

# SITTING ON THE BENCH: THE FAILURE OF YOUTH FOOTBALL HELMET REGULATION AND THE NECESSITY OF GOVERNMENT INTERVENTION

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## INTRODUCTION

Over the last several years, an increasing amount of attention has been paid to the frequency and causes of traumatic brain injuries (TBIs),<sup>1</sup> commonly known as concussions.<sup>2</sup> Given several recent high-profile cases of current and former athletes suffering debilitating and life-threatening side effects of repeated brain trauma, concussions have become the focal point of heightened concern and the subject of new research within the medical and sports communities.<sup>3</sup> The Center for the Study of Traumatic

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1. See *NINDS Traumatic Brain Injury Information Page*, NAT’L INST. OF NEUROLOGICAL DISORDERS & STROKE, <http://www.ninds.nih.gov/disorders/tbi/tbi.htm> (last updated Jan. 30, 2012) (stating that traumatic brain injuries (TBIs) are a form of acquired brain injury that occurs when a sudden trauma causes damage to the brain, commonly resulting from the head suddenly and violently hitting another object); see also *Traumatic Brain Injuries*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/traumaticbraininjury/> (last updated Jan. 17, 2012) (recognizing TBI as a serious public health problem in the United States as approximately 1.7 million people sustain some level of TBI annually). It should be noted that while this Comment focuses on the relationship between youth athletics and concussions, the difficulty in diagnosing and treating concussions has been addressed in other fields, particularly the military. See Gregg Zoroya, *More Troops’ Concussions Diagnosed Under New Rules*, USA TODAY, Oct. 28, 2010, [http://www.usatoday.com/news/military/2010-10-28-1Aconcussions28\\_ST\\_N.htm](http://www.usatoday.com/news/military/2010-10-28-1Aconcussions28_ST_N.htm) (reviewing the new policies of the military for treating troops suffering from the effects of concussions sustained in the battlefield); see also Lizette Alvarez, *Home From War, Veterans Say Head Injuries Go Unrecognized*, N.Y. TIMES, Aug. 26, 2008, at A1 (discussing the close relationship between post-traumatic stress disorder and traumatic brain injuries).

2. See, e.g., Stephanie Smith, *Dead Athletes’ Brains Shows Damage from Concussions*, CNN (Jan. 26, 2009), [http://articles.cnn.com/2009-01-26/health/athlete.brains\\_1\\_concussions-brain-damage-traumatic-encephalopathy?\\_s=PM:HEALTH](http://articles.cnn.com/2009-01-26/health/athlete.brains_1_concussions-brain-damage-traumatic-encephalopathy?_s=PM:HEALTH) (addressing the studies of the Center for the Study of Traumatic Encephalopathy in Boston, which have focused on the dangerous long-term effects of concussions and the manner in which such side effects have afflicted former athletes).

3. See *Researchers to Study 49ers RBs*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=6643720&campaign=rss&source=ESPNHeadlines> (last updated June 9, 2011) (detailing the analyses of the brains of two deceased former National Football League (NFL) players who both suffered from Chronic Traumatic Encephalopathy (CTE), which is caused by repeated brain trauma); see also Alan Schwarz, *Study Says Brain Trauma Can Mimic A.L.S.*, N.Y. TIMES, Aug. 17, 2010, <http://www.nytimes.com/2010/08/18/>

Encephalopathy in Boston, in conjunction with the Sports Legacy Institute, have garnered national headlines by studying the brains of living and deceased athletes to better understand the cumulative effects of these injuries.<sup>4</sup> In its studies, the Sports Legacy Institute has found that athletes with a history of concussions have reported long-lasting symptoms of memory loss, motor function loss, and psychological disorders such as depression.<sup>5</sup> In response, the National Football League (NFL) has adopted stricter internal policies regulating when players who suffer from concussion symptoms can return to the field.<sup>6</sup> Additionally, only in 2010 did the National Collegiate Athletic Association (NCAA) create an Association-

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sports/18gehrig.html (citing a recent study demonstrating that NFL players who suffered from CTE exhibited some of the same neurological defects of Amyotrophic Lateral Sclerosis). See generally Malcolm Gladwell, *Offensive Play: How Different Are Dogfighting and Football?*, NEW YORKER, Oct. 19, 2009, [http://www.newyorker.com/reporting/2009/10/19/091019fa\\_fact\\_gladwell?currentPage=all](http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell?currentPage=all) (surveying several anecdotes of former football players suffering from severe physical and psychological disorders and the medical studies seeking to explain the ailments that are frequently seen in the brains of deceased former football players).

4. See, e.g., Smith, *supra* note 2 (detailing the findings of a study that showed evidence of CTE in both a deceased former NFL player, as well as in the brain of a deceased eighteen-year-old multisport athlete who reportedly suffered multiple concussions).

5. See Alan Schwarz, *Duerson's Brain Trauma Diagnosed*, N.Y. TIMES, May 2, 2011, <http://www.nytimes.com/2011/05/03/sports/football/03duerson.html> (addressing the finding that the brain of former NFL player Dave Duerson, who died of a self-inflicted gunshot wound at fifty years old, exhibited clear patterns of CTE, which contributed to his deteriorating mental state).

6. See Goodell Issues Memo Changing Return-to-Play Rules for Concussions, NAT'L FOOTBALL LEAGUE, <http://www.nfl.com/news/story?confirm=true&id=09000d5d814a9ecd&template=with%20video%20with%20comments> (lasted visited Feb. 8, 2012) (discussing the 2009 memorandum that NFL Commissioner Roger Goodell sent to all NFL teams outlining stricter guidelines for determining when a player who previously suffered a concussion during practice or a game can return to play); see also *Protecting Student Athletes from Concussions: Hearing on H.R. 6172 Before the H. Comm. on Educ. & Labor*, 111th Cong. 22 (2010) [hereinafter *Hearings*], (statement of Sean Morey, Executive Board Member, NFL Players Association) (stating the NFL is actively working to change the locker room culture and on field management of concussions). But see Ken Belson & Alan Schwarz, *Concussion Treatment Cited in Suit Against N.F.L.*, N.Y. TIMES, July 20, 2011, <http://www.nytimes.com/2011/07/21/sports/football/retired-players-sue-nfl-over-treatment-of-concussions.html> (citing a recently filed civil action in which seventy-five former NFL players filed suit against the NFL and football helmet manufacturers, alleging teams mismanaged the players' concussions and that the NFL purposefully concealed evidence of the long-term effects of head injuries). Specifically, the complaint alleges negligence and fraud against the NFL for how it handled concussion testing procedures and treatment. Plaintiffs' Complaint for Damages & Demand for Jury Trial at paras. 524-66, *Maxwell v. NFL*, No. BC465842 (Cal. Super. Ct. July 19, 2011). Additionally, the plaintiffs allege against the helmet manufacturers claims of strict liability for design and manufacturing defects and failure to warn plaintiffs of the risk of concussions. *Id.* at paras. 567-81.

wide policy governing concussion management of injured collegiate athletes.<sup>7</sup> While it appears the long-term consequences and detrimental effects of concussions sustained by athletes are beginning to be understood and appreciated,<sup>8</sup> the sports world, both professional and amateur, is still lacking clear guidance in creating preventative measures and equipment to curb the proliferation of such injuries.

In just the last three years, over 400,000 concussions were reported as a result of participation in high school athletics<sup>9</sup>; chief among the causes of

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7. Memorandum from Debra Runkle, Chair of NCAA Comm. on Competitive Safeguards and Med. Aspects of Sports (CSMAS), to NCAA Head Athletic Trainers (Apr. 29, 2010), available at [http://www.ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/ncaa/academics+and+athletes/personal+welfare/health+and+safety/concussion+management+plan+memo](http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/academics+and+athletes/personal+welfare/health+and+safety/concussion+management+plan+memo) (notifying trainers of the adoption of an association-wide concussion management plan for universities and colleges in all three divisions of the NCAA, as well as outlining recommendations for concussion management plans). Notably, the first provision in the NCAA's recommended Concussion Management Plan states, "Institutions shall require student-athletes to sign a statement in which student-athletes accept the responsibility for reporting their injuries and illness to the institutional medical staff, including signs and symptoms of concussions. During the review and signing process student-athletes should be presented with educational material on concussions." *Id.* at 3 (footnote omitted). Clearly, the NCAA is reminding its affiliated institutions of the potential legal pitfalls of assuming responsibility for managing the observation and treatment of student athletes.

8. See *Hearings*, *supra* note 6, at 23 (statement of Sean Morey, Executive Board Member, NFL Players Association) (indicating NFL's leadership has begun to recognize the severe effects of concussions on its athletes and is taking steps to better protect its players from being cleared to play before they are medically able to do so); Smith, *supra* note 2 (highlighting the findings of CTE in the brains of recently deceased former NFL players); Memorandum from Debra Runkle to Head Athletic Trainers, *supra* note 7 (pointing out to affiliated institutions that the NCAA's policies stem from continuing research and communications with the medical community).

