

# College Athletics and the Law

Practical Guidance on Athletics Laws and Regulations

VOLUME 17, ISSUE 6

SEPTEMBER 2020

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#### 2016 Winner

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## COMPLIANCE

### Expert offers insight into NIL opportunities coming up the pike for your student-athletes

*By Claudine McCarthy, Editor*

When name, image, and likeness opportunities get the green light, they'll encompass far more than just the star quarterback making TV commercials for brand-name athletic apparel or the local car dealership. Those types of opportunities will be rare and "primarily for the elite of the elite," explained Luke Fedlam, Esq., President of Anomaly Sports Group and Partner with Porter Wright Morris & Arthur LLP's Corporate Department, where he leads the Sports Law Practice Group. Instead, most NIL opportunities will be accessible by virtually every college student-athlete, and will involve social media and in-person events that even benchwarmers can cash in on. "There are going to be more than just these large blockbuster endorsement deals," he said.

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## COMPLIANCE

### Understand potential ramifications of ruling involving NCAA show-cause orders

*By Joshua J. Lens, J.D.*

Los Angeles County Superior Court Judge Frederick Shaller issued a ruling in October 2018 invalidating the show-cause order the NCAA's Committee on Infractions placed on now-former University of Southern California Assistant Football Coach Todd McNair. Shaller's ruling, which the NCAA appealed, could have numerous, critical ramifications for college athletics if upheld on appeal.

In a 2010 case, the COI concluded McNair knew or should have known then-USC football student-athlete Reggie Bush's involvement with sports agents jeopardized Bush's amateurism status under NCAA legislation. Further, the COI determined McNair violated NCAA legislation prohibiting unethical conduct by providing false and misleading information to the NCAA's enforcement staff during its investigation.

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## Documentary chronicles positive impact of sports

The new documentary film *After the Game: A 20 Year Look at Three Former Athletes* features former student-athletes sharing how they learned the life lessons that fueled them through their careers.

### Two-Minute Drill

Each month, this feature will include legal pointers and news involving athletes and athletics departments nationwide.

The film chronicles the 1999–2000 season of the women's basketball team at Chapman University in California. The film's director/producer/editor, April Abeyta, was a member of the basketball team while studying film and television production. She juxtaposed vintage footage with recent interviews with two of her teammates and the team's head coach in which they reflect on the impact sports had on their lives.

For information on screenings, go to [www.afterthegamethemovie.com/](http://www.afterthegamethemovie.com/). ■

## Sports law students launch career network

The Student Sports Law Network launched in August, with a mission of becoming the nation's premier network for law students interested in a career in sports law. After a soft launch earlier in the summer, the organization has grown to more than 200 law students from 75 law schools in seven

countries, making it the largest such organization in the world.

The organization offers free membership to law students who are interested in sports. Member benefits include various platforms for thought leadership (blog, podcast, media partnerships, and a virtual symposium in 2021) as well as mentoring and other opportunities.

For more information, go to [www.studentsportslawnetwork.com/](http://www.studentsportslawnetwork.com/). ■

## Past concussions can impair future driving

College student-athletes who have suffered from a concussion may not be ready to drive even after symptoms have resolved, according to new research.

The small study of college students revealed that those with recently resolved symptoms from a concussion showed slower driving reaction times on three different tests in comparison to peers without history of a concussion, according to *Medscape Medical News*. The study's findings were presented at the American Academy of Neurology's Sports Concussion Virtual Conference.

The study's authors compared the reaction times of 14 college students who had recently recovered from symptoms of a concussion with a control group made up of an equal number of students who had not had a concussion. All of the participants in the study took simulated driving reaction time tests and computerized neurocognitive tests. ■

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## Review policies in light of student-athlete activism

By Timothy O'Brien, Esq.

Compelling societal issues and concerns inevitably have an impact on sports, and that's especially evident in the recent nationwide activism involving many student-athletes. Whether rooted in concerns about injustice, inequality, unfair treatment, or fundamental fairness, student-athletes are using their voices and social media platforms to speak out on past actions, present conditions, and the need for sensitivity, understanding, and change on a number of issues.

From individual student-athletes to collective actions by specific teams, activism has taken many forms, including kneeling during the national anthem, candid and sharp criticisms of coaches and administrators in interviews and on social media, threats not to play unless certain changes are made, publication of team statements on pressing issues, and expressions of support in person or online about justice and equality. Although it may be some time before sports in all conferences and division levels resume competition, the increasing frequency of these types of activism suggests schools might benefit from better understanding the legal environment in which they arise so they can establish a framework to support or address issues in the future.

