

NCAA v. UNC: CHALLENGING THE NCAA'S JURISDICTION

Timothy Davis¹

I. INTRODUCTION

The National Collegiate Athletic Association's ("NCAA") enforcement staff submitted a Notice of Allegations to the University of North Carolina at Chapel Hill ("UNC") by letter, dated May 20, 2015.² As outlined below, the NCAA's Notice of Allegations ("First Notice of Allegations") asserted that UNC engaged in severe breaches of conduct that amount to Level I violations of NCAA bylaws. Consequently, the alleged Level I violations exposed UNC to the most severe sanctions that can be imposed for violations of NCAA bylaws.³ The First Notice of Allegations focused principally on classes offered in UNC's African and Afro-American Studies Department between the years 2002 and 2011.⁴ The NCAA asserts these classes impermissibly aided students in maintaining their academic eligibility, subsequently affecting their eligibility to participate in intercollegiate athletics on behalf of UNC.⁵

¹ John W. & Ruth H. Turnage Professor of Law at the Wake Forest University School of Law.

² Jonathan F. Duncan, *Notice of Allegations, University of North Carolina, Chapel Hill, Case No. 00231*, NAT'L COLLEGIATE ATHLETIC ASS'N (May 20, 2015), <http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2015/06/NCAA-NOA.pdf> [hereinafter *Notice of Allegations*].

³ See NAT'L COLLEGIATE ATHLETIC ASS'N, 2016–17 DIVISION I MANUAL §§ 19.1, 19.9 (Aug. 1, 2016) [hereinafter *NCAA Manual*] (describing the NCAA violation structure and penalties attached to the violations).

⁴ *Notice of Allegations, supra* note 2, at 1.

⁵ *Id.*

In April 2016, the NCAA submitted to UNC an Amended Notice of Allegations⁶ based on information allegedly obtained by the NCAA subsequent to the submission of the organization's First Notice of Allegations. To buttress its assertions, the NCAA submitted its Second Amended Notice of Allegations ("Third Notice of Allegations") in December 2016.⁷ As discussed below, the NCAA's most recent notice provides a more focused set of allegations and enhances the possibility that the NCAA's Committee on Infractions ("COI") will find the irregularities in UNC's African and Afro-American Studies Department constitute Level I violations of NCAA bylaws.

First, this article discusses the factual background leading to the NCAA's contentions that UNC's conduct violated NCAA bylaws. Second, the article discusses the NCAA's allegations against UNC.⁸ Third, the article addresses UNC's responses to the alleged violations of NCAA bylaws,⁹ as well as the NCAA's responses to UNC's arguments.¹⁰ Last, the article concludes with a discussion of the implications of the NCAA's action against UNC.

⁶ Jonathan F. Duncan, *Amended Notice of Allegations to the Chancellor of the University of North Carolina, Chapel Hill*, NAT'L COLLEGIATE ATHLETIC ASS'N (Apr. 25, 2016), http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2016/04/NOA_Amended_042516_NorthCarolina.pdf [hereinafter *Amended Notice of Allegations*].

⁷ Jonathan F. Duncan, *Second Amended Notice of Allegations*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 13, 2016), <https://carolinacommithment.unc.edu/files/2016/12/NCAA-third-notice-of-allegations.pdf> [hereinafter *Third Notice of Allegations*].

⁸ See *infra* text accompanying notes 77–110.

⁹ Rick Evrard & Bob Kirchner, *Response to NCAA Amended Notice of Allegations* (Aug. 1, 2016), <http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2016/08/UNC-Response-to-2016-ANOA.pdf> [hereinafter *Response to NCAA Amended Notice of Allegations*].

¹⁰ Tom Hosty, *Enforcement Written Reply and Statement of the Case, University of North Carolina, Chapel Hill, Case No. 00231.*, THE NEWS & OBSERVER (Sept. 19, 2016), <http://media2.newsobserver.com/static/content/multimedia/interactive/uncscandal/pdf/unc-ncaa-response.pdf>.

II. FACTUAL BACKGROUND

In late 2013, the North Carolina State Bureau of Investigation (“SBI”) informed UNC that the Bureau would conclude its investigation of alleged irregularities in courses taught at UNC and indict Julius Nyang’oro, former chair of UNC’s African and Afro-American Studies Department (hereinafter “AASD”).¹¹ Moreover, the SBI stated it would provide UNC with access to information it had obtained during its investigation.¹² On February 21, 2014, with SBI approval, UNC appointed the law firm of Cadwalader, Wickerstram and Taft (“Cadwalader”) to receive the SBI information and to conduct an investigation.¹³ On October 16, 2014, Cadwalader completed its report, *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill* (“Wainstein Report”).¹⁴

Cadwalader conducted the investigation in the aftermath of six previous investigations related to the alleged irregularities in courses taken by student-athletes in AASD.¹⁵ One of these investigations was conducted by the NCAA. In 2012, the NCAA investigator concluded that in “light of the fact that these classes

¹¹ Kenneth L. Wainstein et al., *Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill*, CADWALADER, WICKERSHAM & TAFT LLP (Oct. 16, 2014), <http://3qh929iorux3fdpl532k03kg.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/UNC-FINAL-REPORT.pdf> [hereinafter Wainstein Report]. Effective as of July 1, 2013, UNC’s African and Afro-American Studies Department changed its name to the Department of African, African America and Diaspora Studies. *Id.*

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ *Id.* at 1.

