



Lawyers New to Higher Education Online Course

September 22, 2020

04 College Athletics

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**Lawyers New to Higher Education Online Course
College Athletics
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Janet Judge
Partner
Holland & Knight LLP

Bharath Parthasarathy
Deputy General Counsel
Georgia State University

Contracts

1. Bharath Parthasarathy, "[Contract Issues in College Athletics](#)" (Lawyers New to Higher Education Online Course 2020).

Sports Injury/Medicine

1. Janet Judge, "[NCAA Guidelines: Sports Medicine, a General Overview](#)" (Lawyers New to Higher Education Workshop 2019).
2. NCAA, [Interassociation Recommendations: Preventing Catastrophic Injury and Death in College Athletics](#) (July 2019).
3. *In re NCAA Student Athlete Concussion Injury Litigation*, [Second Amended Settlement Class Action Settlement and Release](#) (approved by Judicial Order, August 19, 2019).
4. National Collegiate Athletics Association, [Interassociation Recommendations: Preventing Catastrophic Injury and Death in Collegiate Athletics](#) (May 2019).
5. [NCAA Sports Science Institute](#)

Title IX and Gender Equity

1. Bill Thro, "[The Title IX Implications of Eliminating an Intercollegiate Sports Team](#)" (NACUANOTE , June 22, 2010).
2. Nat'l Collegiate Athletics Association, [Board Policy on Sexual Violence & FAQ](#) (last accessed on May 30, 2019).
3. NCAA, "[2019-20 Campus Sexual Violence Attestation Form.](#)"
4. U.S. Dep.'t of Educ. Office for Civil Rights, [Case Processing Manual](#) (Aug. 26, 2020).
5. Indiana University, [Policy Disqualifying Prospective Student-Athletes with Records of Sexual Violence.](#)

NCAA Enforcement and Governance

1. Lakeisha Marsh, “[NCAA Overview and Enforcement Process](#)” (Lawyers New to Higher Education Workshop 2019).
2. NCAA, [Infographics on Governance and Enforcement](#) (last accessed Sept. 16, 2020).
3. [NCAA 2020-21 Division 1 Manual](#) (Effective Aug. 1, 2020)
4. [NCAA 2020-21 Division 2 Manual](#) (Effective Aug. 1, 2020)
5. [NCAA 2020-21 Division 3 Manual](#) (Effective Aug. 1, 2020)

Name/Likeness/Image and Compensation and Benefits

6. U.S. Dep.’t of Labor, [Fact Sheet: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act \(FLSA\)](#), (March 2018).
7. CUPA-HR and NCAA, “[Payment of Coaches & Athletic Trainers Under Federal Law,](#)” (last accessed May 30, 2019)
8. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 19-15566 (9th Cir. May 18, 2020) (“Alston Injunction”).
9. Ohio State University, [Student-Athlete Standards of Conduct and Social Media Policy](#) (last accessed May 30, 2019).

CONTRACT ISSUES IN COLLEGE ATHLETICS

September 22, 2020

Bharath Parthasarathy¹
Deputy General Counsel
Georgia State University
Atlanta, Georgia

I. Introduction

Intercollegiate athletics is often the “front door” to colleges and universities across the country. Administrators, faculty and staff, students (prospective and current), alumni, donors, legislators, and the public gain greater appreciation for the institution as they closely follow every win, loss, and hire of an athletic department. Athletic departments must manage the growing expectations and demands of each group, all while also surviving the scrutiny of traditional and digital media. Moreover, athletic departments must keep up with the efforts of fellow National Collegiate Athletic Association (“NCAA”) athletic departments, despite growing gaps in annual revenues (e.g., University of Texas at Austin earns approximately \$224 million in annual revenues, compared to \$3.2 million at Coppin State University).²

As a result of these efforts, athletic departments face a variety of legal issues spanning numerous topic areas, employment matters to taxation issues, and multimedia rights to marketing agreements for ticket sales. In particular, athletic departments utilize a variety of contracts to manage their affairs. At Georgia State, for example, the Office of Legal Affairs drafts, reviews, and negotiates hundreds of contracts for its Department of Athletics each year. Many of these contracts require close coordination between the Office of Legal Affairs, the Department of Athletics, and other institutional units/departments. Additionally, these contracts require in-house counsel to not just understand the legal implications of the underlying contract, but also the business, policy, and media ramifications behind the terms. Counsel new to intercollegiate athletics would be wise to build broad contacts throughout their campuses in order to help understand these nuisances for their particular athletic departments.

This outline aims to assist counsel new to intercollegiate athletics by exposing them to the types of significant contracts counsel can expect to see from their athletic department. It also provides some practical tips for counsel to consider when reviewing and negotiating these agreements, especially for the first-time.

¹ The views and opinions expressed in this paper are solely those of its author and not the Office of Legal Affairs or Georgia State University. This paper is not intended to serve as legal advice and should not be relied upon as legal advice.

² *NCAA Finances*, USA Today, accessible at: <http://sports.usatoday.com/ncaa/finances/>.

II. Contract Issues in College Athletics

A. Executive Search Firm Contracts

Institutions frequently turn to executive search firms when hiring athletic directors, senior athletic administrators, and high-profile coaches. Executive search firms can be key partners for institutions and their administrators, handling many aspects of the search process, including (a) handling calls about a vacancy; (b) helping identify potential candidates; (c) arranging travel and lodging for interviewing candidates; and (d) negotiating an offer letter and/or contract with a candidate. By using executive search firms for athletics-related hires, institutions (especially public institutions) gain necessary discretion about potential candidates during a process that is often tracked closely by campus constituencies, fans, and the media.

1. Executive Search Firm Contract: Terms and Conditions

An executive search firm's contract includes the following basic terms:

- a. The type of position sought by the institution;
- b. The executive search firm's scope of work, including:
 - i. Understanding the goals of the institution;
 - ii. Identifying the appropriate advertising venues to post the position's job description;
 - iii. Providing research and candidate identification services;
 - iv. Facilitating the search process with all stakeholders;
 - v. Scheduling interviews with potential candidates;
 - vi. Notifying candidates and keeping them updated during the process;
 - vii. Conducting background investigations (including, criminal, credit, and motor vehicle investigations; confirmation of candidates' degrees; NCAA sanctions review; media reviews; and degree confirmations) on final candidates; and
 - viii. Conducting reference checks on final candidates.
- c. Compensation terms (percentage-based fee v. flat-fee, expenses); and
- d. Termination provisions.

2. Practice Tip: Compensation for executive search firms can range from a percentage of the target position's first year annual base salary (typically 25% – 33%) to a flat-fee arrangement (typically \$50,000 - \$100,000). Compensation fees typically exclude expenses, such as research and delivery costs and travel and interview expenses for candidates and executive search firm consultants. Expenses can often be capped at a certain percentage of the overall fee (e.g., 10% – 15% of the search fee).
3. Practice Tip: Some executive search firms agree to conduct a new search for no fee (just expenses) if a placed candidate leaves the institution within 12 months – 24 months of hire. Counsel should discuss the desirability of such a term in an executive search firm contract with the institution's president and/or athletic director, as applicable.
4. Practice Tip: While executive search firms conduct extensive background checks on potential candidates, institutions cannot abdicate final responsibility for such searches to these firms (or their subcontractors). Counsel, along with human resources colleagues, should be involved in vetting potential candidates as well, including reviewing potential candidates' social media profiles, reviewing message board forums, and drafting questions for reference checks. Counsel should treat any high-profile athletics-related hires equivalent to other important hires at an institution, such as a new president, provost, or dean.
5. Practice Tip: Executive search firms often have template offer letters and agreements. However, counsel should thoroughly vet these documents prior to submission to a potential candidate to ensure compliance with his/her institution's policies and procedures and applicable laws. Counsel should work with institutional administrators and human resources colleagues to tailor these documents to the institution's particular needs during a search. This is especially true if a potential candidate is only signing an offer letter prior to being announced in his/her position, and there will be a gap before the candidate signs a full employment agreement. Counsel should ensure all material provisions are included in the offer letter in case it serves as a *de facto* employment agreement for a significant period of time.
6. Additional Resources:³
 - a. Letter agreements with executive search firms can be accessed through freedom of information law requests to public institutions.

³ For general overviews of the role of executive search firms in placing athletic directors and high-profile coaches, please see: Dana O'Neil, *Need a Coach? There's a Firm for That*, ESPN.com (August 2, 2013); Chris Smith, *Hired Guns: How Search Firms are Changing the Business of College Coaching*, Forbes.com (March 30, 2012); and Brent Schrotenboer and Rachel Axom, *Search Firms Come Under Scrutiny after Rutgers Flap*, USA Today (June 6, 2013).

A model letter agreement can also be obtained upon request from the author at bparthasarathy@gsu.edu.