At any public institution, although the student-athletes possess the constitutional right to free speech and expression, this right does have some limits. The U.S. Supreme Court has recognized voluntary participation in athletics carries additional requirements and obligations beyond those for other students. Consistent with this view, as long as any speech or expression restrictions imposed on student-athletes are reasonable in terms of time, place, and manner, they will usually be viewed by the courts as valid. As a result, restrictions on communications on game days, during practices, or relating to the health of teammates may be understandable. With that said, some social media policies obviously go much further and contain significant detail. Developing policies that have the right balance in their design and content is never an easy task.

In contrast to public institutions, this constitutional right doesn't apply at private institutions, and so student-athlete speech, conduct, and expression can be more highly regulated in those environments. Although allowed more flexibility in that regard, as a practical matter, decisions on what to restrict or

allow generally reflects each private school's mission, values, approach, and reputation.

In light of this, many athletics departments have established conduct codes for student-athletes and/or social media policies that purport to regulate different forms of speech, conduct, and activism. The difficult decision for schools now involves whether, how, and where to better define, revise, reestablish, and/or enforce currently established boundaries in these areas. Indeed, recent events and issues involving equality and justice suggest it may be

time for a complete reevaluation of the content of codes and policies so they're actually consistent with developing practices. It's also important to recognize many of these codes and policies were drafted years ago and so may not be as reflective and understanding of where each educational institution now stands on student-athlete speech and expression, particularly regarding significant societal issues.

As a result, college athletics departments may wish to consider taking the following actions:

- Assess the school's overall approach to speech, expression, and activism by ordinary students, and determine how to incorporate that approach into the regulation of conduct by student-athletes.
- Review the existing conduct code and social media policy to determine whether they're overly restrictive and/or address the reality of the current level of activism. Consider revising codes and policies so they're more specific and better reflect the numerous modes of speech and conduct in light of the many social media platforms as well as the athletics department's actual approach in dealing with these issues at present. Obtain input from student-athletes, and coordinate revisions with the school's student-athlete advisory council, legal counsel, and diversity and inclusion office.
- Educate staff members, coaches, and student-athletes on the athletics department's expectations regarding speech, expression, activism, and the existing and/or revised conduct code and social media policy.

The bottom line is that student-athletes tend to give substantive thought to the content of their respective messages and the forms of their expression. As a result, your athletics department should also clearly and effectively communicate expectations for speech and conduct so all parties have an accurate awareness of the permissible and legal parameters. ■

### About the author

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### Continued from page 1

Even if they're not the biggest star on their team or don't have the largest following on social media, student-athletes can expect to be approached by businesses willing to compensate them for posts on Instagram and TikTok, Fedlam said. Say you're just an average college football player who happens to be really into fishing, for example, and your social media followers engage with you when you post about your fishing endeavors during the off-season. A fishing-related company could likely want to benefit off your following, by paying you to send out tweets promoting its brand of rods, reels, or boats, he said. Another example might be a college tennis player who has a social media following and is approached to wear a particular brand of jeans whenever she's not playing tennis and to frequently post photos reflecting that on social media.

In-person appearances will also become common NIL opportunities for even small-time college student-athletes, Fedlam said. And no, you don't have to have nationwide name recognition for this to become part of your financial reality, he noted. College student-athletes will encounter offers from those in their hometown or college town to appear at autograph signings and off-season coaching, clinics, and camps, he explained. Young student-athletes and their parents will seek out one-on-one or group coaching from the college field hockey player who's back in their hometown during summer break, in hopes of having similar success in that sport or even receiving scholarship offers.

Also marketable will be the student-athletes who can tell a unique story, perhaps about their transition from high school into college, Fedlam explained.

In these scenarios, businesses will take care of the organization and registration for the camps, clinics, and other events, and the student-athlete merely has to show up, benefiting financially from loaning out their name, image, and likeness in promotional advertising and in person at the event, he said. It's not far-fetched when you consider that parents are already paying for similar arrangements with private tutors in academic subjects, so it's easy to see it transfer to athletics, he noted.

On the other hand, you can expect college student-athletes to have entrepreneurship opportunities that might have little to no relationship to the student-athlete's athletic achievements at your school, Fedlam noted. In the past, student-

athletes who owned a business prior to college, needed to ask the NCAA for a waiver, which sometimes was granted but other times the student-athletes just closed their businesses upon entering college, he said. But soon enough, college student-athletes will be permitted to start and run their own businesses, making and selling products and services, such as designing clothing or helping applicants with college entrance essays, he explained.

### Educate, prepare student-athletes for NIL opportunities, challenges

Although name, image, and likeness opportunities could provide college student-athletes with financial benefits, they should expect plenty of challenges, too, warned Fedlam.