¹⁵ *See id.* at 10, 24–29.

were available to—and used by—students as well as student-athletes, the NCAA apparently concluded that there was insufficient evidence of an athletic purpose behind the classes to establish an academic integrity violation under the NCAA by-laws.”¹⁶

Subsequently, the NCAA asserted these previous investigations failed to appreciate the complete scope of the academic irregularities due, in part, to the refusal of Nyang’oro and Deborah Crowder, a UNC alumna and former AASD Student-Services Manager, to meet with and cooperate in providing information to investigative bodies, including the NCAA.¹⁷ As discussed below, Crowder orchestrated the classes resulting in the irregularities. The earlier investigations were also conducted without the benefit of the information obtained by the SBI in its investigation. Unlike the other investigations, Cadwalader’s investigators were granted access to approximately 1.6 million emails and other evidentiary materials, including transcripts and protected student academic information.¹⁸

As mentioned above, the bylaw violations, alleged in the NCAA’s three notices of allegations, stem from alleged irregularities in courses offered in UNC’s AASD. According to the Wainstein Report, the alleged violations emanated from a scheme, devised by Deborah Crowder, which endured from 1993 until 2011, two years after Crowder’s retirement in 2009.¹⁹ The initial academic irregularities occurred in independent study classes that were designed and administered by Crowder.²⁰ The NCAA’s notices refer to these classes as “anomalous classes.”²¹ Both the Wainstein Report and this article refer to these classes as “paper classes.”

As outlined in the Wainstein Report, the paper classes were both similar and dissimilar to traditional independent study

¹⁶ *Id.* at 25.

¹⁷ *See id.* at 1–2, 25.

¹⁸ *Id.* at 12.

¹⁹ *Id.* at 3, 16, 21.

²⁰ *Id.* at 16.

²¹ *Id.* at 20; *Notice of Allegations*, *supra* note 2, at 1.

classes.²² Like traditional independent study classes offered at UNC, the paper classes entailed no class attendance and required only the submission of a single research paper.²³ Unlike traditional independent study classes, however, students did not meet periodically with faculty to discuss students' progress on their papers.²⁴ The typical process would have involved a rather extensive effort culminating in a professor assigning the final grade.²⁵ In the paper classes, no faculty member oversaw students' research and writing.²⁶ In fact, students enrolled in the paper classes did not have a single interaction with a faculty member.²⁷ Students interacted with Crowder, who oversaw the paper classes.²⁸ Crowder, a non-faculty member, provided no instructional content in the paper classes.²⁹ She registered students for the classes, assigned students their paper topics, received, and graded students' completed papers at the end of the semester; she also recorded students' final grades, which typically were either A's or high B's, regardless of the qualitative content of the papers.³⁰

According to the Wainstein Report, Crowder's actions appear to have had the implicit if not the express permission of Nyang'oro.³¹ Crowder's ability to assume an important role in the AASD appears to have been facilitated in part by the hands-off administrative approach of Nyang'oro who permitted Crowder to oversee course scheduling, registration, and

²² Wainstein Report, *supra* note 11, at 1.

²³ *Id.* at 16.

²⁴ *Id.* at 16–17.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 17.

²⁸ *Id.*

²⁹ *Id.* at 1.

³⁰ *Id.* at 16–17.

³¹ *Id.* at 17.

enrollment.³² Additionally, Nyang'oro permitted Crowder to sign his name on department matters.³³ It appears that Crowder and Nyang'oro's actions were motivated primarily by their desire to help students and student-athletes for which the UNC curriculum presented academic challenges.³⁴ Seemingly, Crowder must have been particularly motivated "to help [student-athletes] manage their competing athletic and academic time demands."³⁵

In 1999, as a consequence of curricular changes at UNC that limited the number of independent study hours for which students could earn academic credit, Crowder modified the operation of the paper classes.³⁶ Instead of being offered as independent study classes, UNC offered the paper classes as lecture courses with assigned meeting dates and times with classroom assignments.³⁷ Unlike traditional lecture courses at UNC and elsewhere, however, students enrolled in these classes did not attend classes, had no interaction with faculty, and students' papers were not graded by faculty but rather by Crowder.³⁸ In short, notwithstanding their lecture course designation, Crowder designed and managed the lecture classes based on the same model on which she designed and managed the independent study classes.³⁹

According to the Wainstein Report, both as independent study and lecture courses, the paper classes were available to all UNC students, but student-athletes, particularly football and men's basketball players, disproportionately enrolled in the classes.⁴⁰ Although student-athletes comprised approximately 4.0% of UNC undergraduate students, student-athletes enrollment in paper classes accounted for 1,871 or 47.4% of the 3,933 student enrollments in the paper classes.⁴¹ Football players

³² *Id.* at 15, 17.

³³ *Id.* at 15.

³⁴ *Id.* at 43.

³⁵ *Id.* at 3.

³⁶ *Id.* at 17.

³⁷ *Id.* at 16–17.

³⁸ *Id.*

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 3–4; *see, e.g., id.* at 34–35.

