

# NCAA DRUG TESTING: IT'S TIME TO CHANGE

Jason Lewis\*

## I. PROPOSAL

Under the current NCAA drug-testing program, member institutions are largely responsible for drug testing their student athletes, while the NCAA conducts its own drug tests in championship competition and under some other circumstances. Additionally, member institutions are not required to develop drug-testing programs. Where a member decides to implement its own program, the NCAA merely offers guidance and does not mandate protocol that must be followed.

In the NCAA, member institutions are by their nature self-interested actors. Even without any evidence of malfeasance, the current NCAA system creates at least the possibility of impropriety. Allowing member institutions to implement substandard drug-testing programs presents a danger not only to current student-athletes but to the member institutions themselves. While it may seem as if the NCAA and its member institutions have adequately addressed doping in collegiate competition, there is no way of knowing whether their policies are actually effective.<sup>1</sup> Because of the

---

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

1. See Mary Pilon, *Drug-Testing Company Tied to N.C.A.A. Stirs Criticism*, THE N.Y. TIMES (Jan. 5, 2013), [http://www.nytimes.com/2013/01/06/sports/drug-testing-company-tied-to-ncaa-draws-criticism.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/01/06/sports/drug-testing-company-tied-to-ncaa-draws-criticism.html?pagewanted=all&_r=0) 11/11/2014 (During the NCAA's year-round testing program for the 2010-11 year, only 63 positive tests were found in 10,735 samples, or 0.6 percent); see also *2013 Anti-Doping Testing Figures Sport Report*, WORLD ANTI-DOPING AGENCY, 1, 4, available at <https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-2013-Anti-Doping-Testing-Figures-SPORT-REPORT.pdf> (last visited Feb. 18, 2015) (As point of comparison, in 2013, WADA reported that out of 176,502 Olympic sport samples there were 1,712 adverse findings, or 0.97 percent. This may be an unfair comparison, since the NCAA figures

NCAA's bifurcated approach to drug testing, NCAA and member institution anti-doping programs have been viewed as fractured and ineffective.<sup>2</sup> The NCAA anti-doping program, administered by the independent company Drug Free Sport, has drawn criticism for lax notification policies and limited substance tests.<sup>3</sup>

The NCAA should no longer allow its members to control their own drug-testing programs. Instead, the NCAA and its member institutions should either petition the World Anti-Doping Agency to become signatories to the World Anti-Doping Code ("Code") or amend its drug-testing program to conform to the Code. Once member institutions become signatories to the Code, they should seek to have their drug-testing procedures solely administered either by the United States Anti-Doping Agency or by some other reputable third party.

## II. HISTORICAL PRECEDENT

The NCAA began conducting drug testing on student-athletes at championship events in 1986 and four years later started its year-round program.<sup>4</sup> Part of the impetus for this change was a pending congressional probe

---

only represent the NCAA year-round testing program and not all tests conducted by the NCAA and member institutions).

2. See Eddie Pells, *NCAA College Drug-Testing All Over the Map*, HUFFINGTON POST (Mar. 30, 2011) [http://www.huffingtonpost.com/2011/03/30/ncaa-college-drugtesting-\\_n\\_842524.html](http://www.huffingtonpost.com/2011/03/30/ncaa-college-drugtesting-_n_842524.html).

3. Pilon, *supra* note 1 (Drug Free Sport does not administer unannounced tests, and college athletes can sometimes receive up to a day's notice of an impending test. Drug Free Sport advertises that all tests will be analyzed in a WADA certified laboratory but does check samples against the WADA banned substance list).

4. See *Understanding the NCAA's Drug Testing Policies*, NCAA, <http://www.ncaa.org/health-and-safety/policy/drug-testing>, (last visited Feb. 6, 2015).

and the threat of legislative oversight.<sup>5</sup> That move was 16 years in the making and required numerous surveys, committee investigations, and conference directives to member institutions.<sup>6</sup>

On July 17, 2000, Dr. Wade Exum, the former director of drug control administration for the United States Olympic Committee (USOC), filed a 42 U.S.C. § 1981 employment discrimination claim against the USOC.<sup>7</sup> In his complaint, Dr. Exum alleged the USOC was hostile towards his efforts to implement an effective doping control system and actively impeded those efforts.<sup>8</sup> Exum's complaint alleged she had personal knowledge of several high-level athletes failing drug tests at the Olympic Trials prior to the 2000 Olympic Games in Sydney Australia, but these athletes were not prevented from participating in the Games.<sup>9</sup> During litigation in the District Court of Colorado, the USOC motioned the Court to issue a protective order restricting disclosure of any document relating to individual athlete drug testing.<sup>10</sup> Exum's complaint came at a time when his position was being phased out of the USOC, and, since he tried negotiating a settlement with the USOC in lieu of

---

5. *NCAA to Implement Drug Testing*, L.A. TIMES (Sept. 24, 1986), [http://articles.latimes.com/1986-09-24/sports/sp-8886\\_1\\_drugs-testing-ncaa](http://articles.latimes.com/1986-09-24/sports/sp-8886_1_drugs-testing-ncaa), 11/12/2014.

6. *See Key Dates in NCAA Drug-Testing History*, NCAA (Nov. 21, 2006), <http://fs.ncaa.org/Docs/NCAANewsArchive/2006/Association-wide/key+dates+in+ncaa+drug-testing+history+-+11-20-06+ncaa+news.html>.

7. *Exum v. U.S. Olympic Comm.*, (D. Colo. 2003) (No. 1:00CV01421).

8. Steve Gutterman, *U.S. Olympic Leaders Accused of Doping*, ABC NEWS, <http://abcnews.go.com/Sports/story?id=100883&page=1&singlePage=true> (last visited Feb. 6, 2015).

9. *Id.*

10. *Exum v. U.S. Olympic Comm.*, 209 F.R.D. 201, 204 (D. Colo. 2002).

litigation, his motivations have been called into question.<sup>11</sup> Regardless of Exum's motivation, his suit provides interesting context to the USOC's move to create an independent drug-testing authority.