Student-athletes will need to first determine if they can manage the time demands and decisions surrounding NIL opportunities, in addition to their academics and athletics obligations. And college athletics administrators have a valuable role to play in this, he said. "The education has to start now so the student-athletes can be prepared. Education around NIL is the most critical component of what we're going to see over the next 10 months or so," Fedlam said. "Student-athletes need to understand the totality of the name, image, and likeness environment. It's a matter of understanding all the responsibility that's going to come with it."

Although of course it's important to ensure student-athletes, coaches, and staff know how to comply with NIL rules and regulations, Fedlam recommended also providing education about the following key areas, which can help protect your student-athletes:

✓ **Building a team of advisors.** Student-athletes considering NIL opportunities should learn how to establish a team of advisors, which could include a marketing advisor or agent; an independent, objective attorney; an accountant; and a business manager and/or social media manager. Team size and make-up depend on each student-athlete's level of celebrity, level they want to engage in opportunities, and amount of current/potential assets. Student-athletes need to understand the value and requirements of having a team of professional service providers around them. For example, most student-athletes think of lawyers only as someone to help them get out of trouble, and don't understand the value of an independent, objective lawyer who can serve as their advisor and protect their best interests.



Student-athletes need to also understand the scope of services each professional provides, how each professional is compensated, and how to manage that compensation.

✓ **Researching potential hires.** Although not every NIL opportunity will warrant hiring an agent, student-athletes need to learn about the importance of conducting due diligence when interviewing and hiring agents or other professionals. They'll need to know how to dig into each professional's background and to look for trust factors. Before student-athletes sign a contract or agreement with an agent or other professional, they should understand the terms, especially surrounding termination and compensation.

✓ **Managing decisions.** Before student-athletes consider endorsement opportunities, they need to know how to develop, manage, and market their own brand, which involves knowing who they are and how they want to represent that. They'll need a defined, clearly articulable, and repeatable decision-making process, which will prove very valuable in helping them make effective, focused decisions with each opportunity. For example, student-athletes should know how to decide if they want to accept or decline deals their freshman year, which would give them time to garner more of a following and to learn from the school's social media staff, better positioning them for NIL opportunities in their sophomore year. Of course, factors in the decision-making process will include financial need.

✓ **Managing finances.** Student-athletes will need education about financial management that goes beyond basic financial literacy and explains how to budget NIL compensation and how that compensation could impact scholarships, PELL grant money, and stipends they may already be receiving. Although some student-athletes, especially those who face economic challenges or need to send money home to their families, will have a hard time turning down NIL opportunities, you want to warn them about taking on deals strictly based on financial need. Student-athletes should also learn the ins and outs about compensation, such as how much of it goes directly to them versus taxes and/or advisors, and if it would make sense to set up an LLC.

✓ **Understanding deals.** Whether it's a deal for appearances, endorsements, camps, clinics, or speaking engagements, student-athletes must understand what they're agreeing to do. Contracts from big-name brands will likely have been

drafted by experienced lawyers, but for deals with smaller organizations, such as camps and clinics, they might just involve signing an agreement that was pulled off the internet. Student-athletes need to understand if they're agreeing to the use of their name, image, and likeness (which might be referred to in a contract as intellectual property and/or photos) before, during, or even after a particular event or when an agreement expires. If the required appearances end up conflicting with the student-athlete's academic or athletic obligations or schedules, do they know the ramifications of breaching that contract? How about indemnification clauses? For example, if the student-athlete gets injured during an in-person event, can that company be held responsible for negligence? "Compensation is important, but so much more important is knowing what services they have to provide, what rights they have, and what rights they're giving up," Fedlam noted.

To ensure student-athletes receive an effective education on all of these points, Fedlam said, athletics administrators will need to take a multifaceted approach. While your compliance department will know the rules and can take on the role of compliance-related education, you'll need to reach out further to cover other equally important areas, he advised. Lean on your academic counterparts, such as professors with work experience in marketing, branding, and digital storytelling, he recommended.

Also consider tapping into outside, third-party resources, who can share their knowledge about the market and industry. Fedlam provides schools with a comprehensive curriculum and real-world practical perspective and education, all of which is also now available via virtual educational workshops accompanied by online resources that student-athletes can access on their schedule and can refer back to again later when the situation arises, he said. Workshop fees are determined based on the school's need, he said.

And don't overlook the importance of providing parents and guardians with education about the NIL environment, Fedlam warned. Student-athletes will likely seek out the advice of their parents and guardians, but the NIL questions and decisions are likely to be a whole new world for them, too, he said. That's another avenue where college athletics departments can help provide valuable guidance, he noted.