9. See *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 3 (2010) (statement of Rep. Miller, Chairman, H. Comm. on Educ. & Labor) (introducing the topic of how concussions impact the academic wellbeing and quality of life of high school athletes). Interestingly, there are several cases in which the plaintiff was an athlete suffering from a nonconcussion injury and sued an equipment manufacturer for damages. See, e.g., *Green v. Schutt Sports Mfg. Co.*, 369 Fed. App'x 630, 637 (5th Cir. 2010) (holding, *inter alia*, that the helmet manufacturer was allowed to admit evidence that the helmet complied with National Operating Committee on Standards for Athletic Equipment's (NOCSAE's) standards); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577-78 (5th Cir. 2001) (holding that the helmet manufacturer was not strictly liable for the reconitioner's failure to replace old padding with newer energy-absorbing foam and that the mother could not recover for bystander emotional distress); *Lister v. Bill Kelley Athletic, Inc.*, 485 N.E.2d 483, 487 (Ill. App. Ct. 1985) (finding a helmet manufacturer and retailer not liable for a plaintiff's permanent quadriplegia, as the helmet was not defectively designed, and that "the possibility of injury result[ed] from a common propensity of the product which is open and obvious"). In contrast, no cases could be found in which an

these concussions is the participation of young athletes in football.<sup>10</sup> An estimated 4.5 million children play organized football in the United States, which includes about 1.5 million high school participants.<sup>11</sup> Yet, despite the enormous number of student athletes who require proper protection, there is a noticeable lack of modern standards in terms of effective football helmet regulation. This institutional void can be seen on several levels, including the manner in which equipment manufacturers test their products, the widespread use of outdated or defective helmets, and how helmet manufacturers may advertise the safety benefits of their products to the public.<sup>12</sup>

Since its formation in 1969, the National Operating Committee on Standards for Athletic Equipment (NOCSAE), a volunteer trade association, has been the governing body responsible for the oversight of sports safety equipment standards in the United States.<sup>13</sup> Among NOCSAE's goals when it was first created was the development of a more advanced understanding of athletic equipment, particularly an understanding of protective gear for contact sports.<sup>14</sup> NOCSAE recognized that this meant developing testing standards for equipment designed for contact sports, specifically football helmets.<sup>15</sup> However, NOCSAE's testing standards for football helmets have not changed since 1973,<sup>16</sup> despite the

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injured athlete suffering from the effects of a concussion sued a football helmet manufacturer for a defective product. The majority of concussion lawsuits focus on negligence of coaches, physicians, or school administrators in properly diagnosing and treating concussions. *See, e.g.,* Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 679 N.W.2d 198 (Neb. 2004) (focusing on the negligence of coaching staff). *See generally* Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17 (2002).

10. *See* Children's Sports Athletic Equipment Safety Act, S. 601, 112th Cong. § 2(11) (2011) ("In any given season, 20% of all high school football players sustain brain injuries."); *see also* *Guidelines for Pediatricians: Head Injuries*, Am. Acad. of Pediatrics, Feb. 2000 (estimating that 20% of high school football players and 40% of college players will sustain a head injury during their careers).

11. CSAE Act, S. 601 § 2(9).

12. *See* Alan Schwarz, *As Concussions Rise, Scant Oversight for Football Helmet Safety*, N.Y. TIMES, Oct. 20, 2010, at A1 [hereinafter Schwarz, *Scant Oversight*], (assessing issues surrounding the lack of oversight of football helmet development, testing, and marketing, and specifically addressing concerns with the NOCSAE's outdated testing standards and policies).

13. *See About NOCSAE: History and Purpose*, NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., <http://www.nocsae.org/about/history.html> (last visited Feb. 8, 2012) (explaining the history and purpose behind the creation of NOCSAE in response to increasing concerns about injuries sustained in the course of participating in football).

14. *Id.*

15. *Id.*

16. *See* Alan Schwarz, *Two Bills Put Focus on Equipment Safety for Children*, N.Y. TIMES, Mar. 15, 2011 [hereinafter Schwarz, *Equipment Safety for Children*],

fact that the technology of the materials used in the design and production of football helmets has significantly advanced.<sup>17</sup> In addition, NOCSAE does not conduct independent testing or market surveillance to ensure compliance with its safety standards for either new or potentially defective reconditioned helmets.<sup>18</sup>

In response to the combination of the growing issue of concussions among school-aged athletes and the lack of clear standards and guidance from NOCSAE, Senator Tom Udall of New Mexico proposed the Children's Sports Athletic Equipment Safety Act in March 2011 (CSAE Act).<sup>19</sup> Senator Udall's bill, which has been referred to the Senate Committee on Commerce, Science, and Transportation as of March 2011,<sup>20</sup> seeks to implement more rigid standards for manufacturing, independent third-party testing, regulations on advertising, and distribution

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[http://www.nytimes.com/2011/03/16/sports/football/16helmets.html?\\_r=2](http://www.nytimes.com/2011/03/16/sports/football/16helmets.html?_r=2) (highlighting two recently drafted pieces of legislation that focus on federal regulation for the treatment of youth-sport concussions and increasing government oversight within the football helmet industry in an effort to increase the industry's focus on developing equipment designed to prevent or reduce the risk of concussions).

17. See *Newer Football Helmet Design May Reduce Incidence of Concussions in High School Players, Shows University of Pittsburgh Study*, SCI. DAILY (Jan. 14, 2006), <http://www.sciencedaily.com/releases/2006/01/060114151826.htm> (discussing a recent study released by the University of Pittsburgh Medical Center's Sports Medicine Concussion Program, which shows the Riddell Revolution football helmet may reduce the incidence of concussions in high school players when compared to standard football helmets). *But see* Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 249–50 (2010) (pointing out that despite the common belief that improved equipment aids in the reduction of athletics-related concussions, some studies have demonstrated that improved equipment for other parts of the body, such as the elbows or shoulders, produces a perverse result by increasing head injuries). While it is a valid point that improved technology can cause some athletes to be reckless in using their equipment to inflict greater force on their opponents, such studies do not address the main issue of this Comment, which is the development of helmets that properly protect athletes from the complexities of forces causing concussions.

18. See Children's Sports Athletic Equipment Safety (CSAE) Act, S. 601, 112th Cong. § 2(24) (2011) (addressing the legislative findings that led to the Children's Sports Athletic Equipment Safety Act proposal); *see also* Schwarz, *Scant Oversight*, *supra* note 12 (asserting that NOCSAE does not have a role in ensuring that new helmets or reconditioned helmets meet the limited standards that NOCSAE establishes).

19. CSAE Act, S. 601; The Constitutional Authority Statement that accompanies the House version of the Act, H.R. 1127, 112th Cong. (2011), cites Article I, Section 8, Clause 3 of the U.S. Constitution as the vehicle behind which Congress can enact the reforms proposed by the CSAE Act. See 157 CONG. REC. H1907 (daily ed. Mar. 16, 2011) (statement of Rep. Pascrell).

20. *Bill Summary & Status, 112th Cong. (2011–2012): S. 601*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.601> (last visited Feb. 8, 2012).

of football helmets used by school-aged children.<sup>21</sup> The bill has three central components. First, it instructs the Consumer Product Safety Commission (CPSC) to initiate rulemaking proceedings to develop a consumer product safety rule with respect to new and reconditioned youth football helmets.<sup>22</sup> Second, it mandates third-party testing of youth football helmets, which would be bound by the third-party testing requirements of § 2063(a)(2)<sup>23</sup> of the Consumer Product Safety Act.<sup>24</sup> And third, it instructs the Federal Trade Commission (FTC) under § 57(a)<sup>25</sup> of the Federal Trade Commission Act to regulate the manner in which helmet manufacturers advertise the safety specifications of their products,<sup>26</sup> as well as empowering state attorney generals to bring actions on behalf of citizens to obtain appropriate injunctive relief or to pursue any appropriate criminal charges against manufacturers or distributors for false or misleading claims with respect to the safety benefits of their products.<sup>27</sup>

This Comment argues that NOCSAE's current standards of testing are ineffective and that its lack of market oversight has allowed inferior products to thrive, endangering the welfare of millions of student athletes.<sup>28</sup> Additionally, this Comment maintains that the proposed CSAE Act is the best mechanism to create a greater atmosphere of accountability and compliance among equipment manufacturers and school administrative personnel by developing more stringent testing and safety standards as well as stricter guidelines in the advertising and marketing of the equipment's safety capabilities.<sup>29</sup> Part I provides background on NOCSAE, including its

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21. See generally CSAE Act, S. 601 (providing new guidance in the development, testing, and advertising of the youth football helmet industry by drawing in the powers of the Consumer Product Safety Commission (CPSC) and Federal Trade Commission (FTC)). But see Laurence M. Vance, *Strong Helmets and the Stronger Hand of Government*, FUTURE OF FREEDOM FOUND. (May 31, 2011), <http://www.fff.org/comment/com1105x.asp> (condemning possible federal government involvement in the regulation of sporting equipment and arguing that such proposed legislation centralizes more power in the federal government when such issues should be regulated by state governments, if at all).

22. CSAE Act, S. 601 § 3(a)–(c).

23. Consumer Product Safety Act, 15 U.S.C. § 2063 (Supp. IV 2010).

24. CSAE Act, S. 601 § 4(a), (c).

25. Federal Trade Commission Act, 15 U.S.C. § 57a (2006).

26. CSAE Act, S. 601 § 5(a)–(b).

27. *Id.* § 5(c).

28. See Gregg Easterbrook, *Virginia Tech Helmet Research Crucial*, ESPN (July 19, 2011), [http://sports.espn.go.com/espn/page2/story?page=easterbrook-110719\\_virginia\\_tech\\_helmet\\_study&sportCat=nfl](http://sports.espn.go.com/espn/page2/story?page=easterbrook-110719_virginia_tech_helmet_study&sportCat=nfl) (citing the recently released Virginia Polytechnic Institute and State University (Virginia Tech) study, which showed the second-lowest rated helmet was the most commonly used helmet in the NFL and was prominent in both collegiate and high school programs across the country).

29. See Schwarz, *Scant Oversight*, *supra* note 12 (noting how limited oversight by

organizational structure, an overview of its policies, and its relationship to the procedures of the National Athletic Equipment Reconditioners Association (NAERA). Part II introduces the CSAE Act, explaining the context in which the bill is being proposed and the rationale behind shifting the power of youth football helmet safety regulation from NOCSAE to the FTC and CPSC.