⁴¹ *Id.* at 19.

comprised 50.9% of the 1,871 total student-athlete enrollments in paper classes.⁴² Men's basketball players accounted for 12.2% of student-athlete enrollments, women's basketball players accounted for 6.1%, and athletes in Olympic and other sports accounted for 30.6% of the student-athlete enrollments in the paper classes.⁴³

Academic counselors in the Academic Support Program for Student-Athletes ("ASPSA") steered many of the student-athletes, particularly football and men's basketball players, to these classes.⁴⁴ According to the Wainstein Report, these counselors' actions were motivated, in part, by the pressure they were under to assist student-athletes in maintaining their academic eligibility to play sports.⁴⁵ The Wainstein Report states that ASPSA academic counselors steered many student-athletes to take the courses with knowledge that the paper classes had no faculty involvement and that the courses were "GPA boosters," which permitted student-athletes to earn grades that enabled them to maintain their academic and athletic eligibility.⁴⁶ Specifically, the Wainstein Report concludes that certain counselors even suggested to Crowder the grades that student-athletes needed to earn in the paper classes to maintain their academic eligibility.⁴⁷

Students were generally aware that Crowder did not carefully read papers submitted for the paper classes.⁴⁸ Consequently, many students submitted papers that included original material in introductions and conclusions, with

⁴² *Id.* at 3, 35.

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 20.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* at 3.

plagiarized text in between.⁴⁹ Moreover, certain ASPSA tutors provided impermissible assistance to student-athletes by partially drafting their papers.⁵⁰

The final grades Crowder assigned in the paper classes confirmed students' understanding that they would receive high grades.⁵¹ The 3.62 average grade awarded in paper classes was higher than the 3.28 earned by all students in regular AASD classes.⁵² The average grades awarded to student-athletes in these classes were 3.55 compared to an average of 2.84 earned by student-athletes in regular AASD classes.⁵³ The Wainstein Report further states that the inflated grades awarded to student-athletes in the paper classes significantly impacted student-athletes' GPAs by an average of .03 grade points.⁵⁴ This, in turn, significantly impacted student-athletes' ability to reach the 2.0 grade threshold required for them to remain academically eligible and/or to graduate.⁵⁵

Crowder announced she would retire from her position in 2009 with the AASP Department.⁵⁶ The Wainstein Report investigators found that ASPSA football counselors, who had grown dependent on the paper classes, instructed players to submit their papers before Crowder's retirement.⁵⁷ These counselors also informed football coaches "that with Crowder's retirement they no longer had access to classes 'that met degree requirements in which [the football players] didn't go to class . . . didn't take notes [or] have to stay awake . . . didn't have to meet with professors [and] didn't have to pay attention or necessarily engage with the material.'"⁵⁸

The Wainstein Report found that during a November 2009 meeting, two ASPSA personnel described to UNC's

⁴⁹ *Id.* at 20.

⁵⁰ *Id.*

⁵¹ *Id.* at 70.

⁵² *Id.* at 3.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 14, 21, 7 n.1.

⁵⁷ *Id.* at 21.

⁵⁸ *Id.* at 4.

football coaches, including then UNC head football coach Butch Davis, how the paper classes had been used to help football players remain eligible.⁵⁹ The presentation included PowerPoint slides that compared football players' GPAs with and without the aid of the paper classes.⁶⁰ The ASPSA personnel emphasized that the coaching staff should recruit better prepared players and encourage them to pay more attention to their studies, [but] the short-term message was a warning that grades were going to fall precipitously with Crowder's retirement.⁶¹ According to the Wainstein Report, the prediction became a reality when in the fall of 2009, UNC football players' GPAs fell to 2.12, the lowest level in approximately 10 years.⁶² Following the presentation, the PowerPoint slides were sent to ASPSA's director and to UNC's Senior Associate Director of Athletics.⁶³ ASPSA personnel also successfully persuaded Nyang'oro to continue to offer the paper classes, which he did, albeit, in more limited numbers.⁶⁴

In 2011, after the media raised concerns regarding irregularities in AASD, UNC's administration began to scrutinize the paper classes.⁶⁵ Prior to 2011, UNC employees appear to have possessed varying levels of knowledge of the paper classes and how they operated.⁶⁶ According to the Wainstein Report, some ASPSA counselors and members of the UNC Athletic Department staff were aware that student-athletes

⁵⁹ *Id.* at 22 n.20.

⁶⁰ *Id.* at 22.

⁶¹ *Id.* at 23.

⁶² *Id.*

⁶³ *Id.* at 22 n.20.

⁶⁴ *Id.* at 23–24, 36. Nyang'oro offered two lecture classes, one independent study class, and three bifurcated classes in which some students took these classes in the traditional lecture format and others took these classes in a paper class format. *Id.* at 23–24, 36.

⁶⁵ *Id.* at 24.