For more information, *you may email* [lfedlam@anomalsportsgroup.com](mailto:lfedlam@anomalsportsgroup.com). ■

## Boost morale, productivity with actual conversations

By Claudine McCarthy, Editor

Remote work, Zoom meetings, emails, texts, and social media can help you stay connected to career and family while limiting your exposure to the COVID-19 virus, but they won't protect you from catching the loneliness bug triggered by limiting your exposure to chit-chat. Even before the shutdown brought on by the COVID-19 pandemic, "the world was already experiencing a loneliness epidemic," according to Celeste Headlee, an award-winning journalist, professional speaker, and author of *Heard Mentality* and *We Need To Talk: How To Have Conversations That Matter*. She spoke during a webinar hosted by NASPA: Student Affairs Administrators in Higher Education. "The human voice is healing," she explained, and authentic interactions boost the immune systems of those involved.

Chit-chat with others — even strangers — is one of the quickest ways to reduce cortisol, stress, and heart rate, among other physical, mental, and emotional health benefits, Headlee said. Even a 10-minute conversation improves cognitive test

results and success in many other areas, she said. For example, when a manager walks around the office to talk to staff members, that's likely to lead to boosts in morale and profit margins and decreases in turnover, she noted.

Despite all these benefits of verbal conversations, and long before social distancing guidelines were issued, we as a society were already choosing to distance ourselves in many other ways. In fact, nearly 90% of people, on average, check their cellphones during in-person conversations with family and friends, Headlee said. It seems we interact with our cellphones more than we interact with actual people.

People avoid chit-chat partly because they're addicted to their cellphones, Headlee said. Every time we refresh our Twitter feed or email screen, or receive a new text, we get a boost of dopamine, which then encourages us to keep texting and emailing instead of actually talking to one another, she noted.

On the other hand, an actual authentic conversation (in which you hear a human voice) triggers a

### Review Q&As about the lost art of conversation

Celeste Headlee, an award-winning journalist, professional speaker, and author, addressed some critical questions about communication during a webinar. Here's an excerpt of that Q&A session, adapted for space and clarity.

**Q: Why aren't we talking to one another?**

**A:** For these three main reasons:

- **The illusion of speed.** We honestly believe texting and emailing are faster than talking. But it's a lie and a delusion we tell ourselves. Emails and texts aren't more efficient. They lead to many more misunderstandings, conflicts, and mistrusts than talking. Sophisticated and nuanced information gets relayed to our brains more efficiently when we actually talk to one another.

- **Our fears.** We're afraid the listeners will reject us, won't like us, and will think we're dumb.

- **Mistaken assumptions.** We think we have nothing to talk about, especially among student-athletes and other young people. But you can always find common ground. Even if you don't agree on politics, you can find something you both like, whether it's tacos, Star Wars, or dogs.

**Q: Does note taking reinforce what you're hearing, or does it qualify as multitasking, which interferes with listening?**

**A:** Using a laptop does interfere with listening. But there's something about the manual process of actually taking notes down in written form that gets the information into our memory.

**Q: What's something I can do to improve the efficiency of conference calls while working from home?**

**A:** Conference calls work better when you have your camera on because your colleagues can see if you're looking down at your phone or otherwise distracted, which holds you accountable and forces you to pay attention to one another. And that makes conference calls shorter and more productive.

**Q: What do you say to those who avoid real conversations because they're introverts?**

**A:** A giant number of people call themselves introverts, but introverts and extroverts are extreme ends of the spectrum. In reality, almost all of us are ambiverts, which means we can adapt as necessary. If you label yourself an introvert, you're more likely to avoid social interactions, which degrades your social skills, which then leads you to believe you're socially awkward. It becomes a very dangerous, vicious cycle. So just pick up the phone and talk to someone. ■

shot of serotonin, which makes us more compassionate, generous, and kind, Headlee said. And that's why people typically feel happier after a real conversation on the phone versus an electronic conversation, she explained. Even a simple hand wave or handshake (the real, live kind, not in emoji form) can boost our moods, but isolating ourselves

can negatively impact our health and immune system, she noted.

So what's the antidote for all this loneliness? Calling someone on the phone for some actual chit-chat, Headlee said. "And it's so crucial now, when we're isolated. So pick up your phone and use it as a phone. Use your own voice to help other people," she advised. ■

### Apply 10 tips for more effective communication

Sometimes it just seems easier to send a quick text or email rather than actually talking. After all, conversations take time and sometimes don't go well, but that's the other person's fault, right?

"Fewer than one in five people think they're the ones to blame when a conversation goes badly. We can't all be blameless. It can't always be the other person," said Celeste Headlee, an award-winning journalist, professional speaker, and author, who shared her insights during a webinar hosted by NASPA: Student Affairs Administrators in Higher Education.