B. Coaches' Contracts⁴

An institution's stakeholders and the media will always have a high degree of interest in a coach's contract in contrast to the thousands of other contracts that colleges and universities routinely enter into each year in the ordinary course of their operations. Despite this heightened attention, basic contracting principles apply in crafting a coach's contract. Unlike the more standardize contracts for NFL coaches, college coaching employment agreements for football and all other sports are as diverse as the NCAA's member institutions and every school may develop unique provisions. In the broadest terms, the coach's contract should be drafted to address two critical aspects of the employment relationship between the coach and an institution:

- First, the employment agreement should define the rights and responsibilities of the parties during the life of the contract, including, without limitation, providing the institution with some degree of flexibility to have the coach perform all duties as necessary for the institution's benefit over time.
- Second, from the very outset of the employment relationship, the coach's contract should plan for the termination of the relationship in clear detail. The question is generally not whether the employment relationship will terminate but when it will terminate. Given that some coaches may be the highest paid employees of an institution, it is imperative for the coach's contract to provide clear language addressing this outcome.

These elementary principles are essential to keep in mind in drafting a coach's contract. Counsel for institutions of higher education should recognize that the institution's ability to achieve these objectives begins – not after the press conference announcing the hiring of a new coach or the contract extension of an existing coach – early on and requires planning by counsel, the athletic director and the chancellor or president.

1. Coach Contract: Terms and Conditions

The basic provisions of a coach's contract include the following terms:

- a. Term of the contract;

⁴ The Coaches' Contracts Section originally appeared in the June 18, 2013 NACUA Presentation *Legal Issues in College Athletics* by T. Scott Varady, University of Arkansas, and is presented here with the Presenter's consent; see also, Debra Kovich, University of Michigan, *College Athletics 101: What Every University Lawyer Should Know*, 2016 NACUA Annual Conference Presentation.

- b. Amount of compensation and the source of compensation;
- c. Specific and detailed responsibilities and duties of the coach;
- d. A provision permitting the institution, in its sole discretion, to reassign a coach to other duties upon the termination of an individual's coaching duties;
- e. A liquidated damages provision in the event that either the coach or the institution terminates the contract early;
- f. The grounds allowing the institution to terminate for cause, including, but not limited to, violations of NCAA rules (some universities allow for termination even when the alleged rules infractions occurred at a previous institution);
- g. A provision addressing outside income and reporting requirements on such income (which may arise from summer camps, endorsements, television and radio shows, as well as shoe and apparel contracts);
- h. A provision addressing the head coach's authority to hire assistant coaches and to develop game schedules;
- i. A detailed fringe benefits provision addressing expense accounts, retirement, insurance, season tickets, as well as other standard university benefits.⁵

2. **Specific Terms and Conditions**

- a. Furloughs. Many athletic departments face revenue shortfalls following the loss of Spring 2020 and Fall 2020 athletic seasons. Among the myriad of responses to declining revenues has been the use of furloughs by athletic departments for both coaches with university contracts or contracts with independent athletic associations. If coaches' contracts do not explicitly authorize the institution or athletic association to implement furloughs or otherwise unilaterally reduce salaries, the institution can face coaches who reject salary reductions (despite other universities employees or coaches taking such reductions). Counsel should carefully consider the use of furlough language in coaches' contracts and how they will be triggered in various economic situations. Georgia State University's furlough language, which has been in place in coaches' contracts since 2007 is as follows:

⁵ Ray Yasser, James R. McCurdy & C. Peter Goplerud, *Sports Law* at 24 (2d ed. 1994).

Notwithstanding any other provision of this Agreement, if the Board of Regents of the University System of Georgia and/or the President of the University implements a mandatory furlough program, requiring any University employees to take a certain number of days of unpaid annual leave, during any contract year during the Term, Head Coach understands and agrees that Head Coach shall not receive any compensation described in Section 3.1, including, but not limited to, base salary, appearance fees, etc., during such furlough period.

- b. Many NACUA resources and third party articles have gone into great length on specific provisions of a typical coach's contract. For more information about compensation provisions, job duties, and termination provisions, please see:
 - i. T. Scott Varady, *Legal Issues in College Athletics*, NACUA (June 18, 2013), accessible at: http://www.nacua.org/securedocuments/programs/june2013/newlawyers_05a_13-06-1.pdf.
 - ii. T. Scott Varady, *High Finance, Moral Clauses and Bonuses: Fun with Coaching Contracts*, NACUA (June 22–25, 2008), accessible at: http://www.nacua.org/securedocuments/programs/june2008/2g_iv-08-06-1.pdf.
 - iii. Edward N. Stoner & Arlie R. Nogay, *The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation*, 16 J. of C. & Univ. Law 43, 44-45 (1989).
- 3. Additional Resources: In addition to the NACUA website, several electronic databases provide compensation data and/or copies of coaches' contracts:
 - a. USA Today (Free):
 - i. Football Head Coaches:
<http://sports.usatoday.com/ncaa/salaries/football/coach>
 - ii. Football Assistant Coaches:
<http://sports.usatoday.com/ncaa/salaries/football/assistant>

- iii. Men's Basketball Head Coaches: <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach>
- b. Coaches Hot Seat (Free): <http://www.coacheshotseat.com/>
- c. Winthrop Intelligence (\$): <http://winthropintelligence.com/>

C. **Athletic Director Contracts**

The role of athletic director (at all NCAA Divisions) has changed dramatically over the past two decades. Originally, athletic directors often served without contracts (i.e., they were at-will employees like other institution administrators) and had either risen through the ranks of intercollegiate athletic administrators or served as coaching staff for a college or university. These individuals adequately focused on the management of their departments and on the overall academic and athletic success of their student-athletes.

However, with the rise of NCAA compliance obligations and multi-million television rights, apparel rights, and sponsorship agreements, many institutions began to seek alternate athletic director candidate. As some commenters considered the job equivalent to that of a CEO of a multimillion company,⁶ institutions sought candidates with a legal background or from the private sector. Not surprisingly, with the increase in the complexity of the job, and the resulting increase in compensation for the job, institutions and athletic directors alike began calling for contracts between the parties.

1. **Athletic Director Contract: Terms and Conditions**

The basic terms of an athletic director contract are similar to those of an institution's high-profile coaches' contracts (as noted above). Athletic director contracts focus on term, compensation, performance bonuses (athletic- and academic-related), job duties, and termination/furlough provisions.

2. **Specific Terms and Conditions**

Counsel should give special consideration to the following items in an athletic director's contract:

- a. **Athletic Competition Bonuses**: The athletic director is responsible for the overall athletic success of his/her department; however, the athletic director has no day-to-day involvement with the athletic successes of his/her teams. Accordingly, counsel and institution administration must carefully craft an athletic director's athletic

⁶ For a general overview of the changing roles of athletic directors, please see: Steve Berkowitz and Jodi Upton, *Demands on college ADs resemble CEO challenges*, USA Today (October 6, 2011).

compensation bonuses to properly incentive an athletic director to better his/her athletic teams strategically, while not basing bonuses on goals not tied to personal performance. As a result, most athletic director athletic competition bonuses are only triggered if the institution's athletic teams achieve the highest level of success for their sport (e.g., bowl games, post-season tournaments, or NCAA championships).

- b. Academic Achievement Bonuses: Similarly, the athletic director is responsible for the overall academic success of the department's student-athletes. Academic achievement bonuses for athletic directors are often tied to overall student-athlete Grade Point Average (G.P.A.) or Academic Performance Rates (A.P.R.), as calculated by the NCAA.
- c. Job Duties: In many ways, the job duties of an athletic director often mirror the duties of an institution's President or a Dean, heavily focused on the administration, management, and finances of the athletics department, as well as interactions with all internal and external stakeholders. The following job duties of an athletic director are provided as an example⁷:
 - i. General Duties. To perform the reasonable duties assigned by the President of the University (or his/her designee), and to maintain the moral and ethical standards commonly expected of the Director of Athletics as a leading representative of the Department of Athletics.
 - ii. Commitment. Except as may be authorized pursuant to this Agreement, to devote full-time attention and energy to the duties required herein and to the promotion of the Department and the University's athletic programs and to avoid any business or professional activities or pursuits that may interfere with the performance of his duties under this Agreement or might otherwise conflict with the University's interests.
 - iii. Department Management. To manage thoughtfully and capably all activities of the intercollegiate athletics program at the University, including, but not limited to (a) hiring and as appropriate, making recommendations to the appropriate University administration regarding employment and salary of all personnel in the Department, (b) the assignment of duties and supervision, including discipline, of all personnel

⁷ Provided from the Georgia State University Director of Athletics Agreement template.

within the Department, and (c) assuring infrastructure, staffing, and other resources for academic success and achievement, athletics performance, and athletics compliance activities.