⁶⁶ *Id.* at 63.

had enrolled in the paper classes and how these classes operated—requiring no class attendance and no faculty involvement.⁶⁷ These personnel also possessed knowledge that consistently high grades were awarded to student-athletes in the paper classes even for low quality work.⁶⁸ In addition to steering student-athletes to the paper classes, certain ASPSA academic counselors allegedly steered student-athletes to African and Afro-American studies majors.⁶⁹

According to the Wainstein Report, certain academic administrators became aware of what might have been irregularities in AASP but failed to follow up.⁷⁰ For example, in 2005 or 2006, one administrator questioned Nyang'oro's capacity to supervise over 300 independent studies per year but failed to follow up.⁷¹ The Wainstein Report states that this failure to follow up contributed to the paper class scheme continuing for another five years.⁷² Other UNC faculty, administrators in Athletics, and ASPSA were aware that the paper classes lacked academic rigor but decided not to ask critical questions.⁷³ The Wainstein Report concludes, however, there was no evidence that high level UNC administrators “tried in any way to obscure the facts or the magnitude of this situation.”⁷⁴

After they became aware of the paper classes scheme, UNC administrators immediately self-reported potential rule violations to the NCAA.⁷⁵ It also commissioned the aforementioned investigations.⁷⁶

⁶⁷ *Id.* at 64.

⁶⁸ *Id.*

⁶⁹ *Id.* at 67.

⁷⁰ *Id.* at 5.

⁷¹ *See id.*

⁷² *Id.*

⁷³ *Id.* at 5–6.

⁷⁴ *Id.* at 6.

⁷⁵ *Id.* at 2, 96.

⁷⁶ *Id.*

III. THE NCAA'S FIRST AND AMENDED NOTICES OF ALLEGATIONS

A. FIRST NOTICE OF ALLEGATIONS

Focusing on irregularities in the paper classes, the NCAA contended in its First Notice of Allegations that between 2002 and 2011, UNC “provided impermissible benefits to student-athletes that were not generally available to the student body.”⁷⁷ The first allegation (“Allegation 1”) in the notice is premised on the alleged special arrangements that ASPSA counselors made with Crowder, Nyang’oro, and faculty within AASD.⁷⁸ These arrangements included registering athletes in the paper classes, obtaining assignments for student-athletes for these classes, turning in papers on behalf of student-athletes, and recommending grades that should be assigned to student-athletes enrolled in the paper classes.⁷⁹ The NCAA also alleges that ASPSA counselors used the paper classes to “help ensure the eligibility of academically at-risk student-athletes.”⁸⁰ According to the NCAA, this and other conduct constituted a Level I violation in that UNC provided impermissible extra benefits over a nine-year period that “undermined or threatened the integrity of the NCAA Collegiate Model”⁸¹ In particular, UNC’s conduct allegedly undermined student-athletes’ participation in their own education.⁸² Allegation 1 asserts that the

⁷⁷ *Notice of Allegations*, *supra* note 2, at 1. The NCAA refers to the paper classes as anomalous because the courses deviated from the way in classes are typically taught at UNC in that the classes required minimal if any faculty interaction, had no attendance requirements, and lax standards.

⁷⁸ *See generally id.* at 2–35.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1.

⁸¹ *Id.* at 2.

⁸² *Id.*

aforementioned conduct violated NCAA Bylaw 16.11.2.1, which prohibits student-athletes from receiving extra benefits.⁸³

The second allegation (“Allegation 2”) of the notice focused on the role of Jan Boxill, a former UNC philosophy professor and women’s basketball counselor within ASPSA. The allegation asserts that between 2007 and 2010, Boxill knowingly provided extra benefits to women’s basketball student-athletes and thus committed a Level I violation.⁸⁴ Specifically, Boxill allegedly provided substantial impermissible academic assistance in the form of requesting that Crowder enroll student-athletes into the AASD paper classes, completing course work on behalf of student-athletes, turning in work on behalf of student-athletes, and recommending that Crowder assign certain grades to student-athletes.⁸⁵ Boxill’s conduct allegedly violated Bylaws 10.1 and 10.1(c) regarding ethical conduct, and Bylaw 16.11.2.1 regarding extra benefits.⁸⁶

The third and fourth allegations (“Allegation 3” and “Allegation 4”) of the First Notice of Allegations, allege unethical conduct by Crowder and Nyang’oro, respectively. Allegation 3 asserts that in 2014 and 2015 Deborah Crowder engaged in unethical conduct by refusing to cooperate and provide relevant information (e.g., refusal to submit to an interview with NCAA enforcement staff) to the NCAA relating to its investigation of the irregularities in courses offered in the AASD.⁸⁷ The NCAA contends that Crowder’s conduct was a severe Level 1 breach.⁸⁸ She allegedly violated NCAA Bylaws 19.1.1. and 19.1.1-(c), which impose obligations on institutional employees to cooperate with the NCAA in its investigation.⁸⁹ The NCAA makes no reference to violations of the ethical conduct bylaws articulated in Bylaw 10.1. Similarly, Allegation

⁸³ *Id.* at 1.

⁸⁴ *Id.* at 35.

⁸⁵ *Id.* at 35–45.

⁸⁶ *Id.* at 35.

⁸⁷ *Id.* at 45.

⁸⁸ *Id.*

⁸⁹ 2014-2015 NCAA Division I Manual, NCAA 313, 313–14 (Aug. 1, 2014), <http://www.ncaapublications.com/productdownloads/D115.pdf> [hereinafter *NCAA Division I Manual*].