You can make your conversations — at work and beyond — more successful by following Headlee's tips:

**1 Don't multitask.** While in Zoom meetings, close other tabs/windows. During conference calls, don't multitask — simply because it doesn't work. In fact, multitasking decreases IQ by 10 to 12 points and the quality of both tasks by 25% or more. Even if you just keep your email inbox open in the background during a Zoom meeting or your phone out on the table during an in-person meeting, you're still thinking about it and your brain interprets that as multitasking. When people don't try to multitask, it saves time (e.g., conference calls get shorter).

**2 Don't lecture.** Don't try to change the other person's mind, especially in this era when so much is politicized. As soon as people feel you're giving them unsolicited advice, they'll resist it. Instead, ask questions to promote thinking and problem-solving and to gather and understand new information.

**3 Ask open-ended questions.** Asking yes or no questions or guessing at the answers won't amount to authentic conversation, which is a mutual exchange of ideas with both parties listening, responding, and learning from one another. Ask brief, open-ended questions (e.g., "What happened?" or "How are you feeling?" or "What do you need?"). Stay away from questions that pass judgment (e.g., "How could you believe that?" or "What kind of person are you?"); instead, ask such questions as "What sources are you reading?" and "What led you to think that?"

**4 Go with the flow — of the conversation.** Our inner monologues interfere with listening, because we have stories and points we can't wait to share. By

choosing to let go of your inner thoughts, you can truly listen.

**5 If you don't know, say so.** It's very difficult to resist Googling everything. Instead, say "I've never heard of that; tell me about it." Acknowledge you can't know everything, Headlee noted, and remember that "pretending knowledge erodes trust." To build trust, simply admit you don't know.

**6 Don't equate your experience with theirs.** When people share something tough or painful, we're tempted to top it. Even if you think you're expressing empathy, the other person hears it as conversational narcissism or a tendency to default to our own story. When we try to fix the problem or give unsolicited advice, it's almost never heard or implemented but instead interpreted as an attack. If conversation partners ask about your experience, tell them. Otherwise, just listen as you let them get it off their chest. For example, if they're afraid, let them tell you about that.

**7 Don't repeat yourself.** The effort to remember helps people to remember. If you repeat something, you're removing the effort from their side of the equation, which makes them less likely to remember what you said. Repeating yourself doesn't help people remember. In fact, they're less likely to listen and to remember because they know you're going to repeat yourself. Try to say things once. When people realize you're not going to repeat yourself, they're going to listen and remember.

**8 Leave out the details.** Stay out of the weeds. Verbalizing your inner monologue gives too many details that don't interest your audience and loses their attention.

**9 Practice engaged listening.** Listen to not just their words but their ideas and what they're trying to say. That will decrease the conversation's length. If you don't have the brain space to really focus and listen, postpone the conversation by saying something like "Give me five minutes" or "Come back tomorrow."

**10 Be brief.** Attention spans are less than one minute. That means when you're speaking, you have the listener's attention for 30 to 60 seconds. So if you're likely to present a long list of items in a meeting, for example, turn it into an interactive session rather than a monologue. ■

**Continued from page 1**

As a result, the COI imposed a one-year show-cause penalty on McNair beginning June 10, 2010. The penalty precluded McNair from engaging in any recruiting activities during that timeframe. Further, any university employing McNair during the show-cause period must submit a report to the COI evidencing its understanding of the penalties and acknowledging responsibility to monitor compliance with them.

USC didn't renew McNair's contract, and McNair hasn't worked in college athletics since. McNair filed a lawsuit against the NCAA that, among other things, challenged the show-cause penalty. McNair contended the show-cause order violated California law by restricting McNair's ability to secure employment at NCAA member universities and effectively ended McNair's college coaching career. Shaller agreed, declaring void the relevant NCAA legislation regarding show-cause orders within California under a state law prohibiting unlawful restraints on engaging in a profession.

The NCAA appealed Shaller's decision, and the case is pending before the California Court of Appeal, Second Appellate District. The NCAA based its appeal on a number of legal arguments.

More practically, recent events reveal show-cause orders don't automatically preclude an individual from coaching at the university level. For example:

- Auburn University hired Bruce Pearl as its Head Men's Basketball Coach while he was subject to a show-cause order stemming from an incident while Pearl coached at the University of Tennessee.

- Kent State University hired Rob Senderoff as an Assistant Men's Basketball Coach while the NCAA investigated his involvement in NCAA violations at Indiana University, retained him after the COI imposed a 30-month show-cause order on him, and eventually promoted him to Head Coach.

- Saint Peter's University will reportedly retain Head Men's Basketball Coach Shaheen Holloway despite his recent receipt of a 20-month show-cause order for involvement in an NCAA violation while he was on Seton Hall University's men's basketball staff.