On March 20, 2000, several months before Exum's resignation and lawsuit, the USOC created the United States Anti-Doping Agency (USADA).<sup>12</sup> The USOC formed the USADA in response to international criticisms its current doping control system lacked credibility.<sup>13</sup> The USADA took over doping control from the USOC on October 1, 2000, after the Sydney Olympic Games concluded.<sup>14</sup> Previously, the USOC provided specimen collection services for the various national governing bodies (NGBs) it regulated, but any sanctions related to a positive test for banned substances were left to the discretion of the individual NGB.<sup>15</sup>

In 2005, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the International Convention against Doping in Sport.<sup>16</sup> Countries that are party to the treaty must restrict the availability of prohibited substances to athletes, facilitate

---

11. Alan Abrahamson, *USOC Official Made Big Demand*, L.A. TIMES (Sept. 30, 2000), <http://articles.latimes.com/2000/sep/30/news/ss-29372>, 11/12/2014.

12. Appellate Brief, *Exum v. U.S. Olympic Comm.*, (Nos. 03-1256, 03-1280), 2003 WL 24033593, at \*9.

13. *Independence & History*, USADA, <http://www.usada.org/about/independence-history/> (last visited Feb. 18, 2015).

14. *Id.*

15. Appellate Brief, *supra* note 12, at \*4.

16. *International Convention Against Doping in Sport 2005*, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG. (Oct. 19, 2005), [http://portal.unesco.org/en/ev.php-URL\\_ID=31037&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html).

doping controls, support national drug-testing programs, and withhold financial support from athletes who have committed doping infractions. Additionally, the countries must withhold financial support from sports organizations that do not comply with the World Anti-Doping Code, encourage transparency in labeling in the sports supplement industry, and support anti-doping education.<sup>17</sup> On August 4, 2008, after getting Senate approval, President Bush ratified the convention.<sup>18</sup>

American professional sports have come under scrutiny for what has been perceived as lax drug testing policies and procedures. The Clean Sports Act was drafted to mandate the American Professional Sports leagues address positive doping tests with punishments at least as strong as those of the World Anti-Doping Agency (WADA).<sup>19</sup> While the Clean Sports Act was not enacted, it started a national discourse concerning the problem of doping in professional sports. The Clean Sports Act may have partially come about in response to international pressure implying the United States was not committed to effective doping control. In 2003, Dick Pound, then president of WADA, proposed the international sports community ostracize the United States because of inadequate doping penalties in its professional sports

---

17. *International Convention Against Doping in Sport 2005*, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG., <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/> (last visited Feb. 19, 2015).

18. *United States Ratifies International Convention Against Doping in Sport*, UNITED NATIONS EDUC., SCIENTIFIC & CULTURAL ORG., (Aug. 6, 2008), [http://portal.unesco.org/en/ev.php-URL\\_ID=43227&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html).

19. Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 831 (2006).

leagues and because the United States had recently refused to meet a funding obligation to WADA.<sup>20</sup>

Since league rules in American professional sports are agreed upon through a collective bargaining process, organizations were, at first, recalcitrant in adopting drug-testing programs.<sup>21</sup> However, doping scandals and increased fan pressure have led American professional sports leagues to adopt at least some sort of protocol. Major League Baseball, for instance, adopted the revised Joint Drug Prevention and Treatment Program in 2013.<sup>22</sup> WADA Director General David Howman applauded MLB's efforts to enhance the effectiveness of its drug-testing protocol by adding human growth hormone testing seasonally along with longitudinal profiling for testosterone, and he commented that MLB has set the standard for professional leagues to follow.<sup>23</sup>

### III. NCAA DRUG-TESTING PROGRAM

The NCAA's constitution<sup>24</sup> mandates member institutions be responsible for student-athlete welfare and wellbeing. Article 2.2 of the NCAA Division I bylaws states, "Intercollegiate athletics shall be conducted in a manner designed to protect and enhance the physical and educational

---

20. *IOC Urged to Make U.S. a Sports Outcast*, REDIFF INDIA ABROAD (Nov. 21, 2003), <http://www.rediff.com/sports/2003/nov/21wada.htm>.

21. Haagen, *supra* note 19, at 840.

22. Paul Hagen, *WADA Lauds MLB's Expanded Anti-Doping Testing*, MLB.COM (Jan. 31, 2013), <http://m.mlb.com/news/article/41311348/wada-lauds-mlbs-expanded-anti-doping-testing>.

23. *Id.*

24. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2014-15 NCAA DIVISION I MANUAL, art 2.2 (Aug. 1, 2014) [hereinafter NCAA DI MANUAL], available at <http://www.ncaapublications.com/productdownloads/D115.pdf>.

well-being of student-athletes.”<sup>25</sup> Article 2.2.3 holds, “It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.”<sup>26</sup> Operating under these simple policy statements, the NCAA sends the message its doping protocol has been created more to keep student-athletes safe than to try to identify and punish student-athletes for their conduct.

The NCAA’s constitution continues to focus on how outside actors can influence student-athletes to students’ detriment. Under Article 10.1(f), it is unethical for a prospective student-athlete, enrolled student-athlete, or any staff member to have a “[k]nowing involvement in providing a banned substance or impermissible supplement to student-athletes.”<sup>27</sup> Of course, student-athletes are still ultimately responsible for the substances found in their bodies during drug tests, since student-athletes will be subject to penalties if they provide samples containing prohibited substances.<sup>28</sup> The NCAA bylaws list the classes of banned drugs and state that the Committee on Competitive Safeguards and Medical Aspects of Sports has the authority to identify specific drugs within those classes, even if those drugs are not explicitly listed as banned.<sup>29</sup> The NCAA bylaws further state that a student-athlete currently serving a doping suspension enacted by a national or international governing body acting under the WADA code shall be ineligible for collegiate competition.<sup>30</sup>

---

25. *Id.*

26. *Id.* at art. 2.2.3.