4 asserts that in 2014 and 2015 Julius Nyang'oro also engaged in unethical conduct by refusing to cooperate and provide relevant information (e.g., refusal to submit to an interview with NCAA enforcement staff) to the NCAA during its investigation of the irregularities in courses offered in the AASD.⁹⁰ Moreover, the NCAA contends that Nyang'oro's conduct constituted a severe violation, amounting to a Level 1 breach.⁹¹ Nyang'oro allegedly violated NCAA Bylaws 19.1.1. and 19.1.1-(c),⁹² which impose obligations on institutional employees to cooperate with the NCAA in its investigation.⁹³

In the fifth allegation ("Allegation 5") of the First Notice of Allegations, the NCAA asserts that the breadth and nature of Allegations 1 and 2 demonstrate UNC lacked institutional control and violated NCAA bylaws when UNC failed to monitor Jan Boxill's activities.⁹⁴ The NCAA alleges further that UNC exhibited a lack of institutional control regarding the impermissible extra benefits derived by student-athletes who enrolled in the paper classes in the AASD.⁹⁵ Specifically, UNC's alleged failure to effectively monitor the ASPSA and the AASD enabled the paper class scheme to continue for 18 years and allowed ASPSA personnel to maintain the athletic eligibility of student-athletes, particularly football and men's basketball players.⁹⁶

Although the general student body also had access to the anomalous AFRI/AFAM courses, student-athletes received preferential access to

⁹⁰ *Notice of Allegations, supra* note 2, at 48.

⁹¹ *Id.* at 47.

⁹² *Id.*

⁹³ *NCAA Division I Manual, supra* note 89.

⁹⁴ *Notice of Allegations, supra* note 2, at 48.

⁹⁵ *Id.*

⁹⁶ *Id.* at 48–49.

these anomalous courses, enrolled in these anomalous courses at a disproportionate rate to that of the general student body, and received other impermissible benefits not available to the general student body in connection with these courses.⁹⁷

The NCAA's Notice of Allegations included factual circumstances that could result in more severe sanctions and mitigating factors that would reduce the severity of the sanctions.⁹⁸ The aggravating factors allegedly include: multiple Level I violations, UNC's history of multiple Level I, Level II, or major violations; UNC's lack of institutional control (as described in Allegation 5); the disregard of rules violations and other wrongful conduct by persons in positions of authority; and the alleged unethical conduct of Crowder, Nyang'oro and Boxill.⁹⁹ The First Notice of Allegations stated one mitigating factor in relation to Allegation 1—UNC's history of self-reporting Level III or secondary violations.¹⁰⁰

B. AMENDED NOTICE OF ALLEGATIONS

In a letter dated April 25, 2016, the NCAA submitted its Amended Notice of Allegations to UNC.¹⁰¹ The most notable differences between the First and Amended Notices of Allegations is the omission of specific football and men's basketball players in the Amended Notice as well as broad allegations of impermissible extra benefits present in the First Notice of Allegation.¹⁰² In addition, the Amended Notice of Allegations asserted a shortened timeframe of fall 2005 to

⁹⁷ *Id.* at 49.

⁹⁸ *Id.* at 50–53.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 51.

¹⁰¹ *Amended Notice of Allegations*, *supra* note 6.

¹⁰² Andrew Carter, *UNC Accused of No New Major Violations in NCAA's Amended Notice of Allegations*, THE NEWS & OBSERVER (Apr. 25, 2016, 11:11 AM), <http://www.newsobserver.com/sports/college/acc/unc/article73736122.html>.

summer 2011, within which certain of the alleged violations occurred.¹⁰³

Violations asserted in the Amended Notice of Allegations include Allegation 1, which expands the period of time to include 2003 through 2011 during which Boxill allegedly provided impermissible benefits to student-athletes.¹⁰⁴ Allegations 2 and 3 address the alleged unethical conduct of Crowder and Nyang'oro, respectively.¹⁰⁵ Allegation 4 asserts that from 2005–06 through 2010–11, UNC violated the Principle of Rules Compliance when both academic and athletic administrators failed to sufficiently monitor the ASPSA and AASD.¹⁰⁶ This failure to monitor the operations of the ASPSA and AASD allegedly permitted the paper classes to go undetected. UNC did not document independent study classes and did not address how those classes were taken by students, including student-athletes.¹⁰⁷ The Amended Notice also alleges that UNC failed to sufficiently monitor such activities notwithstanding concerns by UNC personnel that Boxill's relationship with student-athletes was too close.¹⁰⁸

Allegation 5 of the Amended Notice asserts that UNC violated the Principle of Institutional Control and Responsibility in failing to address the paper classes when concerns were brought to the attention of UNC leaders.¹⁰⁹ The Notice alleges that as a result of UNC's failure to exert control, the problems within AASD continued.¹¹⁰

¹⁰³ *Id.*

¹⁰⁴ *Amended Notice of Allegations, supra* note 6, at 5–6.

¹⁰⁵ *Id.* at 49–50.

¹⁰⁶ *Id.* at 51–53.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 53–59.

¹¹⁰ *Id.*

IV. UNC'S RESPONSE TO THE NCAA'S AMENDED AND SECOND AMENDED (THIRD) NOTICES OF ALLEGATIONS

A. UNC'S RESPONSE TO THE NCAA'S FIRST AND AMENDED NOTICES OF ALLEGATIONS

UNC conceded to some assertions but asserted several defenses to others in the First and Amended Notice of Allegations.¹¹¹ These defenses included estoppel and the NCAA statute of limitations.¹¹² UNC accepted the allegations regarding Crowder and Nyang'oro's failure to cooperate with the NCAA.¹¹³ UNC also conceded to the allegation that Jan Boxill provided impermissible benefits to student-athletes, but denied allegations that Boxill engaged in unethical conduct because she did not knowingly provide extra benefits.¹¹⁴ Consequently, UNC

¹¹¹ See *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 10–11.