- iv. Financial Management. To maintain all administrative, operational, and business functions of the Department in accordance with the policies and procedures established by the University, and with a focus on creating profitability and increased net revenues for the Department over time; ensure the fiscal integrity of the Department; develop short-term and long-term strategic plans and annual budgets; actively raise private funds in conjunction with the University's fundraising vehicles; monitor the expenditure of all funds consistent with applicable law, University policies, procedures, and practices, and in accordance with the rules and regulations of its athletic conference and the NCAA;
- v. Rules Compliance. To recognize and comply with the applicable constitution, bylaws, laws, policies, rules, regulations, and/or enforcement structures of and governing the University and its employees, the NCAA and of its athletic conference, as now constituted or as they may be amended during the term hereof. Director of Athletics shall be responsible, through education, monitoring, and oversight to ensure that all Department staff and coaching staffs comply with the aforesaid constitution, bylaws, laws, policies, rules, regulations, and/or enforcement structures. Subject to the rules, regulations, and enforcement structures of the NCAA, its athletic conference, or University, as applicable, the Director of Athletics shall be accountable for any violation(s) by any coach, staff member, student-athlete or other person under the Director of Athletics' supervision or control. Director of Athletics shall have an affirmative obligation to monitor the Department for compliance matters and to immediately inform the President of the University of any suspected violation and fully cooperate in the investigation and reporting thereof.
- vi. Academic Performance. To ensure the academic progress and achievement of the Department's student-athletes. Director of Athletics agrees to adhere to the University's standards and goals for academic performance of its student-athletes, including those standards in connection with the

recruitment and eligibility of prospective and current student-athletes and specifically with regard to the recruitment of student-athletes who are academically qualified for the University. Director of Athletics agrees to follow conscientiously any reasonable directives from the President of the University concerning these matters.

- vii. Role Modeling. To serve as a positive role model for University faculty and staff and Department student-athletes by modeling appropriate behaviors in challenging athletic settings through personal conduct. Director of Athletics will clearly communicate and positively promote to staff the University Employee Handbook and its policies and procedures and to Department student-athletes expectations regarding the University Student Code of Conduct and Administrative Policies and Procedures, the Department Student-Athlete Handbook and Program rules, including fighting, underage drinking, drug use, hazing and other citizenship issues. Director of Athletics will promptly communicate to the President of the University (or his/her designee) any violations under these policies and will respond to the misconduct of staff and student-athletes in a way that reinforces core values and ensures that the Department is sending a clear message that proper social conduct is required to represent the University.
- viii. Stakeholders. To maintain and cultivate effective relations with the media, legislative bodies, governing boards, associations, conferences, committees, institutional alumni, the public, students, University administration, faculty, staff and friends of the University with respect to the Department.

3. Additional Resources: In addition to the NACUA website, several electronic databases provide compensation data and/or copies of athletic director agreements:

- a. USA Today (Free):
 - i. Athletic Director:
<http://sports.usatoday.com/ncaa/salaries/all/director>
- b. Winthrop Intelligence (\$): <http://winthropintelligence.com/>
- c. A model Athletic Director contract can also be obtained upon request from the author at bparthasarathy@gsu.edu.

D. Game Contracts

The NCAA regulates athletic scheduling amongst institutions. Additionally, most institutions belong to an athletic conference composed of ten or more peer institutions that also maintains requirements for athletic competition scheduling. Accordingly, institutions maintain two types of schedules for each athletic team – one composed of competitions against conference institutions and one composed of competitions against “non-conference” institutions. Conference games are scheduled by respective athletic conferences and are not often accompanied by individual game contracts. However, institutions engaging in “non-conference” games will execute game contracts setting forth the general terms governing the competitions (dates, times, locations, financial guarantees, cancellation provisions, etc.). For most sports, these are straightforward and uncomplicated agreements.

However, game contracts and their associated financial guarantees at Division I Football Bowl Subdivision (“FBS”) institutions (the most competitive division in the NCAA) have received increasing scrutiny for their ever-increasing largess.⁸ For example, in 2019, Auburn University paid Tulane University \$1,937,500 and the University of Alabama paid \$1,850,000 to the University of Southern Mississippi to play home football games.⁹ The home team gets the ability to schedule a team of choice, especially at home (which yields millions of dollars in economic impact for the institution and the surrounding communities). For the institutions receiving such funds, financial guarantees can help balance their budgets and obtain important brand recognition in important media markets.

1. Game Contract: Terms and Conditions

Game contracts include the following basic terms:

- a. Parties to the contract;
- b. The date, time, and location of each game under the contract;
- c. Any financial guarantees paid to either team for appearing in a game;
- d. How eligibility of student-athletes, the rules of the game, and officials will be selected;
- e. The process for allocating tickets;
- f. Radio, television, and internet streaming rights; and
- g. Game cancellation process (and associated fees).

⁸ The size of financial guarantees in the FBS increased significantly after 2006 when football teams were permitted to schedule up to 12 games. Paul Steinbach, *Non-Conference Scheduling Leads to Lopsided Scores, Balanced Books*, Athletic Business Chronicle (October 2010).

⁹ Winthrop Intelligence.

2. **Specific Terms and Conditions**

- a. **Television Rights:** The increased participation by institutions in local, regional, and national television networks (whether individually or through their athletic conference membership), coupled with certain NCAA litigation related to the use of student-athlete likenesses, has led to more stringent television rights provisions in game contracts, especially in FBS game contracts. In particular, television rights provisions are now more controlling of any broadcasts may be shown and where and the steps institutions must take to ensure any person filmed in a broadcast has given permission for such broadcasts.
- b. The following television rights provision from the standard Southeastern Conference non-conference game contract is provided as an example:
 - i. Each party acknowledges and agrees that the Home Team (or its conference) exclusively owns and retains all television, pay per view, cable, internet, and other rights to tape, broadcast, rebroadcast, and otherwise distribute, license, exhibit, sublicense, televise, transmit, or retransmit (collectively referred to herein as “Broadcast,” with each person or entity effecting or facilitating the Broadcast being referred to as “Broadcaster”) such Home Game and any and all portions of such Game throughout the universe by any and all means, uses, and media now known or hereafter developed (including via local, regional, or national cablecast or over-the-air transmission, and including by video or audio streaming or other transmittal of actual events or portions or summaries thereof via the internet) (collectively herein “Broadcast Rights”). If and to the extent the Visiting Team has or will have any such Broadcast Rights, the Visiting Team irrevocably assigns, conveys, and transfers all such rights (including full ownership of all copyrights) to the Home Team (or its conference) in perpetuity. (As used herein, “internet” means a global information network consisting of interconnected, but independent, computers including, but not limited to, the World Wide Web.) Neither the Visiting Team, nor its conference, shall have Broadcast Rights except as otherwise expressly set forth herein or as may be agreed in writing by the Home Team on a case by case basis. To the extent that this Section conflicts or is

inconsistent with any other language or provision in this Agreement, the terms and content of this Section shall control and supersede any other such language or provision.

- ii. The Visiting Team hereby grants each Broadcaster a license to use the trademarks and logos of the Visiting Team and the names and likenesses of the Visiting Team's individual players, participants, and coaches to promote and publicize the Game and the participating teams and institutions, provided that such trademarks, logos, names and likenesses must not be used by any Broadcaster as an endorsement of any product or service or in connection with any political cause or candidate, or in any manner prohibited by applicable NCAA rules and regulations. The Visiting Team warrants to the Home Team and its conference that the Visiting Team has obtained the right to license the use of the names and likenesses of individual players, participants, and coaches for the purposes set forth in this paragraph.
 - iii. Each party shall have the right to produce film and/or video tapes of the games and to authorize their use for coaches shows and delayed telecasts, under restrictions of the conference and any national governing bodies.
 - iv. Home Team agrees to provide reasonable press box facilities for the origination of programs described.
 - v. All programs produced as a result of this Article shall be governed by intercollegiate conference rules. To the extent that permission and/or approval of either or both schools is required by said rules or regulations for the origination and presentation of programs provided herein, both schools do hereby agree that such permission shall not be unreasonably withheld.
3. Practical Tip: In determining financial guarantees for a game, counsel should work with athletics administrators to think broadly about the types of compensation available that would lead to an executed game contract. Guarantees can take the form of cash payments, reimbursements for travel and lodging, or commitments to play games in future years.
4. Practical Tip: Athletic conference realignment and changes in NCAA Divisional status impacts the scheduling of athletic competitions, often causing institutions to pay huge financial penalties to cancel games no

longer authorized by the NCAA or that are not advantageous schedule-wise. Accordingly, for any institution possibly considering changes to their athletic conference membership or NCAA Divisional status, counsel should consider excluding his/her institution from cancellation fees if it cancels a game due to such instances.¹⁰

5. Practical Tip: During the Spring 2020 and Fall 2020 athletic seasons, many non-conference game contracts were terminated pursuant to their *force majeure* clauses (thereby not triggering cancellation fees owed to the non-terminating institution). It is important for counsel in a post-COVID environment to review their game contracts for how a termination occurs and the precise language of their *force majeure* clauses. Counsel should seek to understand how a game can be cancelled without penalties (i.e., does the NCAA or Conference have to make that decision or an individual schools, what happens if a federal, state, or local official or health department makes that determination, etc.).
6. Additional Resources: In addition to the NACUA website, several electronic databases provide financial data and/or copies of game contracts:
 - a. USA Today (Free):
 - i. Football Game Contracts:
http://usatoday30.usatoday.com/sports/graphics/coaches_contracts07/flash.htm
 - b. Winthrop Intelligence (\$): <http://winthropintelligence.com/>
 - c. Model game contracts can also be obtained upon request from the author at bparthasarathy@gsu.edu.