27. *Id.* at art. 10.1(f).

28. See *NCAA Drug-Testing Program 2014-15*, NCAA, ch. 4, § 3.2, <http://www.ncaa.org/sites/default/files/DT%20Book%202014-15.pdf> (last visited Feb. 6, 2015).

29. See NCAA DI MANUAL, *supra* note 24, at art. 31.2.3.1.

30. See *id.* at art. 31.2.3.1.2.

While drug-testing procedures administered by the NCAA are in many ways similar to the most stringent international standards, Chapter V of the 2014-2015 NCAA Drug-Testing Program presents a weakness. This chapter details institutional drug testing not conducted by the NCAA.<sup>31</sup> Chapter V does not mandate or even suggest member institutions drug test student-athletes outside of any NCAA drug testing. Where a member institution wishes to create and implement a drug-testing program, Chapter V makes several recommendations but includes no requirements for member institutions to follow. Chapter V does not mandate the member institutions use the same banned substance list in their drug-testing program that the NCAA uses. Chapter V does not require the member institutions impose a specific penalty for positive drug tests. In fact, Chapter V does not command the member institutions to impose any penalty at all.

Obviously, member institutions prefer wide latitude in how they operate their athletic departments.<sup>32</sup> By giving member institutions this type of autonomy, the NCAA allows schools across the country with varying budgets and demographics to find systems best suited to their individual circumstances. This model might be appropriate for finding the best way to run an athletic department, but the resulting lack of consistency between schools and conferences is not

---

31. See *NCAA Drug-Testing Program 2014-15*, *supra* note 28, ch. V at 12 (current NCAA drug-testing program gives NCAA authority to test at all championship events and to select individual student-athletes or entire athletic programs for year-round testing under certain circumstances).

32. See Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure> (describing recent change to Division I structure allowing Atlantic Coast, Big 12, Big Ten, Pac-12, and Southeastern conferences to change rules for themselves).



appropriate for an adequate drug-testing program. Where member institutions are not required to adopt a uniform drug-testing protocol, student-athletes at all member institutions suffer. If School A has stricter institutional standards for drug testing than School B, then the student-athletes at School A suffer, because they are subject to more onerous standards, and student-athletes at School B suffer, because it may be easier for them to get away with taking harmful substances. School B might have a less strict policy for budgetary reasons, but saving a small amount of money on the frontend might create a huge liability on the backend if a student-athlete provides a positive sample or is harmed as the result of taking a banned substance.

The only restriction that the NCAA Drug-Testing Program places on member institutions is found in Article 10.2, which says, “athletics department staff members . . . who have knowledge of a student-athlete’s use at any time of a substance on the list of banned drugs . . . shall follow institutional procedures dealing with drug abuse or shall be subject to disciplinary or corrective action.”<sup>33</sup> Essentially, Article 10.2 says member institutions must follow their own rules, but where a member institution has no rules, no action would need to be taken as the result of a positive drug test.<sup>34</sup>

#### IV. WORLD ANTI-DOPING CODE

The World Anti-Doping Code was developed and adopted in 2003, took effect in 2004, and was subsequently amended in 2009.<sup>35</sup> The World Anti-Doping Code has two

---

33. *NCAA Drug-Testing Program 2014-15*, *supra* note 28, at art. 10.2.

34. It is unlikely that any member institution has no institutional procedure for drug testing, but the absurdity of Article 10.2 is highlighted in this scenario.

35. *World Anti-Doping Code 2015*, WORLD ANTI-DOPING AGENCY, 4 <https://wada-main->

basic purposes. The first purpose is “[t]o protect the *Athletes*’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *Athletes* worldwide.”<sup>36</sup> The second purpose of the World Anti-Doping code is “[t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.”<sup>37</sup> The Code strives for uniformity in implementation by focusing on core anti-doping principles, leaving some flexibility in individual implementation so that differently situated organizations may design anti-doping programs that will best fit their circumstances.<sup>38</sup> In order to achieve the second goal, uniformity in implementation, the Code provides International Standards and Models of Best Practice and Guidelines. International standards are mandatory technical and operational rules that signatories to the Code must follow, whereas the Models of Best Practices and Guidelines are recommendations signatories to the Code may choose to adopt.<sup>39</sup>

Under Article 23.1.2 of the World Anti-Doping Code, sports organizations other than those organizations required to accept the Code may become signatories to the Code upon invitation by WADA.<sup>40</sup> Signatories to the Code are required to accept certain articles of the Code. Those articles cover the Code’s definition of doping and other

---

prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf (last visited Feb. 19, 2015).

36. *Id.* at 11.

37. *Id.*

38. *Id.*

39. *Id.* at 12-13.

40. *Id.* at 120. (Article 23.1.1 lists the organizations that must be signatories to the Code. A comment to Article 23.1.2 indicates professional leagues not currently under the jurisdiction of a government of International Federation will be encouraged to accept the Code).

terms, anti-doping rule violations, proof of doping, specified substances, prohibited substance list, retirement procedures, automatic disqualification of individual results, individual sanctions, consequences to teams, appeals process, recognition of decisions, statute of limitations, and interpretation of the Code.<sup>41</sup>

## V. NCAA APPEALS PROCESS

Once a banned substance is found in a student-athlete's urine sample, a series of coordinated events occur.<sup>42</sup> Section 8.2.2 of the NCAA Drug-Testing Program provides, "For student-athletes who have a positive finding of sample A, Drug Free Sport will call the director of athletics or his or her designee."<sup>43</sup> At this point, it is the member institution's responsibility to inform the student-athlete that the urine sample contains a banned substance.<sup>44</sup> Drug Free Sport will inform the director of athletics that both the institution and the student-athlete have the right to be represented at the laboratory when the second part of the initial urine sample is opened for testing.<sup>45</sup> This opportunity for representation during the second sample testing appears to have been implemented in order to create a transparent process that forecloses arguments of sample tampering.<sup>46</sup>

Once a banned substance is found in the student-athlete's sample B, Drug Free sport will notify the director

---

41. *Id.* at 121.