¹¹² UNC contends that because the NCAA previously investigated these irregularities, the NCAA is estopped from raising additional matters relating to such irregularities. *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 15. UNC also argues that under “Bylaw 19.8.3, the NCAA’s prior decision on those matters is ‘final, binding, and conclusive’” *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 8. UNC also contends that the NCAA Constitutional provision § 2.8.2 and bylaw 19.01.1 entitle that member institutions be afforded fair procedures in proceedings that “reflect fundamental legal concepts of fairness and equity.” *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 8. According to UNC, these principles require the NCAA to adhere to its 2012 decision. *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 8. Finally, UNC asserts that certain of the allegations are time barred because they fall within the NCAA’s four-year statute of limitations. *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 9.

¹¹³ *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 9. See also Andrew Carter, *UNC Says Bogus AFAM Classes Don’t Fall Under NCAA Jurisdiction*, THE NEWS & OBSERVER (Aug. 2, 2016), <http://www.newsobserver.com/sports/college/acc/unc/article93255562.html>.

¹¹⁴ *Response to NCAA Amended Notice of Allegations*, *supra* note 9, at 9.

argues that Boxill's conduct did not amount to a Level I violation but was a Level III violation.¹¹⁵

UNC's primary argument was that the NCAA lacks jurisdiction to adjudicate matters pertaining to the AASD paper classes because the alleged irregularities related to core academic issues, including course content and structure.¹¹⁶ In responding to Allegation 5 of the Amended Notice of Allegations, which asserts a lack of institutional control, UNC argues that because the irregularities associated with the paper classes involved core academic issues, they were outside the purview of the NCAA's Constitution and bylaws.

Issues related to UNC-Chapel Hill's academic irregularities are the proper subject of review by SACSCOC, its accrediting agency – not the NCCA, its athletic association. Accordingly, though conduct related to the anomalous courses presents serious institutional issues, it should not and cannot support a lack of institutional control allegation under the NCAA constitution and bylaws absent an underlying rules violation. In addition, because the anomalous courses did not give rise to Boxill's actions as alleged in Allegations 1 and 4, neither of those allegations independently supports a lack of institutional control.¹¹⁷

To bolster its argument, UNC asserts that the Amended Notice of Allegations did not allege that the student-athletes enrolled in the paper classes obtained an impermissible extra benefit.¹¹⁸

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.* at 10.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 12.

UNC also states: “the [Amended Notice of Allegations] acknowledges in Allegation 5 that problems with the anomalous courses were not directed at or limited to student-athletes, but instead affected the ‘general student body.’”¹¹⁹

B. THE NCAA SECOND AMENDED (THIRD) NOTICE OF ALLEGATIONS

In a letter dated December 13, 2016, the NCAA submitted to UNC a Second Amended Notice of Allegations (hereinafter the “Third Notice of Allegations”).¹²⁰ The Third Notice of Allegations followed an October 2016 appearance by UNC before the COI to address the jurisdictional arguments raised by UNC in its response to the Amended Notice of Allegations.¹²¹ In rejecting UNC’s jurisdictional and procedural arguments, the COI concluded:

[T]he procedural claims raised by the institution do not bar the panel’s consideration of this case on the merits. In sum, the panel concludes that the record supports that the infractions process is properly invoked to consider the merits of the case and neither the statute of limitations nor principle of fundamental fairness or finality bar the panel’s consideration of this case.¹²²

Addressing the NCAA’s lack of jurisdiction argument, the Committee wrote:

The NCAA’s constitution and bylaws do not generally contemplate the infractions process

¹¹⁹ *Id.*

¹²⁰ *Third Notice of Allegations, supra* note 7.

¹²¹ Greg Barnes, *NCAA COI Chair Greg Sankey’s Intervention into UNC Case*, SCOUT.COM (Dec. 22, 2016), <http://www.scout.com/college/north-carolina/story/1739981-sankey-s-intervention>.

¹²² Carol Cartwright et al., *University of North Carolina, Chapel Hill – Case No. 00231*, NCAA (Nov. 28, 2016), <https://carolinacommittment.unc.edu/files/2016/12/November-28-2016-letter-from-Committee-on-Infractions.pdf>.

addressing quality and content assessments regarding academic courses. The NCAA membership, however, has recognized an appropriate space for the infractions process to address circumstances involving an athletics department, coaching or athletic staff members, or other institutional personnel improperly influencing student-athletes' eligibility or academic performance. This is particularly true where conduct could demonstrate orchestrated efforts to inappropriately establish, preserve or obtain eligibility. Those issues cut to the core of the NCAA Collegiate Model, the notions of integrity and fair play and the purpose of the NCAA.¹²³

The letter also provided guidance that would enable the NCAA enforcement staff to modify its allegations in such a manner as to properly implicate academic allegations. The letter stated that the Committee would hear appropriately framed claims involving unethical academic assistance and academic misconduct where facts support the allegations.¹²⁴ The COI requested that the NCAA's enforcement staff make material changes to its allegations that "best position the case for the panel's consideration" and submit a second amended notice.¹²⁵

In the aftermath of the COI's November 28, 2016 letter, the NCAA issued a Third Notice of Allegations that modified its previous notices.¹²⁶ This notice states, more sharply, that the conduct of institutional personnel in relation to the paper classes constituted unethical conduct resulting in an extra benefit to

¹²³ *Id.* at 2.