These examples of universities hiring or retaining coaches subject to show-cause orders demonstrate the penalty doesn't automatically end a coach's career at the university level. This fact, combined with the NCAA's other sound legal arguments, could result in the Second District overturning Shaller's decision and restoring the validity of show-cause orders within the jurisdiction. However, the Second District has been skeptical of NCAA positions before and may uphold Shaller's decision.

If appellate courts continue to uphold Shaller's decision, the ramifications for college athletics are numerous and critical. The NCAA would lose a critical deterrence tool in its enforcement efforts. Some believe coaches at

California universities could be more likely to flout NCAA rules if they couldn't receive valid show-cause orders. Although unlikely, there has been concern in the industry that conferences or even the NCAA could oust California universities to maintain consistency and fairness.

The voiding of show-cause orders in some parts of California, or possibly all of California if the case makes its way to the state's Supreme Court, could affect employment decisions involving coaches. For example, universities in jurisdictions where show-cause orders are void might be more likely to hire coaches who may violate NCAA rules. Coaches who received a show-cause order in a jurisdiction where they're void may be more likely to be retained or secure employment.

Coaches' attorneys are sure to research relevant state laws for statutes similar to the California law under which Shaller invalidated show-cause orders. Legal challenges to show-cause orders similar to McNair's are likely. Athletics departments may consider possible alterations to coach contracts in the event a coach receives a show-cause order that the legal system invalidates.

Those in the college athletics industry should follow the NCAA's appeal of Shaller's decision in the McNair lawsuit and prepare accordingly in the event it's upheld on appeal.

For further analysis and information regarding the legal status of show-cause orders, please see my article forthcoming in *The University of New Hampshire Law Review*. ■

**About the author**

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## Did court stop college from enforcing suspension?

By Eric Lyerly, J.D.

The plaintiff, a senior at Vassar College, was the captain of the school's soccer team. In May 2019, a female classmate reported to the Title IX coordinator that the plaintiff attempted to coerce her into a sexual encounter after a party they both attended. She also claimed he had engaged in nonconsensual sexual touching of her body in violation of the school's Sexual Misconduct Policy.

The Title IX coordinator investigated the complaint. After a September hearing, the presiding officer decided there was no proof the accuser had consented to sexual activity and the actions alleged met the definitions of "sexual contact" and "sexual harassment" in Vassar's regulations. Accordingly, Vassar suspended the plaintiff for one semester.

The plaintiff sued Vassar, claiming violation of Title IX, and sought a preliminary injunction to stop the college from enforcing the suspension while his lawsuit was pending. The plaintiff argued he would suffer irreparable harm absent a preliminary injunction because a suspension would force him to decide between returning to school to obtain his degree or pursuing professional soccer opportunities.

The district court judge explained a party seeking a preliminary injunction must show it (1) will suffer irreparable harm (such where money damages won't compensate adequately) and (2) is likely to succeed on the merits of his lawsuit.

*Doe v. Vassar College*, No. 19-cv-9601 (S.D. N.Y. 11/21/19).

### Did the court grant a preliminary injunction for the plaintiff?

**A. Yes.** The suspension would cause the plaintiff to suffer irreparable harm because it would advance his timeline to make important academic and vocational decisions, and possibly preclude him from graduating and pursuing professional opportunities on a typical student-athlete timeframe.

**B. Yes.** The interruption to the plaintiff's coursework couldn't be remedied by money damages because he had no alternatives to obtain his degree on time.

**C. No.** The plaintiff's suspension doesn't constitute irreparable harm, as the punishment arose from a disciplinary investigation and was consistent with the college's sexual misconduct policy for such infractions.

**D. No.** The plaintiff wouldn't face irreparable harm if suspended, because he could take credits required for graduation at another university and because such a delay could be compensated through money damages.

Correct answer: D.

The court ruled the plaintiff didn't suffer irreparable harm warranting a preliminary injunction. The plaintiff didn't establish a connection between the suspension and the pursuit of his soccer career. Accordingly, the court found the only harm the plaintiff would suffer was a single-semester delay in his education and graduation. However, this could be remedied by acquiring credits at another school to graduate on time. Moreover, the court stated such a delay was compensable through money damages, as the harms suffered from a delay in graduation are quantifiable. ■

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## AGE DISCRIMINATION

**Judge rules in favor of university**

**Case name:** *Kenny, et al. v. University of Delaware, et al.*, No. 1:17-cv-01156 (D. Del. 11/08/19).

**Ruling:** The U.S. District Court, District of Delaware granted a summary judgment in favor of the University of Delaware.

