

Dealing with the Compensation Problem in Collegiate Athletics: Up a Certain Creek, Trying to Find a Paddle.

Jason Lewis*

Jonathan Stahler's Article *Creating an Equitable Playing Field: Vital Protections for Male Athletes in Revenue-Generating Sports who are predominantly African-American* addresses the popular and controversial topic of compensating Division I NCAA student-athletes in revenue generating sports like Men's Football and Men's Basketball. While the article does a good job of pointing out the main problems inherent in the current NCAA model and attempts to postulate a feasible solution, it only offers a narrow proposal with little information relating to how the system can be changed.

The current NCAA model was born of a troubled past. The article begins by pointing out some of the race and gender hurdles that plagued college athletics in its early days. While the gender inequality problem was addressed by the congressional enactment of Title IX, the article seeks to help the reader understand that certain racial inequities, while largely reduced since the Jim Crow era, still have a devastating effect on minority student-athletes. Even though the author does not explicitly state that Title IX has proven to adversely impact male minority student-athletes in revenue generating sports, they do imply that Title IX's influence has decreased participation opportunities for male students in general. The author is careful not to go beyond this inference, perhaps in deference to the widely held view that Title IX has been a positive force in collegiate athletics and in the fight for gender equality. Beyond this recognition, the article does not make any suggestion that

* Sandra Day O'Connor College of Law, Arizona State University (J.D. Law, 2015 exp.).

Title IX should be repealed or amended, most likely because that type of action would be highly improbable and hugely unpopular.

The article goes on to highlight some of the current proposals being discussed to address the disproportionate compensation problem in collegiate athletics between student-athletes, member institutions, and the NCAA. Two of these proposals deal with current and past litigation. The first regards ongoing litigation over intellectual property infringement and more directly addresses the compensation component of the problem. The second addresses past actions brought on equal protection grounds. The author correctly points out that any case brought on equal protection grounds is going to be determined on a case-by-case basis, and accordingly explain that the discussion concerning such cases is merely illustrative of the underlying problem. While the author briefly summarizes the impetus behind litigation over intellectual property infringement, they give the topic little treatment and almost predict that the plaintiffs will be ultimately unsuccessful. This conclusion might be diminished by recent progress in the *Keller v. Electronic Arts* case.¹ In *Keller*, a class of current and former Division I NCAA football and basketball players challenged the video game maker's use of their likenesses without permission. The 9th Circuit affirmed the lower court's holding that Electronic Arts did not enjoy First Amendment protection in their portrayal of players in their video games.² The author is primarily referring to Ed O'Bannon's current suit against the NCAA, which is an antitrust action brought against the NCAA by

¹ In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013).

² *Id.* at 1284.

several current and former collegiate athletes³ The author's skepticism concerning the litigation route may be warranted since similar actions against the NCAA have been unsuccessful in the past, but as more players seem willing to join class actions, it may be harder for the courts to side with the NCAA.

The remaining proposals discussed by the author deals with possible changes at the association level as opposed to instigating change through legislation or litigation. The author devotes some time to the popular proposal that student-athletes be awarded a cost-of-attendance stipend in addition to the scholarships they are already receiving. The author explains that there was some popular momentum behind this proposal, but that it has lost support because implementing it would create a competition disparity between large schools with ample budgets and smaller schools operating on much less. Arguing in favor of this proposal, the author points out that current budget distributions indicate a great disparity in funds being allocated to coaching salaries and marketing. In the author's view, even schools with a comparatively small operating budget should be able to realign fund distribution in order to accommodate a cost-of-attendance stipend. While the author intimates a workable solution, it seems unlikely that any university would implement such a radical change without enormous outside pressure. Although not suggested by the author, it is possible that the resolution of the O'Bannon lawsuit may provide this type of pressure. If that were the case, institutions might be forced to drastically reorganize their budgets to accommodate the additional stipend, an action that could result in some undesirable side effects.