42. It is important to note that at this stage in the process, the student-athlete's urine sample has been divided into two specimens, sample A and sample B.

43. *NCAA Drug-Testing Program 2014-15*, *supra* note 28, at § 8.2.2.

44. *See id.*

45. *Id.* at § 8.2.2.1.

46. While this process may appear to minimize the risk of tampering, it does not appear to afford student-athletes the right to seek and obtain independent testing of their samples.

of athletics and the institution will be required to declare the student-athlete ineligible.<sup>47</sup> Positive findings may be appealed to the NCAA competitive safeguards committee, but institutions are only required to file an appeal when the student-athlete requests an appeal.<sup>48</sup> The NCAA competitive safeguards committee is comprised of 20 members, with five positions for men, five positions for women, and 10 positions for either gender.<sup>49</sup> The committee must have two athletics directors or senior woman athletic administrators, one active coach, one member active in exercise physiology research, three members from the field of medicine (including one primary care team physician and one certified orthopedic specialist), one member responsible for an institutional athletic training program, one member representing the legal field, one member of the NCAA football rules committee, one member representing secondary school interest, one member active in sports medicine research, one member with expertise in drug testing, one student-athlete from each division sharing a combined vote, and two at large members.<sup>50</sup> The committee conducts the conference by telephone with the student-athlete and an athletics administrator is required to participate; student-athletes may designate a representative.<sup>51</sup> At least three committee members must

---

47. See *NCAA Drug-Testing Program 2014-15*, *supra* note 28, at § 8.2.3.2.

48. See *id.* at § 8.2.4.1.

49. See *Committee on Competitive Safeguards and Medical Aspects of Sports*, NCAA, <http://www.ncaa.org/governance/committees/committee-competitive-safeguards-and-medical-aspects-sports> (last visited Feb. 6, 2015)..

50. See *id.* There is only one circumstance under which a committee member may not participate based on a conflict of interest: when a committee member is employed by the member institution that is the subject of the appeal. See *id.*

51. See *NCAA Drug-Testing Program 2014-15*, *supra* note 28, at § 8.2.4.4.1.

hear the appeal, though it is possible for the entire committee to participate.<sup>52</sup>

The appeals process aspires to be anonymous, though anonymity is not a strict requirement.<sup>53</sup> Positive drug tests may be challenged for a procedural deficiency or on the grounds the student-athlete did not knowingly take the banned substance. A procedural challenge relating to the collection and testing of urine samples requires a student-athlete or institution show some procedural deficiency that, more likely than not, materially affected the integrity of the student-athlete's sample.<sup>54</sup> The committee can find no violation occurred where an institution or student-athlete can show the student-athlete was given a banned substance without his or her knowledge, as long as the student-athlete could not have reasonably known or suspected he or she was given the banned substance.<sup>55</sup> The committee can also find that no violation has occurred where the institution or student-athlete can show the student-athlete asked an appropriate athletics administrator specific and reasonable questions pertaining to a substance, medication, or product and that administrator assured the student-athlete that the substance, medication, or product did not contain a banned substance.<sup>56</sup> In this situation, the institution or student-athlete must show the student-athlete had no actual knowledge and should not have reasonably known the administrator provided erroneous information regarding the substance, medication, or product.<sup>57</sup> Institutions and student-athletes may provide any written materials

---

52. See *Drug Testing Appeals Process*, NCAA, § 1, <http://www.ncaa.org/health-and-safety/policy/drug-testing-appeals-process> (last visited Feb. 6, 2015).

53. See *id.* at § 3.

54. See *id.* at § 5(a).

55. See *id.* at § 5(b)(i).

56. See *id.* at § 5(b)(i)(i).

57. See *id.*

considered vital to the appeal to Drug Free Sport to be distributed to the subcommittee hearing the appeal.<sup>58</sup> Institutions are also specifically required to send all information pertaining to the drug-education program to Drug Free Sport for the subcommittee to determine the viability of that program.<sup>59</sup>

During the appeal, institutions will typically make an introduction, then the student-athlete will make an oral statement, and finally all parties will have an opportunity to ask and answer questions.<sup>60</sup> Following this process, all parties except for the subcommittee will leave the proceeding so the subcommittee may deliberate and come to a decision.<sup>61</sup> It is not clear how the subcommittee reaches its decision on appeals, other than by participating in a vote of some kind.<sup>62</sup> This appeals process provides no mechanism to review appeals. If the committee finds the institution or student-athlete has not met their burden during the appeal, the student-athlete will be prohibited from participating in competition for one year after the collection of the student-athlete's sample.<sup>63</sup>

---

58. *See id.* at § 6.

59. *See id.* at § 7.

60. *See id.* at § 8.

61. *See id.* at § 9.

62. This can be inferred from the fact that the three student-athlete representatives from the three NCAA divisions combine for one vote. *Committee on Competitive Safeguards and Medical Aspects of Sports*, *supra* note 49.