E. Apparel Contracts

Athletic departments expend significant allocations on dressing and equipping their teams' coaching staffs and student-athletes. Accordingly, since the 1990s, athletic departments have become more dependent on their apparel supply and sales contracts to subsidize their overall allocation to these apparel and equipment costs.¹¹ These contracts gave athletic departments access to limited amounts of free merchandise, access to wholesale pricing for more general products and equipment, and even direct cash contributions.

¹⁰ For a comprehensive look at cancellation provisions in Football game contracts, please see: Nathaniel Grow, *Louisville v. Duke and its Implications for Breached College Football Scheduling Agreements*, 27 *Journal of College & University Law* 239 (2011), accessible at: http://www.nacua.org/securedocuments/nonsearched/jcul/37_jcul_239.pdf.

¹¹ Ryan Teeple, *Underneath the logo: What collegiate apparel sponsorships means to BYU, Utah, and USU*, The Deseret News (March 26, 2013).

Athletic departments found willing partners in apparel makers (e.g., Nike, adidas, Under Armour), who like Nike, “saw an opportunity to develop widespread brand recognition through collegiate athletic sponsorship.”¹² Apparel makers were now able to splash their logos all over college and university jerseys and apparel, in-venue signage in view of regional and national television cameras, and placements in institution bookstores. In fact, many institutions created symbiotic relationships with their apparel maker contractors, whereby both would gain increased national reputations through their interdependence. Most famously, the University of Oregon is often referred to as the “University of Nike” due to its close relationship with the apparel maker.¹³

As these relationships increased, the value of major apparel supply and sales contracts began to rise as well. For example, the University of California Los Angeles signed a contract with adidas valued at \$18.67 million annually. Similarly, The Ohio State University signed a contract with Nike valued at \$16.8 million annually.¹⁴

Therefore, counsel should be heavily involved with the negotiating and drafting of these documents for their athletic departments. There are a plethora of guarantees, exemptions, and incentives that need to be carefully considered by counsel, often in conjunction with athletic department administration and public relations professionals at the institution.

1. **Apparel Supply and Sales Contract: Terms and Conditions**

An apparel supply and sales contract includes the following basic terms:

- a. Term of the contract;
- b. Institution’s sports covered by the contract;
- c. License to use the institution’s name and trademarks in connection with the apparel maker’s products;
- d. List of apparel maker’s products available to institution and preferential pricing for such products;
- e. List of promotional merchandise and items provided to institution and its athletic programs (including direct cash contributions to the athletics departments or to fund student-athlete scholarships, performance bonuses for achieving certain athletic success, internship opportunities, etc.);
- f. List of extra compensation provided by the apparel maker to specific sports teams and/or coaching staff members;

¹² Id.

¹³ Greg Bishop, *Oregon embraces “University of Nike” image*, The New York Times (August 2, 2013).

¹⁴ Daniel Kleinman, *The 20 Most Valuable College Apparel Deals*, Forbes.com (January 5, 2018).

- g. Renewal and termination provision (with a right of first dealing and/or right of first refusal for any renewal terms); and
- h. Sponsorship entitlements provided by institution to apparel maker (e.g., signage at athletic venues, season tickets, radio spots, etc.).

2. **Specific Terms and Conditions**

- a. Medical Exceptions: Administrators, coaches, and student-athletes covered by an apparel supply and sales contract agree to wear such apparel maker's uniforms, shoes, and products for all athletics-related events. However, certain bona fide medical conditions may require an individual to utilize a product of another apparel maker in order to recuperate. Counsel should negotiate exemptions to the institution's apparel supply and sales contract to allow for such medical exceptions and should work with teams' physicians, podiatrists, and other healthcare professionals to better understand when such limitations may arise.
 - b. Exempted Products: While institutions often seek comprehensive "all-sports" apparel supply and sales contracts to maximize the financial and resource benefits to the institutions, many sports have unique apparel and product requirements that may fall outside of the preferred apparel maker's products (e.g., an institution's golf team may prefer certain clubs or a tennis team may prefer certain tennis rackets not made by the traditional apparel makers in the marketplace). Similarly, individual coaches may have their own contracts with an apparel maker. Counsel should work with athletics department staff to inventory these unique circumstances and to carve out these exemptions specifically in any "all-sports" apparel supply and sales contracts.
3. Practical Tip: Certain states' ethics laws do not allow individual State employees – like head coaches – to have extra compensation agreements with vendors, such as apparel makers. Counsel need to understand these laws in order to restructure any pre-existing arrangements a coaching hire may have and to counsel current athletic department coaches on what types of arrangements they may have with an apparel maker outside of the athletic department's apparel supply and sales contract.
4. Practical Tip: Many apparel contracts can be terminated by the manufacturer if an institution reduces the number of its varsity teams or if a team does not participate in a season or post-season tournament (due to a pandemic, NCAA enforcement action, etc.). As athletic departments grapple with declining budgets due to post-COVID restrictions, it is important for counsel to understand how their apparel contracts can be

terminated, whether they can be renegotiated unilaterally by apparel companies, etc., especially if their athletic department is considering reducing the number of its varsity teams.

5. Additional Resources: Apparel contracts can be accessed either through utilizing subscription-based databases (like Winthrop Intelligence) or through freedom of information law requests. A model apparel contract can also be obtained upon request from the author at bparthasarathy@gsu.edu.

F. Radio Broadcast Contracts

Although much focus has been given to institution and athletic conference television contracts, most institutions still maintain a presence on the radio. Various live broadcasts of games, coaches' shows, spring games, and other athletics-related events are often cherished by faculty and staff, alumni, and fans who cannot attend live events.

1. Flagship Radio Network Contract: Terms and Conditions

A radio network flagship contract includes the following basic terms:

- a. Term of the contract;
- b. Rights granted to flagship radio network (including what broadcast stations included and for what sports/programs);
- c. Rights granted to create an "Affiliate Network" of local, regional, and national radio stations that agree to broadcast institution's sports/programs;
- d. Limitation of rights (whether the contract includes live broadcasts only, or whether it includes digital/internet streams, recorded broadcasts, etc.);
- e. Allocation of costs to produce radio broadcasts;
- f. Selection of play-by-play, color analysts, program hosts;
- g. Allocation of advertising inventory and advertising revenue;
- h. Broadcast costs (if applicable – some institutions pay to broadcast on radio networks);
- i. Promotional materials/entitlements allocated to each party; and
- j. Termination provisions.

2. Practice Tip: Flagship radio network contracts are very detailed in the allocation of radio time and promotional spots. Counsel should work with

athletic department administrators to identify the best days/times for programs to air and for multi-station radio networks, which stations to broadcast under.

3. Practice Tip: An institution's fans now listen to radio broadcasts on a variety of platforms. Counsel should ensure that a flagship radio network contract allows for listeners to engage streams through traditional terrestrial radio, satellite radio, and through various internet streaming applications (on desktop, tablet, and mobile devices).
4. Additional Resources: Flagship radio network contracts can be accessed either through freedom of information law requests. A model flagship radio network contract can also be obtained upon request from the author at bparthasarathy@gsu.edu.

G. Multimedia and Sponsorship Rights Contracts

For many years, athletic departments maintained their own sponsorship staff and sold sponsorships to local community businesses directly. In return for direct cash payments or trade items, the athletic departments would provide in-venue signage, program advertisements, and other visual identity items to these sponsors. However, as athletic departments have sought to broaden their regional and national exposure, while at the same time minimizing expenses associated with sponsorship staffs and acquisition costs, many athletic departments have outsourced this service to external multimedia rights holders (the most prominent being IMG, Learfield, CBSMedia/Outfront Media, Van Wagner, and JMI Sports).

In these arrangements, institutions have not only gained access to more prominent national sponsors, but the guaranteed cash payments have rapidly increased. For example, the University of Texas signed a contract with IMG for \$12.7 million annually. Similarly, The Ohio State University signed a contract with IMG for \$10.2 million annually.¹⁵

From these agreements, external multimedia rights holders gain access to institution's "intellectual property, digital assets and other team inventory."¹⁶ They use such access to bring in sponsors who traditionally haven't had the ability to market on-campus and who want an easy entry point to institutions' purchasing agents,¹⁷ faculty and staff, and alumni bases, as well as the hundreds of thousands of students who enter college each year and their families.

1. Multimedia and Sponsorship Contract: Terms and Conditions

¹⁵ Matthew Kish, *Exclusive: The Top 25 NCAA Marketing Deals*, *Portland Business Journal* (March 10, 2017).

¹⁶ *Inside the Evolving World of College Sports Sponsorship*, *IEG Sponsorship Report* (April 8, 2013), accessible at: <http://www.sponsorship.com/iegsr/2013/04/Inside-The-Evolving-World-Of-College-Sports-Sponso.aspx>.