**What it means:** A plaintiff claiming age discrimination must show she: (1) is over 40, (2) was qualified for the position she sought to retain, and (3) suffered an adverse employment action under circumstances creating an inference of intentional discrimination. Employers might have many reasons for firing an employee, and a plaintiff can't avoid summary judgment by merely pointing out that her employer gave several nondiscriminatory reasons for its actions.

**Summary:** The University of Delaware's athletics director received an anonymous letter in September 2016 accusing the women's volleyball team's head coach of bullying players. A few days later, a player's parents claimed the plaintiff had shoved their daughter.

The AD's review of student-athlete responses to a university survey about the plaintiff allegedly showed (1) 10 players stated they were sometimes subjected to verbal abuse and (2) 11 stated the coaching sometimes involved mental abuse.

The AD fired the plaintiff shortly after reviewing those surveys, and the plaintiff filed a lawsuit claiming age discrimination. The university filed a motion for summary judgment, asserting the coach was fired because the AD believed she was unprofessional.

The plaintiff argued the reasons given by the university for firing her were false because they varied between: (1) the parental complaint, (2) the survey responses, (3) observations of her coaching methods, (4) the anonymous letter, and (5) the team's losing record.

But the judge ruled those reasons were all consistent with unprofessional behavior. He explained employers might have many reasons for terminating an employee, and a plaintiff couldn't avoid summary judgment by merely arguing the employer had given several consistent nondiscriminatory reasons for its actions.

Alternatively, the plaintiff insisted all of the accusations were false. But the judge said it was irrelevant whether the termination was mistaken or unfair, because the only issue was whether the AD honestly believed the plaintiff had been unprofessional.

**LAWSUITS & RULINGS**

This regular feature summarizes recent court records in rulings of interest to athletics administrators; summarized by Richard H. Willits, Esq. ■

After deciding there was insufficient proof the AD had been lying, the judge granted summary judgment in favor of the university. ■

## ASSUMPTION OF RISK

**Court rules in favor of college**

**Case name:** *Calderone v. Molloy College, et al.*, No. 2017-01160, No. 2017-07936 (N.Y. App. Div. 11/13/19).

**Ruling:** The Appellate Division of the Supreme Court of New York affirmed a summary judgment in favor of Molloy College.

**What it means:** A college isn't liable to a student-athlete who sustained injuries from known or obvious sporting activity risks.

**Summary:** The plaintiff was a Molloy College student-athlete playing in an intercollegiate soccer match in 2012.

According to the plaintiff, he (1) sustained a concussion after being struck in the head with the soccer ball and (2) continued to play until he was replaced during the last minutes of the match. The plaintiff sued, claiming his injuries were exacerbated because the coaches and trainers didn't remove him sooner from the match.

The trial court judge granted summary judgments in favor of Molloy, ruling the plaintiff assumed the risk of his injuries.

The appellate court ruled Molloy wasn't liable because: (1) the plaintiff had consented to the known or obvious risks of playing soccer, (2) there was no reason to believe he had sustained a concussion, and (3) there wasn't any unreasonable increase in the risks normally associated with playing soccer. ■

## FINANCIAL AID

**Judge rules against NCAA**

**Case name:** *Shawne Alston, et al. v. National Collegiate Athletic Association, et al.*, No. 19-15566, No. 19-15662 (9th Cir. 05/18/20).

**Ruling:** The U.S. Court of Appeals, 9th Circuit upheld an injunction ordering the NCAA to allow unlimited compensation to student-athletes for education expenses.

**What it means:** The NCAA rules concerning reimbursement for education expenses were unnecessarily restrictive to maintain the tradition of amateurism.

**Summary:** A group of Division I student-athletes filed a lawsuit in 2015 challenging the entire compensation scheme promulgated by the NCAA.

After a trial, the judge partially agreed, concluding the NCAA limits on education-related benefits were unreasonable restraints of trade.

She allowed the NCAA to continue limiting payments that were unrelated to education but forbade it from imposing limits on most education-related expenses that weren't included in the cost of attendance, such as tutoring and studying abroad.

On appeal, the NCAA accused the trial court judge of straying from a long line of cases holding that a student-athlete must not be paid a penny over the cost of attending a college or university.

In a lengthy opinion, the appellate court ruled (1) the concept of amateurism was hopelessly vague and (2) uncapping education-related benefits would preserve consumer demand for college athletics.

The appellate court affirmed the ruling, holding there was ample evidence the NCAA rules concerning education expenses had been more restrictive than necessary to maintain the tradition of amateurism. ■

TERMINATION

Judge rules against university

**Case name:** *Stanton v. Jarvis Christian College*, No. 6:18-CV-00479 (E.D. Tex. 11/13/19).

**Ruling:** The U.S. District Court, Eastern District of Texas refused to dismiss a lawsuit against Jarvis Christian College.