Part III compares NOCSAE's current testing standards to the regulations mandated by the CSAE Act and argues that given NOCSAE's lack of leadership on the issues of product testing, use of reconditioned helmets, and product advertising, the CSAE Act provides the most effective environment for safer football helmets to be created, tested, and regulated. Part III will also argue that the regulations mandated by the CSAE Act must be supplemented with additional provisions including the creation of a uniform rating system for all helmets, similar to the system recently outlined by scientists at Virginia Polytechnic Institute and State University (Virginia Tech).<sup>30</sup> This Comment concludes that the CSAE Act is the most efficient vehicle currently available as it has the means and mechanisms to properly structure and guide youth football helmet development and regulation in the future. Given that the current voluntary system is inadequate for regulating youth football helmet standards, the CSAE Act should be enacted, employing federal regulation as the primary means to reform the industry.

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NOCSAE has created a lack of leadership in the current testing of new and used football helmets, as well as a lack of vision in how to properly integrate new helmet technologies to reduce the risk of concussions for school-aged players); *see also* Alan Schwarz, *Senator Calls for Helmet Safety Investigation*, N.Y. TIMES, Jan. 3, 2011 [hereinafter Schwarz, *Helmet Safety Investigation*], <http://www.nytimes.com/2011/01/04/sports/football/04helmets.html> (citing concerns that limited testing standards, which are overseen by NOCSAE, can convey a level of concussion protection for school-aged athletes that the headgear may not provide).

30. *See* Lynn Nystrom, *Virginia Tech Announces Football Helmet Ratings for Reducing Concussion Risk*, VA. TECH. COLL. OF ENG'G (May 10, 2011), <http://www.eng.vt.edu/news/virginia-tech-announces-football-helmet-ratings-reducing-concussion-risk> (announcing the creation of a five-star rating system for adult football helmets, which quantifies head impact exposure and concussion risk of helmets currently on the market or in use by professional or collegiate athletes); *see also* *National Impact Database: Adult Football Helmet Ratings—May 2011*, VA. TECH. SCH. OF BIOMED. ENG'G & SCI., <http://www.sbes.vt.edu/nid.php> (last visited Feb. 8, 2012) (delineating the most recent results of the Virginia Tech study and categorizing the tested helmets by their given test score).



## I. BACKGROUND: THE DEVELOPMENT OF VOLUNTEER INDUSTRY OVERSIGHT

### A. *The Creation of NOCSAE and Early Testing Procedures*

Since its inception in 1969, NOCSAE has been the central nonprofit organization in the regulation of athletic equipment.<sup>31</sup> NOCSAE was created through the efforts of several athletic and manufacturer associations<sup>32</sup> in response to a growing need for performance test standards for football helmets.<sup>33</sup> In response to the thirty-six football-related fatalities that occurred during 1968, NOCSAE's initial research efforts focused on minimizing football-related injuries.<sup>34</sup> Despite what NOCSAE determined was an upward trending problem, it was also initially concerned that improved equipment might lead to harder hits to the head because players might be inclined to use their helmets as weapons.<sup>35</sup> Given that in 1968 head injury fatalities were attributed to only two out of every 100,000 athletes, NOCSAE feared that radical changes in the materials used to manufacture the equipment could potentially inflate the number of fatalities by causing an increase in the number of head, neck, or spine injuries.<sup>36</sup> However, despite these concerns, NOCSAE developed testing systems in 1970 with the goal of establishing a uniform football helmet standard.<sup>37</sup>

By 1973, NOCSAE had established a uniform testing standard.<sup>38</sup> While NOCSAE developed the testing standard, to this date it has not performed

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31. *About NOCSAE*, *supra* note 13.

32. Michael Oliver, Exec. Dir. & Gen. Counsel of NOCSAE, Presentation Before CMH Coaches Conference 3 (July 23, 2011), <http://www.childrensmrcy.org/sportsmedicine/Resources/Files/2011%20Coaches%20Conference/Helmet%20Fitting%20&%20Standards%20for%20Athletic%20Equipment%20-%20Michael%20Oliver.pdf>.

33. *Frequently Asked Questions and Answers*, NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., <http://www.nocsae.org/faq/index.html> (last visited Feb. 8, 2012).

34. *About NOCSAE*, *supra* note 13.

35. *Id.*; see also Reed Albergotti & Shirley S. Wang, *Is It Time to Retire the Football Helmet?*, WALL ST. J., Nov. 11, 2009, at 12 (addressing the debate over whether the use of more advanced football helmets would actually lead to increased injuries as players feel more secure and willing to lead into a tackle with their heads).

36. *About NOCSAE*, *supra* note 13.

37. *Id.*; see also Brian James Mills, Note, *Football Helmets and Products Liability*, 8 SPORTS LAW. J. 153, 155 (2001) (indicating that in response to the surge in popularity of football in the 1960s and the increase in serious sports related injuries, the American College Health Association, the National Collegiate Athletic Association (NCAA), the National Federation of State High Schools Association (NFHS), and the Sporting Goods Manufacturers Association combined their efforts to form NOCSAE with the initial purpose of researching the football helmet).

38. *About NOCSAE*, *supra* note 13.

any of the actual testing; rather, NOCSAE permits the manufacturers to test their own newly constructed helmets, while NAERA tests used helmets that need to be recertified.<sup>39</sup> By 1985 there was a decrease in the number of football-related fatalities resulting from structural head injuries.<sup>40</sup> The regression of football-related fatalities resulting from structural head injuries has continued as of the 2006 season.<sup>41</sup> However, there are no statistics on how NOCSAE's testing standards have affected the rate of concussions sustained by athletes. The essential difference between concussions and the aforementioned head injuries is that impairment from a concussion is characterized as causing functional impairment, as opposed to structural damage, which would be actual physical damage to the brain or skull.<sup>42</sup>

It is evident from NOCSAE's history that the organization's central purpose in creating a helmet standard was to reduce the risk of football-related fatalities resulting from structural damage to the head, and not the severe functional impairments that commonly accompany a concussion.<sup>43</sup> While the reduction of such structural injuries has greatly benefited professional and amateur athletics, NOCSAE's standards have not progressed or evolved since its inception and have failed to adequately address the complicated biomechanical forces that cause concussions.<sup>44</sup>

As studies continue to highlight the potential long-term and debilitating effects of concussions,<sup>45</sup> NOCSAE's policies must be revised and updated to

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39. See Mills, *supra* note 37, at 156–57 (outlining that under the testing procedures established by NOCSAE, not all helmets are tested, but only a significant sample of a particular model and size before the helmet is placed on the open market); see also *Frequently Asked Questions and Answers*, *supra* note 33 (indicating that NOCSAE's standard does not “require[] any helmet to be recertified on any regular basis”).

40. See *About NOCSAE*, *supra* note 13 (citing to an 88% percent drop in the occurrence of serious head injuries from the 1964–1968 era to the 2002–2006 era).

41. *Id.*

42. See Wilson, *supra* note 17, at 244 (describing the biomechanical forces causing a concussion and the potential adverse side effects of multiple concussions as they differ from an injury such as a skull fracture). Aside from differences between structural and functional neurological impairment, it is worth mentioning that that concussions are not only caused by focused impact on the head but can also result from force delivered to any part of the body that causes “impulsive force to be transmitted to the head.” *Id.*

43. See *About NOCSAE*, *supra* note 13 (voicing concern over head injury fatalities but remaining silent on any mention of concussions); see also William A. Staar, *Head Cases: The Coming Wave of Concussion Litigation*, FOR THE DEFENSE, Aug. 2010, at 53 (arguing that the hard-shell polycarbonate helmets developed over fifty years ago were designed to eliminate deadly head injuries and not to deal with the complexities of forces that cause concussions).

44. See Schwarz, *Scant Oversight*, *supra* note 12 (asserting that despite rising concussion rates among youth football participants and an increasing understanding of their causes and short- and long-term effects of concussions on cognitive functions, NOCSAE's standard has not adapted to new helmet technologies or medical developments).

45. See generally Michael W. Collins et al., *Cumulative Effects of Concussions in High School*

incorporate newer findings and safety standards to afford the highest level of protection possible for athletes, specifically school-aged athletes. Studies have demonstrated that children between the ages of six and fourteen are more prone to sustaining head injuries than any other group.<sup>46</sup> The accuracy of those studies is difficult to ascertain because young athletes have a tendency to underreport or conceal the symptoms of concussions to return to play quicker.<sup>47</sup> Given the difficulty in diagnosing and reporting concussions sustained by school-aged athletes, the need for safer helmets that are properly tested for optimal protection is even more crucial. While there is currently no such thing as a concussion-proof helmet,<sup>48</sup> the importance of continuing research in an effort to discover materials or equipment which reduce the risk and effects of concussions is critical. While such research is pending, properly screening and reconditioning previously used helmets is vital to the safety of school-aged athletes.

*B. The Role of the National Athletic Equipment Reconditioners Association*

While NOCSAE is the volunteer governing body that developed testing standards for football helmets, NAERA is an association of athletic equipment manufacturers licensed by NOCASE to regulate the reconditioning and recertification process for used athletic equipment.<sup>49</sup> Members of NAERA are licensed by NOCSAE to recondition and recertify football helmets, lacrosse helmets, softball/baseball helmets, and face guards.<sup>50</sup> While NAERA is an independent organization from NOCSAE, NAERA is required to use NOCSAE's testing standards when

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*Athletes*, 51 NEUROSURGERY 1175 (2002) (contending that athletes with prior concussions are more likely to experience repeated on-field loss of consciousness, amnesia, and confusion following a repeated concussion); see also Rosemarie Scolaro Moser et al., *Prolonged Effects of Concussion in High School Athletes*, 57 NEUROSURGERY 300, 302–03 (2005) (reporting findings that athletes who suffered from concussions performed significantly worse on concentration and attention tests compared to athletes without a history of concussions).

46. See Wilson, *supra* note 17, at 246–47 (noting a recent study concluding that between 2001 and 2005, half of the 502,000 emergency room visits for concussions sustained by children between the ages of eight and nineteen were sports-related).