63. *Drug Testing Appeals Process*, NCAA, <http://www.ncaa.org/health-and-safety/policy/drug-testing-appeals-process> (last visited Feb. 6, 2015) (under NCAA Bylaws 18.4.1.5.1, student-athletes who test positive for "street drugs" shall be ineligible to compete for a period equal to one half of their competitive season); *see also NCAA Drug-Testing Program 2013-14*, 12, available at <https://www.ncaa.org/sites/default/files/5.%20Drug%20Testing%20Program%20Book%202013-14.pdf> (last visited Feb. 6, 2015) (under

Sometimes, a student-athlete's testing sample will be found to contain a substance the student-athlete is taking for medical treatment. The NCAA will allow an exception in some cases, but the process for obtaining an exception can be complicated. Chapter II of the NCAA Drug-Testing Program details the medical exception process.<sup>64</sup> The NCAA will consider granting a medical exception to a student-athlete for the following classes of substances: stimulants, anabolic agents, beta-blockers, diuretics, peptide hormones and analogues, anti-estrogens, and beta-2 agonists.<sup>65</sup> In order for the NCAA to grant an exception for anabolic agents and peptide hormones, the member institution must seek approval from the NCAA by submitting a medical exception pre-approval form before the student-athlete participates in collegiate competition.<sup>66</sup> For all other classes of banned substances, institutions are expected to keep comprehensive documentation of the student-athlete's medical records and submit documentation in a medical exception request after the student-athlete has tested positive for a banned substance.<sup>67</sup>

## **VI. WORLD ANTI-DOPING CODE APPEALS PROCESS**

The World Anti-Doping Code contains a broad appeals process, allowing for appeals both to the individual governing body finding the violation and to the Court of

---

Section 9.0 of the NCAA Drug-Testing Program, student-athletes' eligibility may not be reinstated until they test negative for banned substances in an "exit test" administered by the NCAA).

64. *See NCAA Drug-Testing Program 2014-15, supra* note 28, at 2.

65. *See id.*

66. *See id.*

67. *See id.* (NCAA will not grant a medical exception for what it refers to as "street drugs").

Arbitration of Sport ("CAS"). The right to an appeal under the Code is first outlined in Article 8, which states:

For any *Person* who is asserted to have committed an anti-doping rule violation, each *Anti-Doping Organization* with responsibility for results management shall provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel. A timely reasoned decision specifically including an explanation of the reason[s] for any period of *Ineligibility* shall be *Publicly Disclosed* as provided in Article 14.3.<sup>68</sup>

Article 8.5 provides a mechanism for direct appeals to CAS stating,

Anti-doping violations asserted against *International-Level Athletes* or *National-Level Athletes* may, with the consent of the Athlete, the *Anti-Doping Organization* with results management responsibility, WADA, and any other *Anti-Doping Organization* that would have had a right to appeal a first instance hearing decision to *CAS*, be heard directly at *CAS*, with no requirement for a prior hearing.<sup>69</sup>

Any decision made under the Code or made under a rule adopted pursuant to the Code is subject to an appeal.<sup>70</sup> The Code provides a large scope of review, allowing for the appellate panel to review all issues relevant to the alleged doping infraction and not limited to the scope established by

---

68. *World Anti-Doping Code 2015*, *supra* note 35, at 57.

69. *Id.* at 59 (interested parties include the athlete, the anti-doping organization with results management responsibility, WADA, and any other anti-doping organization with a right to appeal).

70. *Id.* at 80.



the sanctioning body.<sup>71</sup> This effectively means bodies have de novo review power when hearing an appeal to an alleged doping violation. Furthermore, the ultimate arbitral body, CAS, is not required to give any deference to the sanctioning organization.<sup>72</sup>

Where an athlete subject to the World Anti-Doping code believes he or she has a justified reason to use a banned substance for medical purposes, he or she may apply for a therapeutic use exemption (TUE). A body deciding whether to grant a TUE must do so in accordance with the International Standard for Therapeutic Use Exemptions.<sup>73</sup> The process for athletes to apply for TUEs depends on their status as either national-level athletes or international-level athletes. National-level athletes apply for TUEs to their national anti-doping organization, while international-level athletes apply for TUEs to the international federation.<sup>74</sup> Under some circumstances, an athlete may apply for a retroactive TUE.<sup>75</sup> WADA retains broad rights to review any TUE, and it must review a TUE granted or denied by a national anti-doping body to an international federation.<sup>76</sup> When WADA does not review or not reverse an international federation decision regarding a TUE, all interested parties to the CAS may appeal the decision.<sup>77</sup>

## VII. BENEFITS TO THE NCAA

---

71. *Id.*

72. *Id.* at 81.

73. *Id.* at 31.

74. *Id.* at 31-32 (athletes may also apply for a TUE to a major event organization, but any TUE granted by that organization is effective for that event only).

75. *Id.* at 35 (this applies to athletes who are neither national-level athletes nor international-level athletes).

76. *Id.*

77. *Id.*

The NCAA is currently under an immense amount of scrutiny concerning student-athlete welfare.<sup>78</sup> By adopting the World Anti-Doping protocol and putting its members under the purview of the USADA, the NCAA can seriously bolster its assertion that student-athlete welfare is one of its top concerns. The NCAA's most aggressive critics assert the NCAA is run in a manner that exploits student-athlete labor for its own pecuniary gain, with the student-athlete being either uncompensated or undercompensated.<sup>79</sup> While a change in NCAA doping policy would not directly address the student-athlete compensation problem, it would go a long way toward showing that the NCAA does in fact have the student-athlete's best interests in mind.

The current NCAA doping model leaves too much room for abuse, either by student-athletes motivated to succeed at any costs or by athletic departments willing to

---

78. Concussions and Chronic Traumatic Encephalopathy ("CTE") have dominated the headlines, with the NCAA recently reaching a proposed settlement of \$70 million in a class action lawsuit over the issue. *See NCAA Reaches Proposed Settlement in Concussion Lawsuit*, NCAA (July 30, 2014), <http://www.ncaa.com/news/ncaa/article/2014-07-29/ncaa-reaches-proposed-settlement-concussion-lawsuit>. Although \$70 million may seem insignificant compared to the \$765 million settlement reached in a similar class action lawsuit against the NFL, the NCAA settlement only covers diagnostic expense for student-athletes and not treatment expenses. *See Jon Solomon, NCAA Settlement: Football Players Carry Three Times Risk of CTE Symptoms*, CBSSPORTS.COM (July 30, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24643655/ncaa-settlement-football-players-3-times-more-likely-to-have-cte-symptoms>. Nevertheless, student-athletes in the class are not foreclosed from bringing suit against individual member institutions. *See id.*

79. Armstrong Williams, *WILLIAMS: The Exploitation of College Athletes*, THE WASHINGTON TIMES (Apr. 6, 2014), <http://www.washingtontimes.com/news/2014/apr/6/williams-the-exploitation-of-college-athletes/>.

turn a blind eye. Furthermore, the current NCAA approach places the student-athlete at odds with the NCAA and member institutions. Where drug tests can be administered by a disinterested third-party under a uniform policy and positive tests can be appealed to professional arbitral bodies, the perception that the NCAA or a member institution has acted in a biased manner toward a particular student-athlete would be greatly diminished.