**What it means:** A plaintiff claiming she was the victim of retaliation in violation of the Family and Medical Leave Act doesn't need to establish that her leave request was the only cause of her termination. Rather, she is merely required to show the two events aren't completely unrelated.

**Summary:** The head coach of the Jarvis Christian College women's basketball team requested FMLA leave on June 9, 2018.

A few days later, she delivered a completed FMLA form in which her doctor said she had incapacitating anxiety and depression.

After she was fired on June 29, she sued, claiming retaliation for making an FMLA request.

Jarvis filed a motion for summary judgment, arguing the plaintiff couldn't show her request for medical leave had anything to do with her termination.

The judge said the plaintiff didn't need to establish her leave request was the only cause of her termination, and was only required to show the two events weren't completely unrelated.


He also explained: (1) when evaluating whether an adverse employment action was causally related to an FMLA request, courts should consider the temporal proximity between the two events; and (2) Jarvis had ignored the fact the plaintiff was fired a mere 20 days after her initial request.


The judge dismissed other portions of the suit but refused to grant summary judgment on the retaliation claim, ruling the temporal proximity alone created a factual dispute to be decided by a jury about whether the two events were related. ■


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## Campus partnerships play valuable role in managing legal ramifications of tough decisions tied to pandemic

By Claudine McCarthy, Editor

College athletics administrators have long known the importance of considering the legal implications of the decisions they make as part of their daily work. But now those legal considerations have increased in scope and complexity due to a completely changed environment.



KATIE E. COLLYER

“College athletics administrators are facing unprecedented challenges due to the global pandemic of COVID-19. The pandemic has created tricky new legal questions for administrators to navigate,” said Katie E. Collyer, Esq., attorney with the law firm of Church Church Hittle + Antrim, a role she’s held for four years now. As a member of the firm’s Sports Law and Litigation practice groups, she represents clients in a variety of sports law matters, including guiding Division I schools and involved individuals through the NCAA investigation, infractions, and appeals processes, and helping student-athletes and schools with initial and continuing eligibility matters, transfer waivers, and student-athlete reinstatement. She also conducts Title IX athletics investigations in response to OCR complaints and uses proactive reviews to assess schools’ Title IX compliance.

At the top of a long list of challenges, athletics administrators face significant concerns related to hosting sports, said Collyer, a member of the *College Athletics and the Law* Advisory Board. Deciding when and whether to allow teams to return to competition “should be balanced against preventive or mitigating measures as well as potential legal liability if an institution’s staff, student-athletes, or even spectators contract COVID-19,” she advised.

At the same time, athletics administrators must also deal with the budget crunches brought on by the loss of revenue from the abrupt ending of this past spring season and the delays and/or cancellations during this fall season, noted Collyer, who previously held internships at two universities as well as the NCAA and the Horizon League. “As such, some administrators are in the unenviable position of eliminating sports, adjusting teams’ schedules, or making budget cuts,” she said. “All of these difficult decisions can have potential Title IX ramifications,” she warned.

### Take key steps

To help college athletics administrators successfully prepare for and manage these challenges, Collyer recommended these key steps:

- Place the health and safety of student-athletes and staff at the forefront of decision-making when weighing whether to allow teams to return to play. “After that, all other decisions will fall into place,” she noted.

- Keep Title IX compliance in mind along the way. Pair with on-campus partners in your school’s general counsel’s office and/or Title IX office, or hire a third-party legal expert to assist in the decision-making process. “These individuals can advise athletics administrators of any Title IX ramifications that budget-related decisions may bring and can help ensure administrators make well-informed decisions,” she noted.

### Apply lessons learned

College athletics administrators can glean valuable lessons as they review their experiences leading their departments through the COVID-19 crisis. And these lessons learned can help athletics administrators to better manage their response to this crisis as well as help them to better prepare for other crises in the future. For example, the pandemic has made it very clear that it’s even more important now to “lean on your campus partners for advice and guidance,” Collyer said. Because higher education as a whole is feeling the impact of this crisis just as much as individual athletics departments, “campus partners can offer valuable insights and ideas” for handling struggles related to the pandemic, she noted. “Athletics administrators can also offer their own unique perspectives on how campus decisions will impact their student-athletes, so the information-sharing can be mutually beneficial,” she said.

“Athletics administrators are well-served to include campus partners in their major decision-making processes. Especially in times of crisis, including all relevant stakeholders will help avoid future potential pitfalls and pain points and can only serve to strengthen relationships between the campus and athletics,” Collyer said.

For more information, you may email Collyer at [kcollyer@cchalaw.com](mailto:kcollyer@cchalaw.com) or follow her on Twitter: @cchacollegiate. ■