47. See *id.* at 247 (citing a study of high school football players that demonstrated unreported concussions influence the accuracy of findings on the total rate of concussions sustained).

48. See *id.* at 249–50 (adding that for certain sports, such as rugby, there is no sport-specific helmet shown to reduce the rate of concussions).

49. *What Is NAERA?*, NAT'L ATHLETIC EQUIP. RECONDITIONING ASS'N, <http://www.naera.net/what.html> (last visited Feb. 8, 2012) (providing a background on the organization and the recertification process).

50. *Id.*

reconditioning and recertifying athletic equipment.<sup>51</sup> Members of NAERA must follow NOCSAE's standards to maintain their NOCSAE recertification licenses.<sup>52</sup> Recertification of a used helmet is a multistep process that includes cleaning, sanitizing, replacing worn parts, a shell inspection, and NOCSAE-approved testing.<sup>53</sup> Currently, there are twenty-three NAERA members that perform all the reconditioning and recertification of athletic equipment for schools and leagues across the country.<sup>54</sup> NAERA's reliance on NOCSAE's testing standards highlights the weight those within the football helmet industry give to NOCSAE as the volunteer governing body.

### C. Current NOCSAE Testing Regulations

While NOCSAE led the movement to develop and test safer football headgear, the organization's testing standards have not significantly changed since 1973.<sup>55</sup> Though NOCSAE continues to oversee testing standards, the equipment manufacturers perform helmet testing for their own newly manufactured products, while NAERA recertification facilities test used helmets—guided by NOCSAE testing standards—before allowing the helmet to be used again by an athlete.<sup>56</sup> As currently implemented under NOCSAE's standard, the football helmet is placed on a synthetic head model that is filled with glycerin and fitted with various measuring instruments.<sup>57</sup> The head model fitted with the helmet is then dropped sixteen times onto a polymer anvil with two of the drops from a height of sixty inches onto six different locations of the helmet at varying temperatures determined by NOCSAE to simulate different potential game temperatures.<sup>58</sup> After each drop a "Severity Index," which measures the severity of the impact absorbed by the head model at the moment of impact, is determined.<sup>59</sup> Helmets are graded on a pass–fail basis, and the

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51. See *Frequently Asked Questions and Answers*, *supra* note 33 (describing the requirements for the recertification of football helmets); see also *What Is NAERA?*, *supra* note 49 (contending that the NOCSAE standards are industry-accepted by institutions such as the NCAA and the NFL).

52. See *What Is NAERA?*, *supra* note 49 (detailing how recertification of football helmets became a large part of the organization's work).

53. *Id.*

54. *NAERA Member List*, NAT'L ATHLETIC EQUIP. RECONDITIONING ASS'N, [http://www.naera.net/members\\_all.html](http://www.naera.net/members_all.html) (last visited Feb. 8, 2012).

55. Schwarz, *Scant Oversight*, *supra* note 12.

56. See Mills, *supra* note 37, at 155–57 (discussing the standard NOCSAE and NAERA testing procedures).

57. *Id.* at 155.

58. *Id.* at 155–56.

59. *Id.* at 156.

helmets that pass are those meeting an acceptable Severity Index.<sup>60</sup> Once a statistically sufficient sample of helmets pass the drop test, each helmet must be stamped with a clearly legible statement that effectively communicates to the purchaser and user the following information:

Warning. No helmet can prevent all head or any neck injuries a player might receive while participating in football. Do not use this helmet to butt, ram or spear an opposing player. This is in violation of the football rules and such use can result in severe head or neck injuries, paralysis or death to you and possible injury to your opponent.<sup>61</sup>

The NOCSAE standard states that this language must be permanently affixed to the exterior of the shell of the helmet and be easily read without removal of a decal tape or other temporary material or permanent part of the helmet.<sup>62</sup> In addition, a permanent and exact replica of NOCSAE's seal that states, "MANUFACTURER CERTIFIES: MEETS NOCSAE STANDARD" must appear legibly on the exterior of the shell for the helmet to be placed on the market for sale.<sup>63</sup> It is important to note that NOCSAE's helmet standard is a voluntary testing standard which a league's governing body is free to adopt.<sup>64</sup> Currently, both the NCAA and the National Federation of State High School Associations (NFHS) abide by NOCSAE standards and require that student athletes use equipment meeting NOCSAE specifications.<sup>65</sup>

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60. See NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., NOCSAE Doc (ND)002-11m11a, STANDARD PERFORMANCE SPECIFICATION FOR NEWLY MANUFACTURED FOOTBALL HELMETS (2011), <http://nocsae.org/standards/pdfs/Standards%2011/ND002-11m11a%20-%20Mfr'd%20FB%20Helmets%20Standard%20Performance%20.pdf>; see also *How are Football Helmets Tested?*, NAT'L ATHLETIC EQUIP. RECONDITIONING ASS'N, [http://www.naera.net/what\\_tested.html](http://www.naera.net/what_tested.html) (last visited Feb. 8, 2012) (defining the Severity Index as "a scientifically accepted measurement of human injury tolerance").

61. NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., *supra* note 60, at 3.

62. *Id.*

63. *Id.*; see also Mills, *supra* note 37, at 157 (stating that when NOCSAE's seal is affixed to the helmet it means that the helmet meets or exceeds the gold standard for head protection, and this level of certification is required by some of the most prominent athletic organizations in the country, including the NCAA, NFHS, and the U.S. military).

64. *Frequently Asked Questions and Answers*, *supra* note 33.

65. See generally NAT'L FED'N OF STATE HIGH SCH. ASS'NS, NFHS RULES CHANGES AFFECTING RISK (1982–2011), available at <http://www.nfhs.org/WorkArea/DownloadAsset.aspx?id=5760> (last visited Feb. 8, 2012) (outlining several sports in which NOCSAE certified equipment is now required); Jeff Miller, *The College Football Helmet Has Come a Long Way*, NAT'L COLLEGE ATHLETIC ASS'N (Sept. 23, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/September+latest+news/The+college+football+helmet>

While NOCSAE does not require helmets to be recertified on a regular basis, NOCSAE does recommend organizations adopt some type of helmet reconditioning program.<sup>66</sup> Despite this recommendation, NOCSAE also makes clear that NOCSAE's standard does not mandate regular reconditioning and recertification of helmets, essentially placing the onus on the helmet manufacturer to determine what the proper timetable is for helmet recertification and reconditioning.<sup>67</sup> Examining the pre-marketing testing for new helmets and reconditioning process for used helmets, two clear concerns arise: First, an overreliance on NOCSAE's initial and now outdated testing standard by all members of the football helmet industry;<sup>68</sup> and second, despite NOCSAE's position of oversight, a clear reluctance or inability on the part of NOCSAE to properly regulate the industry.<sup>69</sup>

#### *D. NOCSAE's Current Stance on the Emerging Issues of Sports-Related Concussions*

In addition to equipment safety research and product testing oversight, NOCSAE also acts as a grant-giving foundation, supplying funds to those that seek to advance the science of sports medicine.<sup>70</sup> With the January 2011 creation of the Scientific Advisory Committee—charged with directing research efforts relating to concussions—NOCSAE has taken a more active role in promoting concussion research.<sup>71</sup> However, as a volunteer trade association, NOCSAE is comprised of a collection of

+has+come+a+long+way (noting that in 1978 the NCAA adopted the NOCSAE standard for helmets for the NCAA's member schools). Notably, the NFL does not mandate that its players wear NOCSAE-approved helmets, and many teams are secretive of the helmet models their athletes wear. See Easterbrook, *supra* note 28.

66. *Frequently Asked Questions and Answers*, *supra* note 33.

67. *Id.* Specifically, NOCSAE's website states, "A manufacturer is also free to limit the number of times its helmet may be reconditioned, or it may establish a useful life beyond which it will not allow reconditioning." *Id.*

68. See generally Schwarz, *Scant Oversight*, *supra* note 12; *What Is NAERA?*, *supra* note 49.

69. See generally *Frequently Asked Questions and Answers*, *supra* note 33.

70. See Press Release, Nat'l Operating Comm. on Standards for Athletic Equip., NOCSAE Approves More than \$600,000 to Fund Concussion Research; Creates Scientific Advisory Committee to Direct Concussion Research (Jan. 22, 2011), <http://www.nocsae.org/MediaKit/2011/NOCSAE%20Grant%20Approval%20News%20Release%20FINAL%20%2001%2022%2011.pdf> (announcing that NOCSAE awarded nearly \$610,000 to advance research in sports medicine related to concussions, as well as announce the formation of a Scientific Advisory Committee to guide research efforts related to concussions); see also *NOCSAE Approves \$1.1 Million to Fund Concussion-Related Research*, PR NEWswire (Jun. 18, 2011), <http://www.prnewswire.com/news-releases/nocsae-approves-11-million-to-fund-concussion-related-research-124127914.html> (announcing that NOCSAE "awarded \$1.1 million in research grants to advance the science of sports medicine," specifically concussion-related research).

71. Press Release, NOCSAE, *supra* note 70.

representatives from a number of groups interested in the business of athletic equipment, including equipment manufacturers, reconditioners, athletic trainers, coaches, equipment managers, sports medicine specialists, and consumer organizations.<sup>72</sup> There is justifiable concern that because the majority of NOCSAE's funding is provided by organizations that NOCSAE should be overseeing during the helmet testing process, NOCSAE lacks the requisite independence to make changes that could alter the landscape of the helmet manufacturing industry for the better.<sup>73</sup>

## II. INCREASED FOCUS ON THE RISK OF CONCUSSIONS IN SCHOOL-AGED ATHLETES

### A. Regulatory Responses to Increasing Concerns About Concussions

As the causes and dangerous long-term effects of concussions continue to be studied and better understood in the medical community, public pressure has caused the NFL to develop stricter guidelines for evaluating athletes thought to be suffering from the effects of a concussion.<sup>74</sup> While professional sports leagues have gradually altered their stances on how best to regulate the treatment of their athletes, only a few states have regulated the evaluation and treatment of concussions suffered by amateur athletes.<sup>75</sup> Only recently has the NFHS weighed in on what it deems to be an adequate approach to regulating the treatment of concussions for student

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72. See *Frequently Asked Questions and Answers*, *supra* note 33.