¹⁷ *Id.* (UPS reportedly gained business from nearly 40 athletic departments and secured approximately 20 campus-wide arrangements as a result of sponsoring college athletics through IMG College).

A multimedia and sponsorship contract includes the following basic terms:

- a. Term of the contract;
- b. Rights licensed by the institution (sponsorships, corporate hospitality, website design, publications/collateral materials, multimedia platforms, etc.).
- c. Protected pre-existing sponsorship arrangements not subject to the contract;
- d. Sponsorship entitlement locations (in-venue signage, facilities set-up opportunities, programs, etc.)
- e. Licensure of institution's name and trademarks;
- f. Staffing structure;
- g. Financial payment structure (usually minimum annual guaranteed payments plus percentages of adjusted gross revenues over certain annual thresholds);
- h. Termination provisions.

- 2. Practice Tip: An all-campus or all-department multimedia and sponsorship rights agreement can be extremely complex and burdened by minutiae. Counsel should work closely with their athletic department to identify all possible sponsorship entitlement opportunities for inclusion in the contract. Additionally, counsel should be particular in the contract about the types of sponsorships that are excluded for sale, pursuant to institutional policies and procedures and applicable law (e.g., no alcohol, adult venue/products, tobacco sponsorships). Finally, counsel should inventory which units on-campus are making sponsorship pitches to what categories. Counsel needs to clearly define pre-existing sponsorship agreements and protected sponsorship categories (e.g., an alumni association may already have a campus-wide affinity credit card) so that there's no disagreements about commissions on past sales or confusion amongst sponsors as to the rights provided to them.
- 3. Practice Tip: Many multimedia and sponsorship contracts are strained following the loss of Spring 2020 and Fall 2020 athletic seasons. Not only are sponsors requesting reductions in payments, no cost extensions, or refunds of paid fees, the multimedia and sponsorship companies are seeking to renegotiate guaranteed payments to institutions calculated based on a standard number of games. Counsel need to understand what variables impact the payment mechanisms in their multimedia and sponsorship agreements and where contract terms may cause financial harm to their athletic departments.

4. Additional Resources: Multimedia and sponsorship rights contracts can be accessed either through utilizing subscription-based databases (like Winthrop Intelligence) or through freedom of information law requests.

III. Additional Legal Issues in College Athletics

A. State Freedom of Information Acts

1. State freedom of information laws can significantly affect the activities of public institutions' athletic departments. Counsel should understand applicable state freedom of information laws and work with athletic department administration to manage (and when appropriate, respond to) requests for high-profile contracts (employment, game contracts, etc.), NCAA and conference violation reports, and electronic communications between the Athletic Director, his/her staff, and other institution officials. Additionally, counsel should understand the intersection of FERPA and freedom of information laws when releasing records involving student-athletes and the impact of freedom of information laws on any NCAA-related records (if involved with any NCAA enforcement actions).
2. Additional Resource: A list of Freedom of Information laws in every State can be found at: <http://www.nfoic.org/state-freedom-of-information-laws>.

B. Tax Issues

1. Intercollegiate athletic programs often engage in a variety of revenue-producing activities to supplement their operating budgets (e.g., corporate sponsorships, in-venue advertising, merchandise sales, etc.). These activities may subject an institution to unrelated business income tax concerns and counsel should be aware of how applicable regulations affect the ability of institutions to structure these activities to achieve favorable tax treatment.
2. Additional Resources:
 - a. For a general overview of the Unrelated Business Income Tax and its impact on College Athletics, please see: Christopher L. Tazzi, *To Tax, or Not to Tax, That is the Question: Searching for a Solution to the Increasing Commercialization of Intercollegiate Athletics*, 38 Journal of College and University Law 381 (2012), accessible at: http://www.nacua.org/securedocuments/nonsearched/jcul/38_jcul_381.pdf.

- b. Another general overview of the Unrelated Business Income Tax and its impact on College Athletics can be found at: Caroline Kern Craig and Karen Weisman, *Collegiate Athletics and the Unrelated Business Income Tax*, 8 Journal of Sport Management 36 (1994), accessible at:
<http://www.humankinetics.com/acucustom/sitename/Documents/DocumentItem/7649.pdf>.
- c. For a general overview of the Unrelated Business Income Tax and its impact on Pouring Rights, Naming Rights, and Sponsorship Agreements in particular, please see: Bertrand M. Harding, Jr., *Pouring Rights, Naming Rights, and Sponsorship Agreements* (2000), accessible at:
<http://www.nacua.org/securedocuments/formbook/auxiliaryenterprises/vi-00-06-2.doc>.

NCAA GUIDELINES: SPORTS MEDICINE A GENERAL OVERVIEW

June 23 – 26, 2019

Janet P. Judge, Esq.
Partner, Holland & Knight LLP

A. The NCAA's Sport Science Institute (SSI)

The NCAA's Board of Governors and President established a Sports Science Institute (SSI) in 2013 to be headed by Dr. Brian Hainline, the NCAA's first Chief Medical Officer. The SSI's stated vision is "to be the pre-eminent sport science voice for NCAA student-athletes and member institutions, and to be the steward of best practices for youth and intercollegiate sports."¹ Its mission is to "promote and develop safety, excellence and wellness in college student-athletes, and to foster lifelong physical and mental development."² To these ends, the SSI has been extraordinarily active. A simple search of the term "best practices" on the NCAA SSI homepage, for example, yielded 67 hits on May 6, 2019, in subject areas ranging from concussion diagnosis and management to cardiac care and student-athlete mental health. The NCAA posts a wealth of information on health and safety topics, sports-specific initiatives, and health education on its SSI webpage. There is also a link to "key publications," described as "important and timely documents developed by the NCAA [SSI] in partnership with leading medical sports medicine organizations, experts and member schools." Many of these titles describe the information contained in the publications as best practices in their respective areas.³

B. Independent Care Model

In 2014, the NCAA implemented legislation requiring all member schools to designate a physician responsible for its intercollegiate team medical care.⁴ Schools have the option to appoint either a "medical doctor (MD) or osteopathic physician (DO)" to fill this position, provided he or she is licensed and in good standing to practice in the state where the school is located.⁵ In addition, the team doctor must be assigned sufficient authority "to oversee the medical services for injuries and illnesses incidental to a student-athlete's participation in intercollegiate athletics."⁶ In 2016, the NCAA further required its Autonomy Five (A-5) members to adopt an "Independent Medical Care" administrative model to ensure "unchallengeable autonomous authority" of team doctors and athletics trainers in their day-to-day responsibilities, including student-athlete-related "medical management and return-to-play

¹ NCAA, About the SSI, NCAA.org (last visited May 7, 2019), <http://www.ncaa.org/sport-science-institute/about-ssi>. See also NCAA, Athletics Health Care Administrator Handbook: A Guide for Designated Athletics Health Care Administrators 9 (2017), http://www.ncaa.org/sites/default/files/PDF%203_AHCA%20Handbook_20170720.pdf.

² Id.

³ NCAA, Key Publications, NCAA.org (last visited May 7, 2019), <http://www.ncaa.org/sport-science-institute/key-publications>.

⁴ NCAA, NCAA Division I Manual 3.2.4.16 (2018-19 ed.). See also NCAA, NCAA Division II Manual 3.3.4.18 (2018-19 ed.); NCAA, NCAA Division III Manual 3.2.4.18 (2018-19 ed.).

⁵ Id.

⁶ Id.

decisions.”⁷ The rest of the Division I schools opted in later that year and NCAA Division II and III members passed similar legislation in 2017.⁸

C. The Athletics Health Care Administrator (AHCA)

Also included in the Independent Medical Care legislations (and implemented with similar timeframes), the NCAA required all Division I members to designate an athletics health care administrator (AHCA) charged with overseeing the delivery and administration of athletic-related medical services.⁹ Unlike the team doctor position, a school’s AHCA need not be a medical provider. The position must be filled by an employee tasked with overseeing the administration and delivery of a school’s athletic health care program and serving as the school’s primary contact with the NCAA’s SSI. Ideally, the AHCA designation is attached to an employee who has the authority to ensure that an independent medical care model is in place and properly implemented.¹⁰

The NCAA’s expectations for those serving in the AHCA role is set forth in the SSI’s Athletics Health Care Administrator Handbook: A Guide for Designated Athletics Health Care Administrators.¹¹ This Handbook is designed to assist newly appointed ACHAs on each campus to understand the breadth of their role and responsibilities. More specifically, the SSI recommends that AHCA’s understand, share, and monitor their institution’s responsibilities under existing NCAA health and safety legislation, NCAA inter-associational best practices and policies, and other relevant policies and recommendations.

D. Relevant NCAA Legislation and Inter-Associational Recommendations

In recent years, NCAA legislation has expanded into the universe of institutional responsibility for student-athlete health and safety. Current NCAA legislation sets standards in the areas of medical privacy, drugs and drug testing, nutrition supplements, tobacco, student-athlete time and time management, physical and mental health, medical waivers, medical exams, sickle cell testing, concussions, and athletics personnel qualifications, certifications, and training.