Member institutions are currently expected to formulate and implement their own drug-testing programs while adequately educating and advising student-athletes regarding doping. These institutions must decide what type of drug-testing program can be feasibly administered based on their budget, student-athlete population, and athletic-department structure. If member institutions, instead of implementing their own drug-testing programs, had a uniform protocol they could implement without having to invest their own resources, those resources could be reallocated more properly. Furthermore, the risk of member institution practices being called into question if a student-athlete has a positive test would be greatly minimized.

### **VIII. DRAWBACKS FOR THE NCAA**

This proposal presents a drastic difference from the status quo in the NCAA drug program. By adopting the World Anti-Doping Code, the NCAA and member institutions would be held to a much higher standard, and with higher standards come higher costs. Member institutions often conduct screens for a limited number of substances, because the cost is thus substantially less.<sup>80</sup> Additionally, conducting appeals through a third-party arbitrator would cost a considerable amount more, since the current appeal system in the NCAA uses an NCAA

---

80. Pilon, *supra* note 1.

committee and does not appear to cost a member institution anything. In the Court of Arbitration for Sport, each party must pay a minimum of 1,000 Swiss francs and must pay 250-400 Swiss francs for an arbitrator's hourly fee.<sup>81</sup> However, the NCAA can still retain control over the first appeal in a doping violation, since Article 13 of the World-Anti Doping Code does not foreclose a signatory from performing its own post-decision review and, in fact, limits the appeals process based on whether an appellant has exhausted the post-decision review process.

By becoming a signatory to the World Anti-Doping Code, the NCAA and its member institutions would lose a significant amount of control over their own affairs, at least regarding drug testing. The NCAA has historically fought to maintain its autonomy, arguing its model, uniquely based on the concepts of amateurism in athletics, requires regulations that create the most level playing field for all member institutions.<sup>82</sup> However, the NCAA's efforts to self-regulate in the past have largely been based on attempting to ensure all member institutions have equal opportunities to generate revenue and therefore opportunities to be competitive. Adopting the World Anti-Doping Code would place all

---

81. *Arbitration Costs*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/arbitration/arbitration-costs.html> (last visited Feb. 19, 2015). See also *American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, AM. ARBITRATION ASS'N 1, 4, [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_004136&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004136&RevisionSelectionMethod=LatestReleased) (last visited Feb. 19, 2015) (American Arbitration Association is the designated arbitration organization for USADA and bases its fees on CAS fees).

82. See generally *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 96 (1984) (NCAA argued restricting television broadcasts of college football preserved competitive balance among all member institutions).

member institutions on an even playing field, since all student-athletes would be subject to the same rules and testing procedures year-round. By giving up some power over their own affairs, member institutions would gain an outcome that addresses a core concept of the NCAA model, with member institutions and ultimately student-athletes having an equal opportunity to compete regardless of resources.

## **IX. BENEFITS TO STUDENT-ATHLETES**

If the NCAA and its member institutions become signatories to the World Anti-Doping Code, student-athletes will be guaranteed their competitors will be subjected to the same rigorous drug-testing protocols they are. No longer would institutional policies dictate the methods of testing and the penalties imposed for testing positive, as they have in the past and do currently.<sup>83</sup> The fairness and transparency provided by the Code could also potentially keep student-athletes from making the decision to take a banned substance based on the belief their competitors may be taking it, as well. The NCAA has placed an emphasis on ensuring a fair playing field between member institutions, and a move toward a stricter and more uniform doping code would do the same thing for student-athletes.

A great majority of student-athletes are legally adults, and as adults they are expected to make mature decisions about their personal health and integrity. Student-athletes are held personally accountable for what they put into their bodies, but the current NCAA drug-testing program leaves the door open for abuse. The constant pressure for results on the field can lead student-athletes to

---

83. See Pells, *supra* note 2 (discussing institutional drug policies “as varied as the schools themselves”).

make poor decisions.<sup>84</sup> The pressure to succeed is often coupled with the reality that a student-athlete's scholarship depends on how he or she performs, and the prospect of losing tens of thousands of dollars in scholarship money can lead some down the wrong path.<sup>85</sup> A fairly implemented, uniform drug-testing policy might take away some of the incentive for student-athlete drug use.<sup>86</sup> Where the testing is more comprehensive, regularly administered, and strictly enforced, the incentive to use banned substances diminishes. Any drug-testing program deals with the reality of actors trying to beat the system, but the stakes in the NCAA are too high not to have the most comprehensive system possible.

The following table represents reported ergogenic drug use by Division I men's sports. This data was taken from a 2013 survey given by the NCAA to 21,000 student-athletes. This data shows a significant number of student-athletes have taken substances included on the NCAA banned substance class list, especially amphetamines. This table does not show data on marijuana use, a substance banned both by the NCAA and WADA. Of student-athletes

---

84. See generally Andrea Petróczi & Eugene Aidman, *Psychological Drivers in Doping: The Life-Cycle Model of Performance Enhancement*, SUBSTANCE ABUSE TREATMENT, PREVENTION, POLICY 3, 7 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2315642/>.