73. See *NOCSAE Overview*, NAT'L OPERATING COMM. ON STANDARDS FOR ATHLETIC EQUIP., <http://www.nocsae.org/MediaKit/2011/NOCSAE%20Overview%201-14-11.pdf> (last visited Feb. 8, 2012) (stating that NOCSAE is primarily funded through licensing fees that it charges to equipment manufacturers that want to certify their equipment with the NOCSAE seal); see also *Frequently Asked Questions and Answers*, *supra* note 33 (noting that the NOCSAE helmet standard is a voluntary standard that is adopted by a sport regulatory body on its own accord).

74. See *Protecting Student Athletes from Concussions: Hearing on H.R. 6172 Before the Comm. on Educ. & Labor*, 111th Cong. 22–24 (2010) (statement of Sean Morey, Executive Board Member, NFL Players Association) (highlighting the changes that the commissioner of the NFL implemented to protect players in light of increasing transparency regarding the detrimental effects of repeated concussions to players).

75. See *States Consider Youth Concussion Laws*, ESPN, <http://sports.espn.go.com/espn/news/story?id=4865622> (last updated Jan. 28, 2010) (highlighting the six states that began to take measures to adopt state laws governing when athletes who suffered concussions can return to play); see also Alan Schwarz, *States Taking the Lead Addressing Concussions*, N.Y. TIMES, Jan. 31, 2010 [hereinafter Schwarz, *States Taking the Lead*], <http://www.nytimes.com/2010/01/31/sports/31concussions.html> (discussing Washington state law which mandates that athletes under eighteen who show symptoms of concussions must obtain the written approval of a licensed healthcare provider prior to returning to play).

athletes.<sup>76</sup>

While individual state and athletic regulatory bodies continue to generate approaches to dealing with the occurrence and effects of concussions,<sup>77</sup> representatives from the federal government have just recently entered the concussion debate. In 2010, the House of Representatives proposed and passed the Concussion Treatment and Care Tools Act of 2010 (ConTACT Act).<sup>78</sup> The ConTACT Act directs the Department of Health and Human Services to establish concussion management guidelines, focusing primarily on the prevention and management of concussions in school-aged children.<sup>79</sup> Studies have demonstrated that, given the developing nature of a school-aged child's brain, the risk of sustaining a concussion and the possibility of more severe damage when compared to a fully developed adult is significantly higher.<sup>80</sup> While the aforementioned studies have forced individual states to examine their concussion management policies for student athletes, or in many cases create such policies,<sup>81</sup> few resources have been put toward a nationwide

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76. See Erika A. Diehl, Note, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 107–08 (2010) (contending the NFHS should recommend a concussion-handling policy which requires an independent healthcare professional evaluate the athlete before the athlete can return to practice for games).

77. See Schwarz, *States Taking the Lead*, *supra* note 75; see also Diehl, *supra* note 76, at 107–08.

78. Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong.

79. See James Wagner, *House Approves Concussion Treatment and Care Tools (ConTACT) Act*, WASH. POST, Sept. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093003378.html> (discussing the mechanics of the proposed legislation, a Department of Health and Human Services conference within two years of medical and athletic experts determining concussion management guidelines).

80. See *Sports Related Concussions: Background and Significance*, UNIV. OF PITTSBURGH MED. CTR. BRAIN TRAUMA RESEARCH CTR., <http://www.neurosurgery.pitt.edu/trauma/concussion.html> (last visited Feb. 8, 2012) (finding that while there are no reported studies as to the effects of concussion in high school athletes, previous age-related studies demonstrate significant post-concussion differences in adolescent versus adult brains).

81. See, e.g., VA. CODE ANN. § 22.1-271.5(B) (West 2010) (mandating local school divisions to “develop policies and procedures regarding the identification and handling of suspected concussions in student-athletes”); TEX. EDUC. CODE ANN. § 38.153(b) (West 2011) (requiring appointed concussion oversight teams for school districts to establish return-to-play protocols for student athletes suffering from the effects of concussions); MD. CODE ANN., EDUC. § 7-443(b)(1) (LexisNexis 2010 & 2011 Supp.) (outlining an awareness program providing school officials and parents with information on risks of concussions, criteria for removing injured players, reporting injuries, and academic accommodations for students diagnosed with concussions). See generally *Concussion Information & Competition Policies by State*, ESPN RISE (Aug. 2010), <http://rise.espn.go.com/all-sports/articles/2010/08/31-Concussions-from-magazine.aspx> (follow the “state-by-state” hyperlink) (surveying the general policies regarding concussion diagnoses and treatment for student athletes in all fifty states).



effort to develop preventative and protective measures.<sup>82</sup> While the ConTACT Act is the first federal program that proposes to mandate unified concussion injury guidelines for children ages five to eighteen, the CSAE Act is the first to address directly the current concerns with the manufacturing, reconditioning, and advertising of football helmets and seek to bolster a loosely regulated area that affects millions of families. Despite the promising changes that the CSAE Act offers, it has failed to make it all the way through Congress.<sup>83</sup>

### B. *The Children's Sports Athletic Equipment Safety Act*

Senator Tom Udall introduced the CSAE Act to the 112th Congress on March 16, 2011.<sup>84</sup> Prior to drafting the proposed legislation, Senator Udall recognized what he deemed to be a severe problem in American youth sports. Senator Udall asked the CPSC to investigate the adequacy of football helmet safety standards and argued that the current voluntary industry standards do not properly address the larger issue of preventing concussions.<sup>85</sup> According to Senator Udall, the CPSC has a duty to ensure that football helmets meet safety standards that “address concussion hazards and reflect the state of the art in helmet technology.”<sup>86</sup> In response to Senator Udall's request, the CPSC told a Senate Commerce Subcommittee that it would start monitoring the football helmet industry and NOCSAE's practices.<sup>87</sup> In addition, Senator Udall wrote a letter to the FTC requesting the agency investigate “misleading safety claims and deceptive practices” by helmet manufacturers and reconditioners.<sup>88</sup> Much

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82. *But see* Football Helmets; Denial of Petition, 45 Fed. Reg. 63,326, 63,327 (Sept. 24, 1980) (denying a 1980 petition requesting that the CPSC issue a consumer product safety standard for football helmets to reduce the risk of head, neck, and spinal injuries).

83. *See Bill Summary & Status, supra* note 20. The last action on the bill was referral to the Committee on Commerce, Science, and Transportation on March 26, 2011.

84. *Id.* The House version of the bill, H.R. 1127, 112th Cong. (2011), sponsored by Representative Bill Pascrell of New Jersey, has been referred to the House Subcommittee on Commerce, Manufacturing, and Trade. *Bill Summary & Status, 112th Cong. (2011–2012): H.R. 1127*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01127>.

85. *See* Alan Schwarz, *Senator Seeks Federal Investigation of Football Helmet Standards*, N.Y. TIMES, Nov. 30, 2010 [hereinafter Schwarz, *Federal Investigation*], <http://www.nytimes.com/2010/12/01/sports/football/01helmets.html> (asserting that Senator Udall's disapproval of the current football helmet standards stems from the industry's inability to update modern testing standards given the improvement in football helmet safety technology).

86. *Id.* (quoting Sen. Tom Udall).

87. Alan Schwarz, *Oversight Group Vows to Pursue Updates to Football Helmet Standards*, N.Y. TIMES, Jan. 23, 2011 [hereinafter Schwarz, *Updates to Standards*], <http://www.nytimes.com/2011/01/03/sports/football/23helmet.html>.

88. *See* Schwarz, *Helmet Safety Investigation, supra* note 29 (citing Senator Udall's letter,

like the CPSC, the FTC acknowledged the seriousness of Senator Udall's claims and declared it would investigate the helmet manufacturers' claims that certain football helmet models can help reduce concussions.<sup>89</sup> Given Senator Udall's comments, it is evident he viewed federal regulation of the football helmet industry as a real possibility. Many of Senator Udall's concerns stemmed from an October 2010 report from the *New York Times* that depicted problems in the reconditioning of used helmets worn by nearly 1.4 million American teenagers playing high school football,<sup>90</sup> as well as concerns that the self-regulating industry has no internal repercussions for misrepresentation of the safety of its products.<sup>91</sup>

The CSAE Act has several different components each addressing different concerns regarding the testing standards governed by NOCSAE. Under the powers of the Consumer Product Safety Act<sup>92</sup> and the Federal Trade Commission Act,<sup>93</sup> the CSAE Act allows the CPSC and the FTC to take over regulation of the football helmet industry that NOCSAE previously controlled. The CSAE Act has three sections, each addressing a separate concern within the football helmet industry.

### 1. Section 3: Football Helmet Safety Standards

Section 3, entitled "Football Helmet Safety Standards," empowers the CPSC to evaluate NOCSAE's voluntary standards for testing new and

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which targets the helmet manufacturer Riddell for its claim that its latest football helmet models decrease concussion risk by thirty-one percent, conveying "a level of concussion-related protection that the headgear is not shown to provide").

89. See Frederic J. Frommer, *FTC Looking into Football Helmet Claims*, BUS. J., Jan. 14, 2011, <http://www.thebusinessjournal.com/the-business-journal-national-news/13-national/7956-ftc-looking-into-football-helmet-claims> (quoting FTC Chairman Jon Leibowitz as stating, "Given the dangers that concussions pose for young athletes engaged in contact sports, it is essential that advertising for products claiming to reduce the risk of this injury be truthful and substantiated.").