In addition, a host of NCAA sports medicine guidelines are contained in the most recent version of the NCAA’s Sports Medicine Handbook (25th ed. 2014). This one hundred thirty plus page document compiles the relevant NCAA sports medicine guidelines effective as of August 2014. At this time, the NCAA is updating the guidelines contained in this Handbook and intends to

⁷ NCAA, NCAA Division I Manual 3.2.4.17 (2018-19 ed.).

⁸ NCAA, NCAA Division II Manual 3.3.4.17 (2018-19 ed.); NCAA, NCAA Division III Manual 3.2.4.19 (2018-19 ed.).

⁹ In 2017, the NCAA expanded member responsibility in the medical care area by requiring members “to designate an athletics health care administrator [“AHCA”] to oversee the institution’s athletic health care administration and delivery.” NCAA, NCAA Division III Manual 3.2.4.20 (2018-19 ed.). See also NCAA, NCAA Division I Manual 3.2.4.17 (2018-19 ed.); NCAA, NCAA Division II Manual 3.3.4.17 (2018-19 ed.).

¹⁰ For more information regarding the administration of a school’s medical program, see the NCAA’s 2016 guidance, NCAA Independent Medical Care for College Student-Athletes Best Practices (2016), https://www.ncaa.org/sites/default/files/2017SSI_IndependentMedicalCare_20170626.pdf.

¹¹ For more information about the role and responsibilities of the AHCA, see NCAA, Athletics Health Care Administrator Handbook: A Guide for Designated Athletics Health Care Administrators (2017), https://www.ncaa.org/sites/default/files/PDF%203_AHCA%20Handbook_20170720.pdf.

publish the new guidelines on a mobile app platform, including information about the Association's nine strategic priorities:¹²

1. Cardiac Health
2. Concussion
3. Doping and Substance Abuse
4. Mental Health
5. Nutrition, Sleep and Performance
6. Overuse Injuries and Periodization
7. Sexual Assault and Interpersonal Violence
8. Athletics Healthcare Administration
9. Data-Driven Decisions

E. Concussion Management

Per 2010 NCAA guidance, each member school is required to have a concussion management plan (CMP) for its student-athletes.¹³ The legislation expressly provided that a school's CMP must include the following minimum standards:

- (a) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions. Student-athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member;
- (b) A process that ensures a student-athlete who exhibits signs, symptoms or behaviors consistent with a concussion shall be removed from athletics activities (*e.g.*, competition, practice, conditioning sessions) and evaluated by a medical staff member (*e.g.*, sports medicine staff, team physician) with experience in the evaluation and management of concussions;
- (c) A policy that precludes a student-athlete diagnosed with a concussion from returning to athletics activity (*e.g.*, competition, practice, conditioning sessions) for at least the remainder of that calendar day; and
- (d) A policy that requires medical clearance for a student-athlete diagnosed with a concussion to return to athletics activity (*e.g.*, competition, practice, conditioning sessions) as determined by a physician (*e.g.*, team physician) or the physician's designee.

In addition, the NCAA has published a Concussion Diagnosis and Management Best Practices Reference guide.¹⁴ In this document, the NCAA makes recommendations it describes as

¹² NCAA, Health and Safety Topics, NCAA.org (last visited May 7, 2019), <http://www.ncaa.org/sport-science-institute/topics>. These priorities have been formally endorsed by the NCAA's Board of Governors.

¹³ NCAA, NCAA Division I Manual 3.2.4.18 (2018-19 ed.). See also NCAA, NCAA Division II Manual 3.3.4.16 (2018-19 ed.); NCAA, NCAA Division III Manual 3.2.4.16 (2018-19 ed.).

¹⁴ NCAA, Concussion Diagnosis and Management Best Practices, NCAA.org (last visited May 7, 2019), <http://www.ncaa.org/sport-science-institute/concussion-diagnosis-and-management-best-practices>.

“endorsed best practices . . . for the diagnosis and management of sport related concussion[s].” Id. The 2015 A-5 legislation provides best practices in the space. The remainder of Division I schools have since opted in and NCAA Division II, III have passed similar but not identical legislation. The NCAA Division II and III template is available on the SSI website.¹⁵ Unlike their Division I colleagues, Division II and III schools are not obligated to participate in an annual peer review process. Rather, the NCAA provides these schools with a template designed to facilitate effective on-campus review and adjustment on an annual basis as required by the relevant divisional NCAA legislation. Division I schools are required to submit a Concussion Safety Protocol to the NCAA Concussion Safety Protocol Committee by May 1 of each year and, arguably, set the minimum standard for all schools wishing to show an appropriate level of concussion-based care for their student-athletes. According to NCAA’s “Diagnosis and Management of Spot-Related Concussion Best Practices,” schools should develop, implement, and publicize a Concussion Management Plan, describing the school’s education, pre-participation assessments, recognition and diagnosis of concussion, and post-concussion management protocols.¹⁶ In addition, schools should provide students who have experienced concussions with individual treatment plans describing return-to-activity, return-to-play, and return-to-academics protocols.

F. Catastrophic Sport Injury and Death Prevention Recommendations

On May 2, 2019, the NCAA announced that its Board of Governor’s had “unanimously endorsed and thereby established as NCAA policy comprehensive recommendations for the prevention of catastrophic injury and death” contained in a new “Association-wide policy.”¹⁷ This policy was reported to provide schools with a “road map” to “effectively prevent injury” in the following six areas:

1. Sportsmanship
2. Protective Equipment
3. Acclimatization and Condition
4. Emergency Action Plans
5. Strength and Condition Personnel
6. Education and Training

According to the NCAA, these recommendations require schools to take certain actions, including but not limited to implementing longstanding reporting structure recommendations for strength and condition personnel. The recommendations have been endorsed by “13 external scientific and medical organizations” and work accomplished during the 2016 Safety in College Football Summit.

¹⁵ NCAA, Concussion Safety Protocol Template (2019-2020), <http://www.ncaa.org/sport-science-institute/topics/concussion-safety-protocol-template>.

¹⁶ Id.

¹⁷ Stacey Osburn, Board of Governors endorses catastrophic injury guidelines, NCAA.org (May 2, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-endorses-catastrophic-injury-guidelines>. The Policy is attached as Exhibit 1. The SSI online version is not yet available and is scheduled to be posted by mid-June 2019.

The recommendations contained in this policy are not limited to any one sport or to catastrophic injury. Rather, the guidance is expansive and represents a fundamental shift in the way certain athletics programs currently operate, including strong statements regarding the unacceptability of punitive conditioning, staff obligations to take affirmative steps to minimize observed dangerous conduct, minimum credentialing and reporting lines for strength and conditioning staff, as well as venue-specific emergency action plan content, annual training, and education. In addition, the policy details certain broad-stroke guidance around the planning, oversight, documentation, and transparency of conditioning activities that likely will prompt additional discussion around the potential disclosure of proprietary information, and the necessity of expanding existing staffing in support areas. As with prior guidance out of the NCAA regarding certain medical best practices, this policy has the very real potential to set the floor for acceptable policies, protocols, and individual behaviors in the areas addressed.

TOPIC:**THE TITLE IX IMPLICATIONS OF ELIMINATING AN INTERCOLLEGIATE SPORTS TEAM****INTRODUCTION:**

In the first years of the second decade of the twenty-first century, colleges and universities face grave financial challenges. Endowments, which seemed certain to grow in perpetuity, are declining. The promise that state government will heavily subsidize the tuition of every student has been broken. As institutions, particularly those outside of the major NCAA Division I conferences, decide how to balance their budgets, it is tempting to focus on an expensive activity that benefits only a few students—intercollegiate athletics in the “non-revenue” sports.

Yet the decision to eliminate an intercollegiate sports team has significant legal ramifications, particularly in the area of Title IX. The purpose of this NACUANOTE is to explore those implications. This NACUANOTE has two parts. Part I provides an overview of Title IX’s application to intercollegiate athletics. Part II discusses the legal consequences of eliminating an intercollegiate athletics team.

DISCUSSION:**Overview of Title IX's Application to Intercollegiate Athletics**

Title IX of the Education Amendments of 1972 prohibits public and private educational institutions that receive federal funds from discriminating because of sex in any aspect of their operations [\[1\]](#). If any aspect of an institution’s operations receives federal funds, then all aspects of the institution’s operations are subject to Title IX. Because virtually all institutions of higher education receive federal funds in the form of student financial aid, virtually all institutions are covered.

Athletics Participation

Although nothing in the statutory text mentions intercollegiate athletics, the U.S. Department of Education had promulgated regulations regarding the application of Title IX to intercollegiate athletics [\[2\]](#). In a further effort to clarify the regulations, the Department of Health, Education and Welfare issued a policy interpretation of the regulations which was later adopted by the Office for Civil Rights of the U.S. Department of Education, (“OCR”), the agency charged with enforcing Title IX [\[3\]](#). Under the OCR’s interpretation, which the federal appellate courts have universally endorsed, an institution must do one of three things to comply with Title IX in the context of athletics participation [\[4\]](#). This is traditionally referred to as the “Three-Part” or “Three-Prong” test.