¹²⁴ *Id.* at 3.

¹²⁵ *Id.*

¹²⁶ *See Third Notice of Allegations, supra* note 7.

student-athletes enrolled in those classes.¹²⁷ As discussed *infra*, the allegations attempt to create a nexus between violations of NCAA Bylaws 10.1 and 16.11.2.1.¹²⁸

Unlike the First and Amended Notices of Allegations, the Third Notice of Allegations frames the conduct of Crowder and Nyang'oro so that it falls more clearly within the ambit of NCAA Bylaws 10 and 16. It states that between 2002 and 2011, Crowder and Nyang'oro, "violated the principles of ethical conduct and extra benefit legislation in connection with certain anomalous AFRI/AFAM courses."¹²⁹ Emphasizing the role of the athletics department in the paper classes, the Third Notice of Allegations states, "the institution and its athletics department leveraged the relationship with Crowder and Nyang'oro to obtain special arrangements for student-athletes in violation of extra-benefit legislation."¹³⁰

The Third Notice of Allegations also asserts that Crowder and Nyang'oro administered and managed the paper classes so as to "delegate to athletics personnel the authority to manage material aspects of these courses for student-athletes in violation of ethical-conduct and extra-benefit legislation."¹³¹ Noting that the paper classes required little or no work by students enrolled in them, the Third Notice of Allegations states the classes provided an extra benefit to student-athletes.¹³² Even though the courses were available to all students, "Crowder and Nyang'oro worked closely and directly with athletics," resulting in student-athletes being "afforded greater access to the [paper classes] and enrolled in these courses at a disproportionately higher rate than students who were not athletes."¹³³ The Notice goes on to state that "[m]any at-risk student-athletes, particularly in the sports of football and men's basketball, used these courses

¹²⁷ *See id.* at 1–2.

¹²⁸ *See id.* at 1–10.

¹²⁹ *See id.* at 1.

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.* at 1–2.

¹³³ *See id.*

for purposes of ensuring their continuing NCAA academic eligibility [in violation of bylaws 10 and 16].”¹³⁴

Attempting to establish the intimate nature of the working relationship between Crowder, Nyang’oro, and UNC’s athletic department, the Third Notice of Allegations asserts that UNC and its athletic department leveraged their relationship with Crowder and Nyang’oro to make special arrangements on behalf of student-athletes.¹³⁵ While general students worked with Crowder and Nyang’oro, “to access and complete the [paper classes], the institution and its athletics department provided student-athletes with special arrangements that were not generally available to the student body.”¹³⁶

The Third Notice of Allegations provides examples of these special arrangements, which allegedly included athletic department personnel: (1) contacting Crowder and Nyang’oro to enroll student-athletes in the paper classes after the registration deadlines had passed; (2) obtaining assignments for the paper classes on behalf of student-athletes; (3) suggesting to Crowder assignments for student-athletes to complete; (4) submitting papers in the paper classes on behalf of student-athletes; (5) recommending grades to be given student-athletes enrolled in the paper classes; and, (6) requesting on behalf of student-athletes that certain paper classes be offered.¹³⁷

The Third Notice of Allegations concludes that:

[T]he excessive involvement by the athletic department in student-athletes’ access to and completion of these courses was a benefit not generally available to other students and relieved student-athletes of the academic responsibility of

¹³⁴ *See id.* at 2.

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

a general student. In some cases, these courses influenced the student-athletes' NCAA academic eligibility.¹³⁸

The Third Notice of Allegations also states that the scope and nature of the above conduct serves, in part, to demonstrate and support the NCAA's claims of lack of institutional control and "a failure [of UNC] to monitor the conduct and administration of its athletics programs."¹³⁹

Thus, the allegations in the Third Notice of Allegations represents the NCAA's attempt to bring the conduct of UNC personnel and student-athletes within the scope of the ethical conduct and extra benefit legislation in effect when the conduct occurred.¹⁴⁰ Comparing the NCAA's First and Third Notices of Allegations, one commentator appropriately states that the Third Notice of Allegations:

[P]resents a stronger, more focused case against the classes and the actions associated with them In [the Third Notice of Allegations], the enforcement staff made clear its stance that the athletic department had "excessive involvement" in the enrollment and completion of those classes, and such involvement was a violation of the spirit of NCAA rules [The Third Notice of Allegations] makes a clearer argument of a scheme, a conspiracy among Crowder, Nyang'oro and athletic department officials [The Third Notice of Allegations] states simply that Crowder and Nyang'oro worked closely and directly with athletics.

Another key point: the enforcement staff based Allegation 1 on a supposed violation of bylaws related to sportsmanship and ethical

¹³⁸ *See id.*

¹³⁹ *See id.* at 7.