90. See Schwarz, *Scant Oversight*, *supra* note 12 (evaluating concerns within the football helmet industry, including lack of independent oversight, outdated testing standards, inadequate safety and testing procedures, and use of misleading safety statistics by helmet manufacturing companies).

91. *Id.*; see also Schwarz, *Updates to Standards*, *supra* note 87 (pointing to the issue that NOCSAE is primarily financed by the sporting goods industry, whose products NOCSAE supposedly oversees). *But cf.* Riddell, Inc. v. Schutt Sports, Inc., 724 F. Supp. 2d 963, 980 (W.D. Wis. 2010) (rejecting Schutt's claim that the study showing Riddell's Revolution helmet reduces the risk of concussions was sufficiently unreliable to constitute false advertisement, although the court did contend that, at most, Riddell's marketing campaign of the Revolution helmet was misleading or deceptive as the advertisements did not differentiate between the adult and youth helmets).

92. Consumer Product Safety Act, 15 U.S.C. § 2051 (2006).

93. Federal Trade Commission Act, 15 U.S.C. § 41 (2006).

reconditioned helmets nine months after the CSAE Act is passed.<sup>94</sup> Particularly, Section 3 seeks to determine if the voluntary standards foster an atmosphere of compliance that will likely result in the elimination or adequate reduction of the risk of injury caused by the use of football helmets.<sup>95</sup> In addition, these standards are to be maintained by a standards-setting organization that meets the procedural requirements of American National Standards Institute.<sup>96</sup> If the CPSC determines that NOCSAE's standards are not in compliance, Section 3 empowers the CPSC to initiate a rulemaking proceeding for the development of a consumer product safety rule that establishes: (1) a standard for youth football helmets that takes into account the different physiological characteristics of children compared to adults; (2) a standard for reconditioned football helmets; (3) a standard for new football helmet concussions resistance, particularly a standard that addresses what is currently understood about concussion risks and possible prevention; (4) a standard for warning labels; (5) a standard for a label for all new helmets that states the helmet's original date of manufacture and warns consumers that a helmet's ability to protect declines over time; and (6) a standard label for reconditioned helmets that states the helmet's last date of reconditioning, its original date of manufacture, and a warning for consumers that a helmet's ability to protect declines over time despite reconditioning.<sup>97</sup> In addition, Section 3 mandates that the CPSC consult with representatives from the athletic equipment industry to assess the effectiveness of NOCSAE's safety standards for youth helmets, reconditioned helmets, and new football helmet concussion resistance.<sup>98</sup> Finally, the CPSC is charged with periodically reviewing and revising the standards they promulgate to ensure that the standards provide the most recent and the highest level of football helmet safety possible.<sup>99</sup>

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94. Children's Sports Athletic Equipment Safety (CSAE) Act, S. 601, 112th Cong. § 3(a) (2011).

95. *Id.*

96. *Id.* § 3(a)(1). See generally AM. NAT'L STANDARDS INST., ANSI ESSENTIAL REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS (2010), <http://publicaa.ansi.org/essentialrequirementsites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2010%20ANSI%20Essential%20Requirements%20and%20Related/2010%20ANSI%20Essential%20Requirements.pdf> (outlining the requirements of the American National Standards Institute, including transparency of information, voting procedures, coordination of procedures, and consensus voting).

97. CSAE Act, S. 601, § 3(b)(1)–(6).

98. *Id.* § 3(c)(1).

99. *Id.* § 3(c)(2).

2. *Section 4: Application of Third-Party Testing and Certification Requirements to Youth Football Helmets*

While under the current NOCSAE regulations helmet manufacturers test their own new helmets using NOCSAE's standards, Section 4 of the CSAE Act calls for third-party testing and certification as governed by § 14(a)(2) of the Consumer Product Safety Act.<sup>100</sup> Section 4 applies the standards set forth in the Consumer Product Safety Act to the testing of youth football helmets, essentially making the testing of a youth football helmet subject to the same regulations that apply to any children's product.<sup>101</sup> Under Section 4, a testing laboratory that is accredited under the International Organization for Standardization/International Electrotechnical Commission will conduct third-party testing and certification.<sup>102</sup>

3. *Section 5: False or Misleading Claims with Respect to Athletic Sporting Activity Goods*

Section 5 of the CSAE Act seeks to curb concerns that football helmet manufacturers present misleading statistics about the level of safety their products afford to buyers.<sup>103</sup> Section 5 makes it unlawful for anyone in the course of selling any piece of athletic equipment intended or designed for

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100. *Id.* § 4(a)–(c); see 15 U.S.C. § 2063(a)(2) (Supp. IV 2010) (“[B]efore importing for consumption or warehousing or distributing in commerce any children’s product that is subject to a children’s product safety rule, every manufacturer of such children’s product . . . shall: (A) submit sufficient samples of the children’s product . . . to [an accredited third party] to be tested for compliance with the children’s product safety rule; and (B) based on such testing, issue a certificate that certifies that such children’s product complies with the children’s product safety rule based on the assessment [of an accredited third party] . . .”).

101. See generally Consumer Product Safety Improvement Act of 2008, 15 U.S.C. §§ 2051–2073 (Supp. IV 2010) (outlining testing and labeling standards for children’s products as well as enforcement provisions and penalties for those found in breach of the regulatory standards).

102. CSAE Act, S. 601 § 4(c)(1)–(3).

103. See Alan Schwarz, *Studies for Competing Design Called into Question*, N.Y. TIMES, Oct. 27, 2007, <http://www.nytimes.com/2007/10/27/sports/football/27riddell.html> (highlighting industry concerns with the alleged concussion reduction ability of competing football helmets); see also Schwarz, *supra* note 12 (stating that non-NOCSAE and helmet industry experts have criticized Riddell for overselling the protective capabilities of its football helmet models); Alexa Vaughn, *Experts Skeptical of ‘Anti-Concussion’ Sports Equipment*, L.A. TIMES, Oct. 19, 2011, <http://articles.latimes.com/2011/oct/19/nation/la-na-sports-brain-damage-20111020> (pointing out that testimony at the recent Senate Committee on Commerce, Science, and Transportation Hearing reveals that although the Riddell Revolution helmet was advertised to reduce concussion by 31%, research indicates that the true reduction is less than 3%).

an athletic sporting activity to make false or misleading claims with respect to the safety benefits of the equipment.<sup>104</sup> Section 5 requires the FTC to regulate any violation under § 18 of the Federal Trade Commission Act (FTCA), codifying the principles that any misrepresentation or misleading claim with respect to the safety of an athletic product would be a violation of the FTCA.<sup>105</sup> Under this provision, any person found in violation of the CSAE Act is subject to the penalties and entitled to the privileges and immunities provided in the FTCA.<sup>106</sup> In addition, Section 5 authorizes state attorneys general to bring actions on behalf of their residents to obtain appropriate injunctive relief or to pursue any appropriate criminal charges.<sup>107</sup>

### III. RECONCILING THE CURRENT NOCSAE STANDARDS WITH THE PROPOSED LEGISLATION

#### A. *How the Children's Sports Athletic Equipment Safety Act Will Affect the Industry*

The CSAE Act seeks to remedy many of the gaps that the current NOCSAE standards have left unfilled as well as the general lack of efficient oversight throughout the industry. Chief among the goals of the CSAE Act is to foster greater transparency in testing standards and safety data reporting.<sup>108</sup> After Senator Udall's initial call to investigate the football helmet industry<sup>109</sup> and the subsequent responses of the CPSC and the FTC to monitor the self-regulated industry,<sup>110</sup> two major announcements came from the volunteer organizations monitoring the football helmet industry. First, in January 2011, NOCSAE announced that it would work with the Centers for Disease Control and Prevention to better communicate to

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104. CSAE Act, S. 601 § 5(a)–(b).

105. *Id.* § 5(a)–(b). *See generally* 15 U.S.C. § 57(a) (outlining the FTC's procedures for initiating investigative proceedings against those accused of partaking in unfair or deceptive trade practices). Similarly, the FTC created an advertising substantiation program, which requires advertisers to have a reasonable basis for advertising claims before dissemination; failure to rely upon a reasonable basis “constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.” *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

106. CSAE Act, S. 601 § 5(b)(1, 3).

107. *Id.* § (c)(1).

108. *See* Schwarz, *Scant Oversight*, *supra* note 12 (discussing what Senator Udall deems to be a severe issue within the football helmet industry—misleading advertising by two major helmet manufacturers which could potentially be a violation of the Federal Trade Commission Act).

109. Schwarz, *Federal Investigation*, *supra* note 85.

110. Schwarz, *Updates to Standards*, *supra* note 87; Frommer, *supra* note 89.

parents of young athletes the safety limits of currently available helmets.<sup>111</sup> In addition, executive members of NOCSAE voiced their concerns that some manufacturers might not have performed as many drop-tests on helmets as required by NOCSAE standards.<sup>112</sup> Second, in March 2011, NAERA announced that it would no longer accept helmets more than ten years old for reconditioning and recertification purposes.<sup>113</sup> Finally, in January 2012, the major helmet manufacturer Riddell announced it would provide a label that documents the initial season of use and recommended maximum life of the helmet for all of its new helmets and helmets reconditioned at a Riddell facility.<sup>114</sup> This makes Riddell the first helmet manufacturer to address the growing concern that young athletes continue to use outdated and unsafe football helmets.<sup>115</sup>

As evidenced by both NOCSAE's and NAERA's promises of reform, Senator Udall's request to have the CPSC and FTC investigate the current state of volunteer oversight and the commissions' respective responses have caused more changes in the current system than at any time since NOCSAE first developed the testing standard in 1973.<sup>116</sup> Yet, despite these reforms, there are inherent problems with the voluntary system and the current structure of NOCSAE that cannot be overlooked. Chief among these issues is the source of NOCSAE's funding<sup>117</sup> and its lack of leadership

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111. See Schwarz, *Updates to Standards*, *supra* note 87 (observing that NOCSAE will also look into creating new standards that consider the complex forces that cause concussions, compared to the traditional impact tests that are currently used in testing).