Substantial Proportionality Test

Under the “Substantial Proportionality” test, each sex’s representation in varsity athletics must be substantially proportionate to its full-time undergraduate representation in the student body. In 1996, the OCR clarified that athletic opportunities are “substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team [5].” In plain English, the OCR first determines how many additional opportunities are required for the underrepresented sex [6] in order to achieve perfect proportionality. If this number is sufficient to field a viable team, then the institution is not substantially proportionate and must add a team.

To illustrate how this OCR test works, suppose a university is 55% female and presently offers 700 athletic participation opportunities. Men have 385 athletic participation opportunities and women have 315 participation opportunities. This means women represent 45% of the athletes (315 divided by 700) although women represent 55% of the full time undergraduates. The first step is to determine how many opportunities are required for women to achieve perfect proportionality of 55%. If male participation remains constant at 385, which is the assumption employed by the OCR, the university must add 156 participation opportunities for women. If the university did so, it would have 471 female opportunities (315 current + 156 additional) and 385 male (all current). The second step is to determine whether the number of new participation opportunities required, 156 in this example, is sufficient to field a viable team. Obviously, it is sufficient. In fact, the university could field seven or eight new women’s teams with 156 additional opportunities. In short, if one sex is fifty percent of the student body, its representation among varsity athletes must approximate fifty percent.

Note that courts have not explicitly ruled on the precise issue of what constitutes “substantial proportionality” nor have they adopted the test set forth by OCR. Some case settlements have included percentage disparities, but the issue itself remains to be litigated.

History & Continuing Practice of Program Expansion Test

Under the “History & Continuing Practice of Program Expansion” test, if an institution has not achieved substantial proportionality, an institution may demonstrate compliance by showing that it has a continuing history of expanding opportunities for the underrepresented sex. In other words, it is acceptable for female representation among athletes to be substantially below their representation in the student body if the institution has consistently added new teams for women and intends to do so in the future. In evaluating “history,” the OCR looks at the institution’s record for adding teams, the institution’s record of increasing participants on existing teams, and the institution’s response to requests to add teams. In assessing “continuing practice,” the OCR examines the institution’s current policy for adding teams. While not specifically referenced in the 1996 Clarification, OCR will not find a program to be in compliance with this test if its expansion of programs for the underrepresented sex coincides with continued expansion of programs for the overrepresented sex. In practical terms, in order to comfortably rely upon this prong, an institution must have consistently added new teams for the underrepresented sex about every three to four years, must refrain from eliminating any teams for the underrepresented sex, should not have been concurrently adding programs for the overrepresented sex and must have a plan for adding new teams in the future.

Fully Accommodating Interests & Abilities Test

Under the “Fully Accommodating Interests & Abilities” test, an institution may demonstrate that it is currently meeting all “interests and abilities of the institution’s students who are members of the underrepresented sex—including students who are admitted to the institution though not yet enrolled [7].” This aspect of the three-part test is the subject of controversy. During the Bush Administration, via a Policy Clarification issued in 2005, the OCR allowed colleges and universities to demonstrate

compliance by relying on surveys of the student body [8]. Critics argued that the “model survey” included in the 2005 Clarification was based on flawed methodology, was burdensome for students to complete, was drafted to encourage responses of “not interested”, allowed schools to count non-responses as affirmative statements of non-interest, and did not require any minimum response rate in order to validate the survey. In 2010, the Obama Administration withdrew the 2005 Policy Clarification and insisted that the inquiry is broader [9].

After the 2010 Clarification, the OCR determines interest by examining (1) survey data; (2) requests by students to add a particular sport; (3) participation rates in club or intramural sports; (4) participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students; and (5) interviews with students, coaches, and administrators [10]. Moreover, in assessing competitive opportunities, the OCR evaluates: (1) the athletic experience and accomplishments of students and admitted students interested in playing the sport; (2) opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; (3) participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport in which there is interest; and (4) competitive opportunities offered by other schools against which the institution competes and those offered by other schools in the relevant geographic area against which the institution does not now compete [11]. Still, as noted in the 1996 Clarification and reiterated in the 2010 Clarification, while such indicators may be “helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports” the actual test remains “whether an institution is meeting the actual interest and abilities of its students and admitted students”. In sum, the Obama Administration has returned to the approach set forth by OCR in 1996 and focuses not only on the student body, but also on the experiences of the broader community and the institution’s traditional rivals.

Scholarships

If an institution provides athletic scholarships, “it must provide reasonable opportunities for such awards for members of each sex *in proportion* to the number of students of each sex participating in interscholastic sports [12].” In effect, if fifty percent of the athletes are female, then females should receive approximately fifty percent of total athletic financial assistance [13].

To be sure, the financial assistance regulation and the accommodating interests and abilities regulation work in tandem. As a sex’s participation increases, its share of scholarship money must also increase. Thus, while adding some extra non-scholarship players may help the institution achieve substantial proportionality in the participation context, it may actually cause non-compliance in the financial context [14]. Conversely, limiting non-scholarship players to achieve financial assistance compliance may cause the university to fail the substantial proportionality test. It is extremely difficult to meet both standards.

Other Considerations

In addition to participation opportunities and scholarships, the regulations require “equal athletic opportunity for members of both sexes [15].” In determining whether equal opportunities are available, OCR considers, but is not limited to, the following factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) The provision of equipment and supplies; (3) Scheduling of games and practice times; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutors; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; and (10) Publicity [16]. Although the regulation emphasizes that equal expenditures are not required, the failure to provide “necessary funds for teams of one sex” is relevant [17].

Analysis of a Decision to Eliminate an Intercollegiate Team

OCR's three-part test for participation has the long-term effect of mandating substantial proportionality. If an institution achieves substantial proportionality, then OCR expects the institution to maintain substantial proportionality. Any elimination of teams must maintain that delicate balance.

Similarly, if an institution is short of substantial proportionality, then OCR expects the institution to take measures to increase participation among the underrepresented sex to achieve substantial proportionality eventually. For example, part two of the three-part test ("History & Continuing Practice of Program Expansion") requires expansion of opportunities for the underrepresented sex. This expansion continues until the school achieves substantial proportionality. Similarly, part three of the three-part test ("Fully Accommodating Interests and Abilities") requires an assessment of the campus, the wider community from which students are drawn, and the practices of traditional rivals in order to gauge the interests of the underrepresented sex. As interest develops, the institution must add teams until it achieves substantial proportionality.

Eliminating an Intercollegiate Team for the Overrepresented Sex

If the institution lacks substantial proportionality and chooses to eliminate an intercollegiate team for the overrepresented sex, then the net effect of the decision is to bring the institution closer to substantial proportionality. However, unless the institution actually achieves substantial proportionality through the cuts, being closer to substantial proportionality does not guarantee compliance with the three-part test. Elimination of opportunities for the overrepresented sex does not constitute expansion of opportunities for the underrepresented sex. Similarly, denying some of the interests and abilities of the overrepresented sex does not equate with full and effective accommodation of the underrepresented sex.

Moreover, the overrepresented sex may claim discrimination because it bore all of the cuts. If the cuts result in compliance or continued compliance with the three-part test, then the need for the institution to comply with OCR's interpretation likely justifies the disparate treatment. Conversely, if the cuts do not result in compliance, then the institution likely cannot justify singling out the overrepresented sex.

Eliminating an Intercollegiate Team for the Underrepresented Sex

If an institution chooses to eliminate an intercollegiate team from the underrepresented sex, then it must do so in a manner that ensures substantial proportionality. As explained below, part two and part three are not viable options.

If an institution eliminates a team and does not replace it with a team that provides greater participation opportunities, then it is legally impossible to comply with part two ("History & Continuing Practice of Program Expansion") of the three-part test [\[18\]](#). As explained above, part two requires an institution to demonstrate a history and continuing practice of program expansion for the underrepresented sex. Yet, if a college or university is eliminating a team for the underrepresented sex, it is necessarily reducing, not expanding opportunities.

Similarly, if an institution eliminates a team, it is legally impossible to comply with part three ("Fully Accommodating Interests & Abilities") of the three-part test. As detailed previously, part three of the three-part test requires an institution to demonstrate that its current selection of sports fully and effectively accommodates the interests of the underrepresented sex. However, regardless of whether one uses the narrow definition of the Bush Administration or the broader definition of the Obama Administration, an institution that has eliminated a team cannot prove full and effective accommodation. Quite simply, the fact that the institution recently fielded an intercollegiate team demonstrates that there is interest and ability in the sport as well as an expectation of reasonable competition. The institution really has no viable claim otherwise.

Elimination of Intercollegiate Teams and Financial Assistance

Regardless of whether an institution is cutting teams from the overrepresented or underrepresented sex and regardless of how it complies with the three-part test, the institution must comply with the financial assistance regulations. This means that the institution must increase or decrease a sex's share of financial assistance to reflect the new reality.