85. NCAA DI MANUAL, *supra* note 24, at art. 15.3.4.3 (an institution may not cancel a student-athlete's financial aid based on performance, but if the award agreement is only for one year, the institution may choose not to renew the student-athlete's financial aid).

86. In a 2013 survey completed by 21,000 student-athletes, 60 percent reported that they saw drug testing as a deterrent. See *NCAA Student-Athlete Substance Use Study: Executive Summary August 2014*, NCAA, <http://www.ncaa.org/about/resources/research/ncaa-student-athlete-substance-use-study-executive-summary-august-2014> (last visited Feb. 6, 2015).

surveyed, 21 percent reported that they had used marijuana within the prior 12 months.<sup>87</sup>

---

87. See *NCAA National Study of Substance Use Habits of College Student-Athletes*, NCAA, 32, (July 2014), [http://www.ncaa.org/sites/default/files/Substance%20Use%20Final%20Report\\_FINAL.pdf](http://www.ncaa.org/sites/default/files/Substance%20Use%20Final%20Report_FINAL.pdf).

Overall Percentage of Use Within Last 12 Months <sup>88</sup>									
Year	Baseball	Basketball	Football	Track	Ice Hockey	Lacrosse	Soccer	Swimming	Wrestling
<b>Amphetamines</b>	8.8%	1.8%	3.9%	11.9%	6.8%	16.7%	3.4%	5.2%	11.9%
<b>Anabolic Steroids</b>	0.7%	0.4%	0.7%	0.6%	0.5%	1.7%	0.0%	0.0%	0.6%
<b>Ephedrine</b>	0.1%	0.7%	0.4%	0.5%	1.0%	2.5%	0.4%	0.4%	0.0%

The data from this survey suggests the current NCAA drug-testing program does not sufficiently deter the use of banned substances by student-athletes. No drug-testing program will ever be able to fully eliminate the use of banned substances, but the disparity between reported use and positive drug tests in collegiate athletics is too high, and ultimately it is the student-athletes who suffer from that disparity.

---

88. *See id.* at 63. Tennis and golf were left off this table for formatting reasons, but both sports had similar data to soccer. Female student-athletes' reported use of substances is substantially lower than that of male student-athletes. *See id.* at 64.



## X. IMPLEMENTATION

In the past, WADA has urged professional sports leagues to adopt the World Anti-Doping Code.<sup>89</sup> In 2009, FIFA, the international governing body responsible for soccer adopted the World Anti-Doping Code.<sup>90</sup> FIFA has been viewed as a progressive partner in WADA's mission to eliminate sports doping and has been praised by the world organization for its efforts to implement wide-scale and effective doping controls in World Cup competition.<sup>91</sup> One of the main hurdles to professional sports leagues adopting the World Anti-Doping Code has been the collective bargaining agreements negotiated between players' associations and the leagues, with players' associations reluctant to place doping control under the authority of a third-party actor.<sup>92</sup> Since NCAA athletes are not generally considered employees, the NCAA does not have the duty to negotiate with a players' association to formulate and institute its rules.<sup>93</sup>

---

89. Barry M. Bloom, *WADA Head Urges MLB to Adopt its Code*, MLB.COM (July 8, 2009), <http://m.mlb.com/news/article/5767006/>.

90. Graham Dunbar, *FIFA Backs WADA Code and Promised to Fight Doping with 'All Possible Means'*, USA TODAY (Dec. 19, 2014, 7:16 PM), [http://webcache.googleusercontent.com/search?q=cache:RikmdUM79r4J:www.usatoday.com/sports/soccer/2008-02-29-2225821037\\_x.htm&client=safari&hl=en&gl=us&strip=1](http://webcache.googleusercontent.com/search?q=cache:RikmdUM79r4J:www.usatoday.com/sports/soccer/2008-02-29-2225821037_x.htm&client=safari&hl=en&gl=us&strip=1) (Google Cache) (last visited Feb. 6, 2015).

91. David Owen, *WADA Welcomes FIFA Anti-Doping Initiative*, INSIDETHEGAMES.BIZ, (June 18, 2014), <http://www.insidethegames.biz/sports/summer/football/732-world-cup/1020800-wada-welcomes-fifa-anti-doping-initiative>.

92. See George T. Stiefel III, *Comment, Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1279 (2008).

93. Courts have generally held student-athletes are not employees. See *Waldrep v. Texas Employers Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000) (holding a former NCAA football player was not an employee of

The NCAA could adopt the World Anti-Doping Code wholesale, in which case the association would most likely need to amend its constitution to reflect that adoption as a fundamental policy. If the NCAA amended its constitution in this manner, it could only do so at an annual or special convention and by a two-thirds majority vote of all delegates present and voting in joint session.<sup>94</sup> A vote under this scenario would apply to all divisions in the NCAA.<sup>95</sup> Alternatively, the NCAA could amend its current doping program to conform with the World Anti-Doping Code. Since this method would avoid amending the NCAA constitution, it could be adopted at a meeting by the board of directors or legislative council.<sup>96</sup> Member institutions may override legislation adopted by the board of directors or legislative council only by a five-eighths majority vote.<sup>97</sup> This approach would create a more realistic opportunity for the NCAA to adopt the World Anti-Doping Code than an

---

the university for worker's compensation purposes); *but see* Northwestern Univ. v. Coll. Athletes Players Ass'n (CAPA), Case No. 13-RC-121359 (NLRB, Reg. 13, March 26, 2014), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f> (college football scholarship players at Northwestern University are employees under the NLRA and are entitled to vote on a collective bargaining representative).

94. *See* NCAA DI MANUAL, *supra* note 24, art. 5.3.7.2 at 35 (describing the procedure for an adoption of a "dominant provision"). "A dominant provision is any regulation that applies to all members of the association and is of sufficient importance to the entire membership." *See id.* at art 5.02.1.1. Further, 40 members from each division shall be present at the annual or special convention for voting purposes. *See id.* at art. 5.1.4.1.