112. *Id.*

113. See Alan Schwarz, *Group to Phase Out Old Football Helmets*, N.Y. TIMES, Mar. 10, 2011 [hereinafter Schwarz, *Phase Out*], [http://www.nytimes.com/2011/03/11/sports/football/11helmet.html?\\_r=1&ref=headinjuries](http://www.nytimes.com/2011/03/11/sports/football/11helmet.html?_r=1&ref=headinjuries) (explaining that football helmets more than ten years old are being worn by over 100,000 young athletes every year, a fact that experts in the field have long considered a severe safety risk).

114. *Riddell Unveils New, External Helmet Dating System*, MARKET WATCH (Jan. 4, 2012), <http://www.marketwatch.com/story/riddell-unveils-new-external-helmet-dating-system-2012-01-04>.

115. *Id.*

116. See Schwarz, *Phase Out*, *supra* note 113 (indicating that in addition to the aforementioned reforms, NOCSAE has also stated that it would pursue new safety tests specifically developed to test the varying forces that cause concussions, as well as develop separate test standards for youth and high school helmets). It is also important to point out that in light of the CPSC's and FTC's responses to Senator Udall's call for investigation, both Riddell, a major football helmet manufacturer, and NOCSAE have hired lobbying firms to protect their interests while the CSAE Act is reviewed and additional legislation becomes more likely as attention to this issue rises. Frederic J. Frommer, *Influence Game: Helmet Bill Stokes Lobbying Effort*, WASH. POST, May 16, 2011, <http://stats.washingtonpost.com/fb/story.asp?i=20110516101141686887108&ref=hea&tm=&src>.

117. *NOCSAE Overview*, *supra* note 73 (explaining that most of NOCSAE's funds come

and creativity in addressing the concussion issue.<sup>118</sup>

In light of these institutionalized concerns, federal regulations seem like the step that could most properly right the ship. Clearly, given both NOCSAE's and Riddell's recent spending on lobbying,<sup>119</sup> the notion that the CPSC and the FTC could jointly regulate the industry through the CSAE Act or through another piece of revised legislation is a distinct possibility. Not only is such reform necessary, it is vital in ensuring that as technologies develop, the proper procedures for helmet testing are implemented and manufacturers are restrained from making false claims regarding their products' safety benefits.<sup>120</sup>

While NOCSAE's and NAERA's proposed reforms are a step in the right direction, much more needs to be done to stabilize an industry with a historically weak record of oversight. On October 19, 2011, the Senate Committee on Commerce, Science, and Transportation held a hearing concerning the current state of concussions and the marketing of sports equipment.<sup>121</sup> Chief among the discussion between Committee members and those asked to partake in the discussion was the concern with equipment manufacturers instilling a false sense of comfort in parents and athletes by proclaiming that their products reduce the risk of head trauma or concussions.<sup>122</sup> Considering the attention that the members of the

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from licensing fees it charges to equipment manufacturers who want to certify their equipment meets NOCSAE standards); see Easterbrook, *supra* note 28 (highlighting the conflict of interest in that if NOCSAE called a helmet unsafe, the manufacturer of the helmet could no longer use NOCSAE's seal and would likely stop paying NOCSAE the licensing fee, thereby causing NOCSAE to lose a source of income).

118. See Easterbrook, *supra* note 28 (referring to Director of NOCSAE Michael Oliver's comments that because there is a lack of "scientific certainty" regarding the causes of football concussions, NOCSAE is unwilling to offer guidance, claiming it to be "unethical").

119. Frommer, *supra* note 116 (noting that Riddell spent \$80,000 in the first quarter of 2011 on lobbying and recounting NOCSAE's recent hire of a Washington lobbyist).

120. Cf. *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (emphasizing the importance of advertisers and ad agencies having a reasonable basis for advertising claims before they are circulated).

121. See Frederic J. Frommer, *Senator Attacks Concussion Safety Claims by Sporting Goods Firms*, CHI. SUN-TIMES, Oct. 19, 2011, <http://www.suntimes.com/news/nation/8306473-418/senator-attacks-concussion-safety-claims-by-sporting-goods-firms.html> (highlighting the Committee's concerns with sports equipment manufacturers misrepresenting the safety capabilities of their equipment to buyers).

122. See *id.* ("The potential harm that I see being caused by products that claim to prevent concussion when they do not is far more than simply the financial harm of paying more for something that isn't likely to work as claimed . . . . It is the harm that comes from having a false sense of security, from not understanding how the injury occurs and what can actually be done to prevent it." (quoting the testimony of Dr. Jeffrey Kutcher.); see also *id.* (highlighting the concerns of Committee Chairman Senator Jay Rockefeller, who stated, "I find it so disturbing that some sports equipment manufacturers are exploiting our growing

Committee reviewing the CSAE Act are giving to the concern of equipment manufacturer misrepresentation,<sup>123</sup> it is evident that the focal point of industry reforms will not only center on creating newer and more concussion-specific testing standards, but also on a greater accountability and transparency by equipment manufacturers. Because the CSAE Act seeks to tackle the two-pronged issue of product testing standards and market advertising accountability, the CSAE Act is the most comprehensive and effective mechanism to steady the football helmet industry for America's youth.

*B. Recommendations to Improve the Effectiveness of the Children's Sports Athletic Equipment Safety Act*

Despite the remedies that the CSAE Act proposes, there are still three additional issues within the industry that need to be addressed by any legislation ultimately passed. First, concerns still linger about the current number of used helmets that might be improperly reconditioned or not recertified that are being used by school-aged football players.<sup>124</sup> The CSAE Act needs to take a stronger position on ridding the playing field of improperly reconditioned helmets. While the cost of new youth football helmets is quite expensive,<sup>125</sup> the dangers that excessively old or unsuitable helmets pose are immense.<sup>126</sup> The CSAE Act should include a provision that mandates the confiscation of any helmet that has been involved in a play that resulted in a head, neck, or spine injury to an athlete. The helmet

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concerns about sports concussions to market so-called 'anti-concussion' products to athletes and their parents.'").

123. See generally *Detection and Treatment of Concussions in Student Athletes* (C-SPAN Broadcast Oct. 19, 2011), available at <http://www.c-spanarchives.com/program/Concuss>; Frederic J. Frommer, *Senators Challenge Sports Equipment Safety Claims*, BLOOMBERG BUSINESSWEEK (Oct. 20, 2011), <http://www.businessweek.com/ap/financialnews/D9QG1ICO0.htm> (citing the comments of Senator Udall, who proclaimed that advertisers need to be monitored when putting anti-concussion and concussion-reducing devices on the market, and Dr. Ann McKee, who stated she objected to the claim that a particular mouth guard advertised to reduce the risk of concussions in fact does so).

124. See Schwarz, *Phase Out*, *supra* note 113 (citing NAERA's concerns with the safety capabilities of helmets that are ten years or older as the reason the volunteer reconditioning agency will no longer be recertifying such helmets); see also Schwarz, *Scant Oversight*, *supra* note 12 (citing that only about 10%–20% percent of school-aged football players wear new helmets, and nearly 500,000 young players will wear used helmets that have not even undergone NAERA reconditioning procedures).

125. See *id.* (documenting that a youth football helmet costs between \$150 and \$200, while the reconditioning of a used helmet costs about \$30).

126. *Id.* (describing one case where a boy was permanently disabled when playing football with a twenty-year-old reconditioned helmet).



should be taken out of commission and not used again until it is properly recertified by an independent third-party testing agency that is either NAERA licensed or, in the alternative, independently appointed by CPSC. Under the Consumer Product Safety Act, the CPSC has the authority to establish consumer product safety standards whenever such a standard “is reasonably necessary to prevent or reduce an unreasonable risk of injury.”<sup>127</sup> Considering the power the CPSC has under this provision and the clear concerns that a damaged helmet will not effectively protect its wearer, the CSAE Act should include additional provisions mandating the confiscation of such helmets pending third-party recertification.

Second, while helmets that have been damaged during the course of a season pose a great risk to the user, helmets that are ten years of age or older pose a special risk.<sup>128</sup> Interestingly, in March 2011, NAERA announced that effective September 1, 2012, its members would adopt a new policy prohibiting it from reconditioning or recertifying any football helmets ten years of age or older.<sup>129</sup> Given NAERA’s new stance, the CSAE Act should include a similar provision that codifies such a policy and imposes penalties such as financial fines or criminal investigations. Under the Consumer Product Safety Act, the CPSC has the power to ban products that are deemed hazardous.<sup>130</sup> Since NAERA will not even recondition or recertify helmets over ten years old, it seems logical that these helmets could be deemed a safety hazard and therefore be labeled as unusable by student athletes under 14 U.S.C. § 2057. However, given the costs of new helmets compared to refurbished helmets,<sup>131</sup> the CSAE Act should be supplemented with a subsidy plan that assists in funding school districts below a certain financial marker in purchasing new or more

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127. See Consumer Product Safety Act § 7, 15 U.S.C. § 2056(a) (2006) (“A consumer product safety standard shall consist of one or more of any of the following types of requirements: (1) Requirements expressed in terms of performance requirements; (2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.”).

128. Schwarz, *Phase Out*, *supra* note 113.

129. *Id.*

130. See Consumer Product Safety Act § 8, 15 U.S.C. § 2057 (stating that the CPSC may ban a hazardous product whenever the consumer product “is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and no feasible consumer product safety standard . . . would adequately protect the public from the unreasonable risk of injury associated with such product”).