CONCLUSION:

In an era of financial difficulties, many institutions conclude that it is necessary to cut their intercollegiate athletic teams. In undertaking this course, colleges and universities must focus not only on the financial bottom line, but also on the requirements of Title IX. In the end, OCR's three-part test with its emphasis on eventual substantial proportionality becomes the touchstone.

FOOTNOTES:

FN1. [20 U.S.C. §1681.](#)

FN2. See [34 C.F.R. § 106.37\(c\)](#), [106.41\(a\)-\(c\)](#).

FN3. Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (1979).

FN4. See *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 290-291 (2nd Cir. 2004); [Miami Univ. Wrestling Club v. Miami Univ.](#), 302 F.3d 608, 615 (6th Cir. 2002); [Chalenor v. University of North Dakota](#), 291 F.3d 1042, 1047 (8th Cir. 2002); [Pederson v. Louisiana State Univ.](#), 213 F.3d 858, 879 (5th Cir. 2000); [Neal v. Board of Trustees](#), 198 F.3d 763, 770 (9th Cir. 1999); [Kelley v. Board of Trustees, Univ. of Ill.](#), 35 F.3d 265, 271 (7th Cir. 1994); [Roberts v. Colorado State Bd. of Agric.](#), 998 F.2d 824, 830 (10th Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3rd Cir. 1993); [Cohen v. Brown Univ.](#), 991 F.2d 888, 896-897 (1st Cir. 1993).

FN5. United States Department of Education, Office for Civil Rights, [Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test](#) (Jan. 16, 1996) ("1996 Clarification").

FN6. For purposes of this Note, underrepresented sex means the sex that is underrepresented when comparing athletic participation to undergraduate enrollment—in most instances women. Because the undergraduate enrollment numbers have shifted dramatically in recent years, the term is sometimes used in campus discussions to mean the sex that is underrepresented in enrollment—in most instances men. This can create confusion in campus discussion of Title IX issues.

FN7. United States Department of Education, Office for Civil Rights, [Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three](#) (April 20, 2010) ("2010 Clarification").

FN8. See United States Department of Education, Office for Civil Rights, [Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test, Part Three](#), (March 17, 2005). See also United States Department of Education, Office for Civil Rights, [Further Clarification of Intercollegiate](#)

[Athletics Policy Guidance Regarding IX Compliance](#) (July 11, 2003).

FN9. United States Department of Education, Office for Civil Rights, [Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three](#) (April 20, 2010).

FN10. Id.

FN11. Id.

FN12. [34 C.F.R. § 106.37\(c\)](#) (emphasis added). See also 44 Fed. Reg. 71413, 71415-23 (1979) (Policy Interpretation).

FN13. This is an OCR promulgated test set forth in a [1998 letter to Bowling Green State University](#). In its letter OCR stated “If any unexplained disparity in the scholarship budget for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the “substantially proportionate” requirement.” A 1% standard can be difficult to achieve given that it is measured based on scholarship dollars actually spent rather than dollars awarded. In addition, schools are bound by the scholarship limits imposed by their athletic conferences. Depending on the menu of sports offered at an institution, schools may not be able to give the full allotment allowed under the conference rules and still comply with Title IX. The 1998 letter also contains defenses to the 1% standard, including adjustments for in-state and out-of-state tuition rates and last-minute decisions by student athletes not to attend an institution and thereby not spend awarded scholarship monies. OCR does not however recognize conference-imposed scholarship limits as a defense.

FN14. Some schools have opted to ensure compliance via the substantial proportionality test by instituting a system of roster management. Such schools have set target squad numbers for their coaches so that the school can predict the number of male and female participants. Both OCR and the courts have reviewed these target numbers carefully to ensure the rosters are reasonable and consistent with the average squad sizes in the conference and at the national level, and sometimes also with coach expectations and wishes. See e.g. [Biediger v. Quinnipiac University](#), 616 F. Supp. 2d 277 (D. Conn. 2009) (Ruling and Order Granting Preliminary Injunction).

FN15. [34 C.F.R. § 106.41\(a\)](#).

FN16. Id.

FN17. Id.

FN18. If an institution eliminates a team from the underrepresented sex, but adds a new team that offers more opportunities for the underrepresented sex, it does expand the opportunities for the underrepresented sex.

AUTHOR:

William E. Thro is University Counsel and Assistant Professor of Government at Christopher Newport University. The views expressed are those of the Author and do not necessarily reflect the views of the Attorney General of Virginia.

RESOURCES:

Statutes:

- [Title IX of Education Amendments of 1972, 20 U.S.C. § 1681](#)

Regulations:

- [34 C.F.R. § 106.37\(c\)](#)
- [34 C.F.R. § 106.41\(a-c\)](#)

Department of Education Guidance:

- [Policy Interpretation on Title IX and Intercollegiate Athletics](#) (1979)
- [Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Text](#) (1996)
- [Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance](#) (2003)
- [Additional Clarification of Intercollegiate Athletics Policy: Three Part Test—Part Three](#) (2005) (Withdrawn 2010)
- [Intercollegiate Athletics Policy Clarification: The Three Part Test—Part Three](#) (2010)

Case Law:

- [Biediger v. Quinnipiac University](#), 616 F. Supp. 2d 277 (D. Conn. 2009)
- [Equity in Athletics, Inc. v. United States Department of Education](#), 504 F. Supp. 2d 88 (W.D. Va. 2007), *aff'd*, 291 Fed. Appx. 517 (4th Cir. 2008) (unpublished)
- [Miami Univ. Wrestling Club v. Miami University](#), 302 F.3d 608 (6th Cir. 2002)
- [Chalenor v. University of North Dakota](#), 291 F.3d 1042 (8th Cir. 2002)
- [Pederson v. Louisiana State University](#), 213 F.3d 858 (5th Cir. 2000)
- [Neal v. Board of Trustees](#), 198 F.3d 763 (9th Cir. 1999)
- [Kelley v. Board of Trustees, Univ. of Ill.](#), 35 F.3d 265 (7th Cir. 1994)
- [Cohen v. Brown University](#), 991 F.2d 888 (1st Cir. 1993)
- [Roberts v. Colorado State Univ.](#), 814 F. Supp. 1507 (D. Colo.), *aff'd in part, rev'd in part sub nom. Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir.)

Journal of College and University Law Articles:

- [The Changing Collective Definition of Collegiate Sport and the Potential Demise of Title IX Protections](#). Todd Crosset and Lisa Masteralexis. 34 JCUL 671 (2008)
- [Intramural and Club Sports: The Impact of Title IX](#). Sarah K. Fields. 33 JCUL 521 (2007)
- [Title IX, the NCAA and Intercollegiate Athletics](#). Sue Ann Mota. 33 JCUL 121 (2006)
- [An Analysis of the New Clarification of Intercollegiate Athletics Policy Regarding Part Three of the Three-Part Test for Compliance with the Effective Accommodation Guidelines of Title IX](#). Catherine Pieronek. 32 JCUL 105 (2006)
- [Title IX Beyond Thirty: A Review of Recent Developments](#). Catherine Pieronek. 30 JCUL 75 (2003)

- [Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues](#). John Gaal, Michael S. Glazier, and Thomas S. Evans. 28 JCUL 519 (2002)
- [The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics](#). Crista D. Leahy. 24 JCUL 489 (1998)

NACUA Outlines:

- [Title IX: A New Frontier in Employment Litigation](#). Dawn Theodora. (March 2009 CLE Workshop)
- [College Athletics Case Law Update](#). Robin Green Harris. (2008 Annual Conference)
- [College Athletics and Title IX Issues](#). Kenneth McKanders. (2007 Pre-Conference Workshop for Lawyers New to Higher Education)
- [Review of Recent Cases in Athletics](#). Lee Tyner. (2007 Annual Conference)
- [Women in Athletics: Title IX, Hiring Practices, Employment and Other Issues](#). Neena Chaudhry. (2006 Annual Conference)
- [Title IX in 2003](#). Robin L. Parker. (2003 Annual Conference)
- [Title IX and Intercollegiate Athletics: Myths and Realities of 30 Years of Enforcement](#). Catherine Pieronek. (2002 Annual Conference)
- [Get Started: A Practical Guide to Auditing and Monitoring Your Coaches' Compensation System](#). Julie D. Vannatta. (November 1999 CLE Workshop)
- [Salary and Coaches ... Women's Sports: Present and Future](#). Alison B. Marshall. (November 1999 CLE Workshop)
- [Current Legal Issues in College Athletics](#). Mary Ann Connell. (October 1998 CLE Workshop)
- [Title IX and the Reign of Proportionality](#). Maureen E. Mahoney. (1998 Annual Conference)
- [Broadening the Demand for Gender-Equity in Athletics: Financial Aid and Coaches' Compensation](#). Brian A. Snow. (1998 Annual Conference)

Additional Resources:

- [NCAA Title IX Resource Center](#)
- [GAO Report: Intercollegiate Athletics—Recent Trends in Teams and Participants in National Collegiate Athletics Association Sports](#) (July 2007)

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