³ Stewart Mandel, *Judge allows Ed O'Bannon v. NCAA to proceed to trial*, SI, (Feb. 20, 2014), <http://sportsillustrated.cnn.com/college-football/news/20140220/ed-obannon-lawsuit-proceeds-to-trial/>.

Another proposal suggested at the association level argues that institutions should maintain the status quo. This proposal is predicated on the notion that the NCAA, in its current form, represents the best compromise between the foundations of amateurism on which the NCAA was founded and the modern realities of obtaining a higher education. The status quo proposal points out that there really is no amateur component to the NCAA since student-athletes are effectively paid in tuition, room and board, books, and academic services. The author's opposition to this proposal closely relates to the author's marginal support of a cost-of-attendance stipend, since it has become clear that the current model undercompensates student-athletes. Proponents of the current system argue that student-athletes are receiving far more than just an education; they are receiving an opportunity to hone their craft in hopes of practicing on a professional level. The author argues that if this opportunity is reflected in the compensation for student-athletes, then it should be reflected in the compensation for coaches as well. As it stands in the current system, coach's salaries increase every year with no similar benefit being experienced by student-athletes. Therefore, the author reasons that a system viewed as a training platform for some professional endeavor should treat all actors equally and reflect that treatment in commensurate compensation. This counter argument assumes that all collegiate coaches have devices on moving to the professional ranks, but perhaps the assumption is warranted since the initial argument assumes that all student-athletes have the same aspirations.⁴ The author's

⁴ See *Probability of Competing Beyond High School*, NCAA.ORG, (last updated Sep. 2013), <http://www.ncaa.org/about/resources/research/probability-competing->

most poignant criticism of the status quo approach points out that the rise in benefits to coaches has happened at the same time that student-athletes have struggled to maintain healthy lifestyles due to financial limitations.

The author goes on to highlight a proposal to allow for more student-athlete education regarding professional sporting careers while they are still in school. NCAA bylaw 12.3 mandates that student-athletes and their families may not receive any type of compensation from professional sports agents or their representatives.⁵ The bylaw does not prohibit contact between student-athletes and agents, but some universities impose stricter standards than the bylaw⁶. The author explains how an organization called Collegiate Sports Advisors wants to start an institution based outreach program that can facilitate and structure communications between student-athletes and agents. The author is amicable to this approach, but points out that it does not address the compensation problem and does not assist student-athletes who will not play professional sports. Collegiate Sports Advisors appears to offer student-athletes an environment in which they can select future representation free of duress or coercion. There is approximately one agent to every two and one half players in the NFL,⁷ a ratio that suggests that at least some agents will attempt to take advantage of future players in order to gain a piece of the market. By facilitating meetings between student-athletes and agents, institutions might be able to mitigate many of the abuses regularly perpetuated against uneducated and vulnerable

beyond-high-school (highlighting that less than 2% of college football players become professional football players).

⁵Nat'l Collegiate Athletic Ass'n, 2009-10 NCAA Division I Manual, 69 (2009), <http://www.ncaapublications.com/productdownloads/D110.pdf>.

⁶*Id.*

⁷ Andrew Brant, *An agent's life isn't all glamour*, ESPN.COM, (Nov. 27, 2012), http://espn.go.com/nfl/story/_/id/8681968/nfl-agent-life-all-glamour.

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athletes. Additionally, the approach called for by College Sports Advisors should serve to increase the quality of agent representatives, since institutions would have some control over which agents have access to their student-athletes. While this does not solve all of the problems student-athletes face during their collegiate careers, it does alleviate a piece of the identified financial education problem by giving student-athletes financial counseling sooner.