131. See Schwarz, *Phase Out*, *supra* note 113 (pointing out that a potential backlash from NAERA’s new policy would be that underfinanced schools possibly purchasing reconditioned old helmets for \$30 will likely be unable to purchase new helmets for \$150 to \$200).

recently reconditioned and recertified football helmets.<sup>132</sup> By providing such a subsidy, the CSAE Act would better prevent underfinanced schools from using older and potentially unsafe helmets instead of purchasing newer helmets. One would hope that a subsidy program and the potential legal liability that would attach to a school district<sup>133</sup> allowing its players to use unsatisfactory helmets would be sufficient to promote safe internal standards within the school programs. While the CSAE Act would provide such subsidies and standards for testing and reconditioning, the language of the bill should make it clear that the school district or governing body for the school's athletic conference are responsible for making sure each school is in compliance with the "no helmet over ten years old" policy.

In an effort to promote helmet manufacturers' involvement in the program and in redefining the acceptable use of youth football helmets, the CSAE Act should offer a tax incentive to manufacturers that provide new or reconditioned and recertified helmets that are less than five years old to schools below the aforementioned financial marker. Additionally, the CSAE Act should incentivize research and technological development by providing research grants to equipment manufacturers to continue the growth of concussion-reducing equipment.<sup>134</sup>

Third, the CSAE Act should codify a ratings standard similar to that of the Virginia Tech star-rating system, which is modeled after crash safety rankings for automobiles.<sup>135</sup> Under the proposed legislation, the FTC is

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132. The CPSC can provide such a subsidy pursuant to its statutory authority in § 7 of the Consumer Product Safety Act, which provides, "If any person participates with the Commission in the development of a consumer product safety standard, the Commission may agree to contribute to the person's cost with respect to such participation, in any case in which the Commission determines that such contribution is likely to result in a more satisfactory standard than would be developed without such contribution . . ." 15 U.S.C. § 2056.

133. See Schwarz, *Phase Out*, *supra* note 113 (detailing the story of Joy Conratt, whose son was permanently disabled by concussions he sustained while wearing a twenty-year-old reconditioned helmet, and the subsequent out-of-court settlement for \$3.2 million for lifelong medical care paid out by the school district, insurance carrier, and reconditioning company).

134. See *supra* note 132 (discussing the CPSC's ability to incentivize cooperation in the creation of rulemaking proceedings through § 7 of the Consumer Product Safety Commission Act).

135. See Nystrom, *supra* note 30 (explaining that five stars means the helmet is the best available in terms of safety results, four stars is very good, three stars is good, two stars is adequate, one star is marginally safe, and NR means the helmet is not recommended). Similar to the automobile crash safety rankings, the Virginia Tech rating system is akin to the Ease-of-Use Ratings for child car seats, which created an accessible five-star rating system to aid consumers in evaluating the safety capabilities of child car seats. Taken into account for ratings are factors such as the clarity of the labeling attached to the restraint,

charged with monitoring and regulating false advertising or misleading claims with respect to the safety benefits of a football helmet.<sup>136</sup> Currently, under § 52 of the FTCA, it is unlawful for any person or entity to disseminate any false advertisement “for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services . . . .”<sup>137</sup> Therefore, even without the passage of the CSAE Act, the FTCA empowers the FTC to bring suit in federal court whenever the FTC believes that a person, partnership, or corporation is engaged in the dissemination of such false advertisements.<sup>138</sup> However, the question that needs to be asked is, how can an agency properly monitor or even penalize for misrepresentation if there is no standardized way to measure the safety benefits and weakness of helmets available to consumers? Even with all of the recent studies regarding the causes and effects of concussions, the Virginia Tech star-rating system is the only current research that attempts to suggest a more effective way to independently measure the safety benefits (or lack thereof) of helmets available to consumers.<sup>139</sup> Using the Virginia Tech star-rating system as a base, the FTC should empower third-party testing agencies to evaluate all helmets under Virginia Tech’s rating rubric.

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ease of installation, and security of the child. *See CPS: Ease-of-Use Ratings FAQs*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/Driving+Safety/Child+Safety/CPS:+Ease-of-Use+Ratings+FAQs> (last visited Feb. 8, 2012) (discussing the criteria taken into account for determining the Ease-of-Use ratings while also distinguishing the current Ease-of-Use rating system from a pure ranking of child restraints on the market). At a minimum, the current Ease-of-Use ranking system provides a readily available database for consumers to research a third-party evaluation of car seat systems currently on the market. *See Child Seats: Ease-of-Use Ratings*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *available at* <http://www.nhtsa.gov/Safety/Ease-of-Use> (last visited Feb. 8, 2012).

136. Children’s Sports Athletic Equipment Safety (CSAE) Act, S. 601, 112th Cong. § 5(a), (b)(1) (2011).

137. Federal Trade Commission Act § 12, 15 U.S.C. § 52 (2006).

138. *See id.* § 13, 15 U.S.C. § 53(a) (describing that upon a proper showing of dissemination of false advertisement, a temporary injunction or restraining order is to be granted); *see also id.* § 14, 15 U.S.C. § 54 (“Any person, partnership, or corporation who violates any provisions of section 52(a) . . . if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof . . . or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine or not more than \$5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction . . . punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than on year, or by both such fine and imprisonment . . .”).

139. *See* Nystrom, *supra* note 30.

Because the Virginia Tech star-rating system is the first to rate the safety benefits of the helmets, the CSAE Act should provide funding to further evaluate and improve the rating system in an effort to increase its effectiveness.<sup>140</sup>

### CONCLUSION

“The voluntary efforts have failed—the voluntary regulatory agency or body, whatever we want to call it, just hasn’t moved forward in an aggressive way.”<sup>141</sup> As the public became more concerned with the fatalities associated with participating in football during the 1960s and 1970s, NOCSAE answered the call to promote research and develop new equipment testing strategies.<sup>142</sup> However, as the game has evolved and the technology of equipment associated with it advanced,<sup>143</sup> NOCSAE stood on the sidelines and avoided adjusting its policies or increasing its authority over the industry to meet this changing dynamic. As the concussion crisis became a growing problem with youth football, NOCSAE did little to update its outdated testing procedures.<sup>144</sup> Specifically, given the advancement in equipment technology and the neurological and biomechanical differences of youth athletes compared to adults,<sup>145</sup> NOCSAE’s testing standards and oversight have done nothing to curb the concussion crisis among school-aged children. The question that must be asked is why, given the widespread attention to the concussion problem at both the professional and amateur levels, has the voluntary oversight system continued to fail? The answer likely lies in a combination of both business<sup>146</sup> and legal<sup>147</sup> concerns. The power that the FTC and the CPSC

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140. See *supra* note 132 (outlining the CPSC’s ability to contribute to the organization’s costs under the Consumer Product Safety Act).

141. Schwarz, *Equipment Safety for Children*, *supra* note 16 (quoting Sen. Tom Udall).

142. See *About NOCSAE*, *supra* note 13 (explaining the impetus behind creating NOCSAE).

143. See *supra* note 17.

144. See Easterbrook, *supra* note 28 (explaining how NOCSAE ranks all helmets that pass its test as equal, and has no plans to update its practice until “there may be ‘scientific certainty’ about the exact cause of football concussions”).

145. See generally Stephanie Smith, *Concussions Extra Dangerous to Teen Brains*, CNN (Feb. 3, 2010), [http://articles.cnn.com/2010-02-03/health/concussions.teen.brains\\_1\\_concussions-david-bosse-school?\\_s=PM:HEALTH](http://articles.cnn.com/2010-02-03/health/concussions.teen.brains_1_concussions-david-bosse-school?_s=PM:HEALTH) (outlining several incidents where teen football players died as a result of misdiagnosed concussions).

146. See *NOCSAE Overview*, *supra* note 73; Easterbrook, *supra* note 117 (discussing the funding structure of NOCSAE).

147. See Easterbrook, *supra* note 28 (discussing NOCSAE’s reluctance to provide guidance on the concussion issue while there is still so much uncertainty regarding the best treatment, equipment, and testing procedures).

have under their respective acts makes federal regulation the most effective tool in establishing a new standard of research, testing, maintenance, and transparency. Under the direction of Senator Udall and the CSAE Act, the youth football helmet industry could see its first positive steps toward adequate oversight, with an emphasis on not only maintenance and uniform testing standards for helmets, but also on continuing research of concussion-reducing equipment.<sup>148</sup> Yet, given the difficulties in creating concussion-reducing testing and equipment, perhaps the most important component to the CSAE Act is the increased focus on protecting consumers from equipment manufacturers falsely advertising the safety capabilities of their equipment.<sup>149</sup> In addition to the educational and preventative initiatives undertaken by individual states<sup>150</sup> and through the ConTACT Act,<sup>151</sup> Section 5 of the CSAE Act offers the greatest avenue of protection while new technologies and testing standards are explored in the hopes of developing safer and more sustainable equipment.

While the CSAE Act does not empower the FTC and the CPSC with any new responsibilities not previously outlined in the FTCA or the CPSCA, the CSAE Act does codify into a single piece of legislation powers that NOCSAE has been unwilling and, perhaps more accurately, unable to enforce throughout the industry. Moreover, the CSAE Act allows for independent agencies, under the aegis of federal legislation, to address issues that voluntary standards have been minimizing or unwilling to address.<sup>152</sup> Under the guidance of the CSAE Act and with the assistance of the CPSC and the FTC, the youth football helmet industry will be able to implement the necessary changes to finally provide the needed level of oversight to hold equipment manufacturers and reconditioners accountable for unsafe youth football helmets. Only then will the football helmet industry be able to effectively supervise and protect the millions of school-aged children participating in youth football across the country.

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148. CSAE Act, S. 601, 112th Cong. § 3(a)(1) (2011) (“[C]ompliance with the standard or standards is likely to result in the elimination or adequate reduction of the risk of injury in connection with the use of football helmets . . .”).

149. *Id.* § 5(a)–(c).

150. *See generally Concussion Information & Competition Policies by State, supra* note 81.

151. Concussion Treatment and Care Tools Act, H.R. 1347, 111th Cong. (2010).

152. *See* Easterbrook, *supra* note 28.