the organization from reporting child sexual abuse to outside authorities. To clear up this perceived loophole, the Office should provide explicit guidelines allowing Third-Parties to report violations of SafeSport policies.

## **VIII. The Third-Party may be the athlete suffering the harm.**

Third-parties should be able to report when they are harmed by the romantic or sexual relationship between a coach and another athlete. The coach’s power is not just in being able to harass or extract sexual favors from some athletes; coaches also decide the future of the entire team, including playing time and positions, grant or endorsement recommendations, grant or denial of leadership opportunities, and restrictions on the athlete’s personal life.<sup>18</sup>

Athletes have reportedly been kept off Olympic teams when their competitors were in a romantic or sexual relationship with the coach that was empowered to select the team. The target of the romantic and sexual overtures by the coach may not complain about the arrangement, yet third parties are still directly harmed by the violation of SafeSport policies.<sup>19</sup> The Draft is deficient when it fails to acknowledge those third parties harmed when two parties are engaged in this type of harassment.

For clarity, we suggest, under Definitions, including “Third-Party Reporter” next to “Reporting

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<sup>15</sup> Third-Party Reporters would include a coach on an opposing team, a volunteer, a non-member of the NGB, a parent of an athlete on an opposing team, a food service worker, or a janitor.

<sup>16</sup> Draft, p. 13.

<sup>17</sup> Marisa Kwiatkowski, Mark Alesia and Tim Evans, “A blind eye to sex abuse: How USA Gymnastics failed to report cases,” *IndyStar*, August 4, 2016, available at: <http://www.indystar.com/story/news/investigations/2016/08/04/usa-gymnastics-sex-abuse-protected-coaches/85829732/>

<sup>18</sup> Nancy Hogshead-Makar & Shelden E. Steinbach, *Intercollegiate Athletics’ Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 Marq. Sports L.J. 173 (2003) p. 176, 177.

<sup>19</sup> ““Quid Pro Quo Harassment” occurs where submission to such sexual conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual’s progress, development or performance, including when submission to such conduct would be a condition for access to receiving the benefits of any sporting program or future success or opportunities in sport.” Draft, p. 8. The Quid Pro Quo definition should also include the *threat* of withholding future success or opportunities in sport.

Party”<sup>20</sup> as well as clarifying that a victim need not be the reporter in order to be protected by the Policies, as discussed above.

**IX. Investigations of sexual misconduct investigations should proceed, even without cooperation from a victim.**

Victims of abuse or harassment are susceptible to, and often experience, emotional manipulation and therefore are unwilling to participate in efforts to investigate or discipline an abuser. This is particularly true of underage victims, who typically cannot understand or process the abuse or harassment until later in life. Experts agree that pedophiles commonly threaten their young victims to gain their silence. The Policies should not reinforce this behavior.

If the victim’s consent is required to initiate an investigation, abusers will leverage such a requirement to silence victims with threats (e.g., “If you tell anyone about us or participate in an investigation, you will never make the Olympic team.”). Moreover, even when victims come to realize that the sexual abuse or harassment was wrong, they may be unwilling to come forward because they feel shame or humiliation.

To break the cycle of silence and to identify individuals who may otherwise remain uninvestigated, amateur sports organizations, clubs or the independent entity that receives a report of suspected sexual abuse or harassment should notify the athlete, or a parent or guardian in the case of a minor athlete, but need not obtain consent from these individuals in order to forward the report to the investigative entity for review.<sup>21</sup> SafeSport’s policies should clear up any confusion; reports made by third parties will be treated like any other report, because the goal is to learn about abuse, to protect them from further abuse, as well as to protect other sport participants.

**X. All USOC, NGBs, and Coaching Association personnel and members should be prohibited from being alone with a child, which should constitute a violation of SafeSport policy.**

No child should be allowed to be alone with sport-personnel, unless it is a family member or legal guardian. Other youth serving organizations have adopted this rule,<sup>22</sup> as has the American Academy of Pediatrics; so can and should sport. This is a bright-line rule that everyone can understand and follow. While not enough by itself to alter the culture sufficiently to protect the vulnerable, it is a necessary element.

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<sup>20</sup> Currently, the policy reads that a “‘Reporting Party’ is the person impacted by a possible SafeSport Code Violation.” Draft, p. 7. “Third-party Reporter” is alphabetized much later in the document; they are individuals reporting a possible SafeSport Code Violation, if not the Reporting Party.” Does not appear until the Draft, p. 8.

<sup>21</sup> *Supra*, note 7. Potential criminal misconduct involving minors should follow a different reporting sequence and cooperation with authorities than SafeSport misconduct involving adults.