95. Similarly, a two-thirds majority vote of present delegates is also required for amendments that affect only the membership of a specific division. *See id.* at art. 5.3.7.3.

96. *See id.* at art. 5.3.2.1. Legislation adopted by the legislative council is always subject to review by the board of directors. *See id.* at art. 5.3.2.2.4.1.

97. *See id.* at art. 5.3.2.3.6.

American professional league would have, since professional leagues can only negotiate collective bargaining agreements once a year, with some agreements remaining in force for several years.<sup>98</sup> This type of change is unlikely to happen overnight, and the NCAA would most likely need to vet the proposal through its committee process, but any work on the front end would be returned many times over if the NCAA could bring itself up to the world standard of doping control.

Perhaps the largest impediment to the NCAA's adoption of a broader anti-doping program is the cost associated with administration and execution. Across all divisions, approximately 460,000 student athletes compete in collegiate athletics.<sup>99</sup> Of those 460,000 student-athletes, nearly 50,000, or 10.87 percent, participate in championship competition.<sup>100</sup> Using the 10.87-percent participation rate, it is safe to assume that, of the 170,000 Division I student-athletes, approximately 18,500 participate in championship competition.<sup>101</sup> In 2010, the head of USADA, Travis Tygart, commented that the drug tests cost between \$200 and \$400, depending on whether the test is only looking for EPO or also screening for HGH.<sup>102</sup> Based on those figures, it would

---

98. The current NFL collective bargaining agreement was adopted in 2011 and continues to remain in force. *NFL Collective Bargaining Agreement*, xiv, (Aug. 4, 2011), available at [http://images.nflplayers.com/mediaResources/files/PDFs/General/2011\\_Final\\_CBA.pdf](http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf).

99. See *Student-Athletes*, NCAA, <http://www.ncaa.org/student-athletes> (last visited Feb. 8, 2015).

100. See *Championships*, NCAA, <http://www.ncaa.org/about/what-we-do/championships> (last visited Feb. 8, 2015).

101. See *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Feb. 8, 2015).

102. *Money Not a Factor in USADA's Drug Testing Program. Mayweather-Mosley Drug Tests Cost \$6,400-\$12,800*, EXAMINER.COM (June 14, 2010, 6:28 PM), <http://www.examiner.com/article/money->

cost between \$3.7 million and \$7.4 million to drug test the 18,500 Division I championship-caliber student-athletes three times a year, which accounts for one test during championship competition and two random tests during the year.<sup>103</sup> Drug tests designed to screen a larger group of banned substances are inherently more expensive, and the appeals process outlined by the World Anti-Doping Code would cost much more than the current NCAA process.

However, the NCAA currently has a reserve of \$530 million in unrestricted assets.<sup>104</sup> Part of those funds could potentially be used to help institute a broader anti-doping program and could even be replaced by increased revenue.<sup>105</sup> Additionally, member institutions could allocate funds they are currently using on their own drug-testing programs to the NCAA, with the NCAA surveying member institutions on how much they spend on drug-testing programs and institute a base contribution based on the average, with an additional contribution based on a program's size. It is also important to note the NCAA would not be required to drug test every single student-athlete. In its guidelines for signatories to the World Anti-Doping Code, WADA suggests a drug-testing program identify an

---

not-a-factor-usada-s-drug-testing-program-mayweather-mosley-drug-tests-cost-6-400-12-800.

103. These figures should be considered high, since not every competitor at a championship is typically drug tested. It should be noted that these figures reflect only drug-testing costs and do not account for administrative costs.

104. See *The NCAA Budget: Where the Money Goes*, NCAA, <http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes> (last visited Feb. 8, 2015).

105. It is possible that a move to increase doping control could be viewed as a proactive move by the NCAA to protect student-athlete welfare. This perception could contradict the increasing sentiment that the NCAA is profiting from the athletic abilities of student-athletes without giving them fair compensation.

athlete pool composed of athletes who regularly compete at the international level.<sup>106</sup> In the context of collegiate competition, this could mean the athlete pool may only consist of athletes who either have competed at the national level or can be reasonably expected to compete at the national level.

## **XI. CONCLUSION**

While the financial implications of this proposal may seem high, the reality is the NCAA is a nonprofit organization operating based on certain core values. Those values include a dedication to the collegiate model and a dedication to sportsmanship and integrity, and they do not include a dedication to profit maximization.<sup>107</sup> Cost of implementation and administrative feasibility are poor arguments against taking action to ensure student-athlete wellbeing. The NCAA and many of its member-institutions already spend a considerable amount of money on drug testing and drug education. While this proposal might require funds beyond those already allocated to drug testing, it does not suggest funding for an entirely new program be diverted from existing programs. Instead, this proposal would have the NCAA and member institutions pool the funds they currently allocate to drug testing and education in order to administer a uniform program.

Student-athletes represent a unique segment of the sporting world. These young people have the incredible opportunity to compete for their schools while obtaining an education, but the current NCAA drug-testing program places this already vulnerable group in an even more precarious position. The autonomy given to member institutions under Chapter V of the NCAA Drug-Testing

---

106. See *World Anti-Doping Code 2015*, *supra* note 35, at 28.

107. See *NCAA Core Values*, NCAA,  
<http://www.ncaa.org/about/ncaa-core-values> (last visited Feb. 8, 2015).

Program is at odds with some of the basic, foundational premises of the NCAA Constitution. The hope is that student-athletes will always make the right decisions, but that should not be left to chance when the stakes are so high. Both student-athletes and athletic departments are under immense pressure to perform on the field, and the current NCAA drug-testing program leaves the unscrupulous too many opportunities to gain unfair advantages and places too many student-athletes at risk of undue harm. If the NCAA is serious about following its core values and placing student-athlete welfare above all other priorities, then it should take a real look at the way it addresses drug testing. Without making substantial changes to its drug-testing program and taking the doping issue head on, the NCAA is setting itself up for a major fall when the inevitable scandal occurs.