The final proposal examined by the author deals with state legislation in California. The legislation was designed in order to protect student-athletes from losing their scholarships when they become injured, to pay for their medical insurance expenses when they become injured or exhaust their athletic eligibility before they graduate, to provide financial and life-skills education to all student-athletes, to standardize disciplinary procedures for all students, and to improve protocols related to serious sports related injuries and ailments. While the author admires this approach, they point out that it fails to address the financial burdens student-athletes find themselves under. Furthermore, the author laments the scope of the legislation since it only applies to 23 institutions in California (since the criteria is based on an institution's marketing revenue). This may be unfair criticism of the legislation. Its passage bodes well for future student-athletes by creating a precedent for similar legislation in other states. The author appears to be searching for a complete solution to the problem, and the bill in question certainly does not offer a complete solution. Regardless of their criticism, the author clearly sees this type of legislation as a component of any future program

addressing the problem and incorporate its ideas into their ideal solution.

Absent from the author's discussion, mainly because the development is so recent, is a treatment of the attempts being made by scholarship football players at Northwestern University to unionize. In late January of 2014, the players petitioned the National Labor Relations Board (NLRB) to unionize under the College Athletes Players Association (CAPA).⁸ In their petition, the players are primarily seeking greater bargaining power in regards to health and safety issues. The players claim that they will not seek to change the current compensation model in the NCAA, but that they would want the ability to bargain for better financial support and increased scholarship protection. The NCAA's position has not changed on this matter since revising their classifications in the wake of *Denver v. Nemeth*: student-athletes are not employees.⁹ This classification has long kept student-athletes from collecting any type of worker's compensation, and, if the NLRB sides with the NCAA, it will keep student-athletes from gaining any type of substantial bargaining power with member institutions. As of this moment, the NLRB has decided that Northwestern football players may vote on whether or not unionize.¹⁰ This decision is on appeal, so it remains to be seen whether or not the players will unionize and what type of effects that organization would have on collegiate athletics.

After examining many of the current proposals designed to alleviate the unfair compensation and disparate treatment of predominantly African-American student-

⁸ See e.g. *Northwestern University*, NLRB.GOV, (last visited Mar. 28, 2014), <http://www.nlr.gov/case/13-RC-121359>

⁹ *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953).

¹⁰ See *NLRB Director for Region 13 issues Decision in Northwestern University Athletes Case*, NLRB.GOV, (Mar. 26, 2014), <http://www.nlr.gov/news-outreach/news-story/nlr-director-region-13-issues-decision-northwestern-university-athletes>.

athletes in revenue generating Division 1 NCAA sports, the author outlines what he sees as a more efficient and effective plan. The author recommends that student-athletes be given fair compensation in the form of a cost-of-attendance stipend, a guaranteed scholarship, and financial/life skills training administered as a part of their course work. These recommendations seem to be a hybrid of the California legislation and the proposal to create a cost-of-attendance stipend. In making these recommendations, the author has chosen to remain on the pragmatic side of the argument, especially by avoiding any mention of compensation commensurate with services rendered. Implementing these recommendations may solve the problem presented for the time being, but there needs to be mechanisms put into place that can ensure a continuing solution. Nothing substantial would need to change in regards to the education component, especially since universities should be able to maintain some control over the curriculum and course content. Student-athletes currently receive a stipend for living expenses, but that stipend is not regularly adjusted and is uniform across all member institutions. The cost-of-attendance stipend should be designed in a way that allows for adjustments due to inflation. Furthermore, the cost-of-attendance stipend would need some sort of protection from abuse, since institutions with greater economic power may be tempted to distribute more funds to their student-athletes than would be necessary to meet their cost-of-attendance needs. Granted, the author is not intimating that his proposal is by any means comprehensive or complete, and any approach is going to have its own host of nuances that must be addressed before anything can be implemented.

The reality of the situation is that the NCAA should be listening to common sense approaches like those outlined by the author. By maintaining a strong position, the NCAA has forced compensation proponents to take drastic action. If and when student-athletes have unionized and have favorable case law on their side, the NCAA will have little choice but to dramatically alter their compensation model. The NCAA has long avoided fairly compensating student-athletes on the pretenses of preserving amateurism, but that reluctance to bargain in the past will surely lead to ruin in the future.