<sup>22</sup> From Boy Scouts of America, “One-on-one contact between adults and youth members is prohibited. In situations requiring a personal conference, such as a Scoutmaster conference, the meeting is to be conducted with the knowledge and in view of other adults and/or youth.” Policy available at: <http://www.scouting.org/scoutsource/HealthandSafety/GSS/gss01.aspx>

**XI. The Policies should be clear that a lack of criminal conviction does not mean the party is innocent, and does not clear the Respondent from sanctions by the Office.**

Some sexual abuse will also constitute criminal conduct. The current Draft reads, “Criminal Dispositions. It is a Violation of the SafeSport Code for any Covered Individual to be convicted of or subject to a Criminal Disposition of any crime involving any (a) form of Sexual Misconduct, or (b) Minor.”<sup>23</sup> The section does not say, however, what happens when the police choose not to prosecute or when a defendant is not convicted at trial.

Police investigations may be useful for fact-gathering, but because the standards for criminal investigations and all other types of inquiries are different,<sup>24</sup> police investigations or reports are not determinative of whether sexual harassment or sexual abuse has occurred. Many sex abuse and assault claims are not criminally prosecuted due to the Constitutionally-required high legal standards imposed in these courts, because some states have very short statutes of limitations. Therefore, lack of a conviction or a plea deal does not necessarily mean that sexual abuse did not happen, and does not mean it cannot be proven under a lesser standard.

**XII. The penalties for “Sexual Misconduct Involving Minors” should receive a sanction of permanent ineligibility.**

Currently, the Draft reads that ineligibility is a “likely” sanction for child sexual abuse. The authors could not conceive of a scenario where it would be safe to put a known child sexual abuser back into circulation with under-age children. On average, those adults who engage in sexual abuse will abuse 100 children over the course of their lives, and there is no age cut off for an abuser. Pedophiles typically seek out employment and avocations with access to children. In the words of former FBI child sex abuse expert Kenneth Lanning, “A pedophile may seek employment where he will be in contact with children (e.g., teacher, camp counselor, babysitter, school-bus driver) or where he can eventually specialize in dealing with children (e.g., physician, dentist, clergy member, photographer, social worker, law-enforcement officer).”<sup>25</sup> Given the research available as to the harm inflicted and the persistence of pedophiles, there should be no latitude in sanctioning a person in a power position with anything less than permanent ineligibility.

**XIII. The penalties for “Non-consensual Sexual Conduct” should list potential sanctions.**

Similarly, the word “likely” should be stricken from the list of sanctions for non-consensual sexual conduct. Rather, the language should read that an individual found to have violated this provision “will receive a sanction ranging from suspension to permanent ineligibility, depending on the severity of the incident, and taking into account any previous disciplinary actions.”<sup>26</sup>

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<sup>23</sup> Draft, p. 2.

<sup>24</sup> Including all civil litigation, administrative hearings, common business Human Resources inquiries, school investigations into violations of their Code of Conduct, etc.

<sup>25</sup> Kenneth Lanning, *Child Molesters, A Behavioral Analysis*, See <https://www.ncjrs.gov/pdffiles1/Digitization/149252NCJRS.pdf>, at 19.

<sup>26</sup> Draft, p. 9.



**XIV. SafeSport should include Rape Shield principles akin to those common in criminal, civil, and administrative procedures.**

Rape Shield laws apply to allegations of sex acts, allowing an adult or child victim to proceed as a “Jane Doe” or as a “John Doe.” The identity is released to the respondent, but not to the public or to the media. This principle is widely shared in the United States as no media outlet will disclose the name of a child abuse or adult rape victim without the victim’s permission. R-6 “Confidentiality” should include, “The identity of all child victims shall be denoted by a pseudonym (Jane or John Doe).” Draft, p. 18.

Furthermore, if the Responding Party or any other individual, NGB, or LAO discloses the name of the underage victim beyond the internal investigation or arbitration, they should have committed a *per se* violation of SafeSport and be subject to the same range of penalties.

The name of the responding party may be disclosed to protect other athletes and to ensure that other victims will come forward with the understanding that they have an obligation not to disclose the victim’s name themselves.<sup>27</sup>

Conclusion

The undersigned are dedicated to the protection of children and applaud the USOC for creating the SafeSport program to better protect them. While the road to creating the SafeSport Office and the current Draft’s policies has been a long and rather tortured, spanning years, we believe it is effort well worth expending. We provide these suggested changes in the hope that USOC’s SafeSport aspirations will be achieved, and children will be safe.

Sincerely,

*Nancy Hogshead-Makar/es*  
Champion Women

*Marci A. Hamilton/es*  
CHILD USA

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<sup>27</sup> Identifying the person after the arbitration has been completed should be disclosed if a violation has occurred. *Contra*, “All identifying information of the Reporting Party (including name), the Responding Party, and witnesses shall be redacted.” Draft, p. 22.