¹⁴⁰ *See id.* at 1.

conduct. Those bylaws—10.1 and 10.01.1—weren't used as a basis for any allegation in [the First Notice of Allegations]. Using them in [the Third Notice of Allegations] allows the enforcement staff and, eventually the committee on infractions, to condemn the classes as a contradiction to NCAA rules outlining sportsmanship and ethical conduct, which the NCAA would argue are paramount to college athletics.¹⁴¹

Now the discussion will turn to an examination of ethical conduct, extra benefits legislation, and NCAA infractions decisions.

C. UNETHICAL CONDUCT AND EXTRA BENEFIT BYLAWS

NCAA Bylaw 10.1, which covers ethical conduct and was in effect during the relevant timeframe, imposed an obligation on individuals employed or associated with NCAA member institutions, including coaches and student-athletes, to “act with honesty and sportsmanship at all times”¹⁴² Bylaw 10.1 also proscribed unethical conduct whether committed by a student-athlete or an institutional staff member.¹⁴³ Among the illustrations of unethical conduct were Bylaws 10.1(b) and (c), providing that unethical conduct included:

¹⁴¹ Andrew Carter, *UNC's Third Notice of Allegations: Questions and Answers*, THE NEWS & OBSERVER (Dec. 24, 2016, 8:00 AM), <http://www.newsobserver.com/sports/college/acc/unc/unc-now/article122813999.html>.

¹⁴² *2010-11 NCAA Division I Manual*, NCAA (Aug. 1, 2010), <http://www.ncaapublications.com/productdownloads/D1111.pdf> [hereinafter *2010-11 NCAA Manual*].

¹⁴³ *Id.* at 49–50.

(b) Knowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete; [and] (c) Knowing involvement in offering or providing a prospective or enrolled student-athlete an improper inducement or extra benefit or improper financial aid.¹⁴⁴

NCAA bylaw 16.01.1, in effect during the relevant timeframe, provided that a student-athlete who received an extra benefit, which NCAA legislation has not authorized, rendered the athlete ineligible to participate in all sports.¹⁴⁵ Bylaw 16 then defines an extra benefit:

An extra benefit is any special arrangement by an institutional employee or representative of the institution's athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation.¹⁴⁶ Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body (e.g., international students, minority students) determined on a basis unrelated to athletics ability.¹⁴⁷

There is no shortage of examples of NCAA infractions decisions involving impermissible extra benefits. In 2016, the NCAA penalized Arkansas State University for the conduct of a former director of the school's men's basketball operations who provided excessive apparel valued at \$5,165 to a men's

¹⁴⁴ *Id.* at 49.

¹⁴⁵ *Id.* at 219.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

basketball student-athlete.¹⁴⁸ The NCAA sanctioned Wichita State University for extra benefits when its former head coach and an administrative assistant provided baseball student-athletes with extra benefits consisting of discounted apparel and other clothing.¹⁴⁹ Other examples of impermissible extra benefits include: impermissible financial aid totaling \$5,500 to three members of a men's golf team;¹⁵⁰ a representative of an institution's athletic interest (a booster) providing student-athletes with gifts, meals, money for tuition and for travel expenses;¹⁵¹ and, assistant coaches and a booster providing lodging, airfare, other transportation and meals to student-athletes and a student-athlete's mother.¹⁵²

In one of the most notable decisions in the NCAA's history, Heisman Trophy recipient and former University of Southern California running back, Reggie Bush, surrendered his Heisman Trophy due to allegations regarding extra benefits. The

¹⁴⁸ *Arkansas State University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS (Apr. 13, 2016), https://www.ncaa.org/sites/default/files/2016_ArkansasStatePublicDecision_20160413.pdf.

¹⁴⁹ *Wichita State University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS (Jan. 29, 2015), <https://www.ncaa.org/sites/default/files/Wichita%20State-Infractions%20DecisionPUBLIC.pdf>.

¹⁵⁰ *Lamar University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS (Sept. 22, 2016), https://www.ncaa.org/sites/default/files/Sep2016INF_LamarPublicInfractionsDecision_20160922.pdf.

¹⁵¹ *University of New Hampshire Public Infractions Decision*, NCAA COMM. ON INFRACTIONS 1, 3–5 (June 27, 2014), <https://www.ncaa.org/sites/default/files/New%20Hampshire%20Public%20Decision.pdf>.

¹⁵² *Report No. 289 Alabama State University*, NCAA DIV. I INFRACTIONS APPEALS COMM. 3–6 (June 30, 2009), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102516> (showing impermissible housing and meals); *Saint Francis University Public Infractions Decision*, NCAA COMM. ON INFRACTIONS 1, 3 (Aug. 28, 2014), <https://www.ncaa.org/sites/default/files/StFrancisPublicInfractionsDecision.pdf>.

COI found that Bush, his family, and his friends received impermissible benefits consisting of cash, merchandise, airline and other transportation expenses (e.g., limousine services), lodging, meals, cash to purchase a car, and the purchase of a home for use by Bush's parents (i.e., under an arrangement whereby Bush's parents paid the agents only \$1,400 of the approximately \$4,500 monthly mortgage).¹⁵³

In cases involving fraudulent academic behavior, NCAA bylaws regarding ethical conduct and extra benefits converged as illustrated in a 2016 infractions decisions regarding the University of Notre Dame.¹⁵⁴ There, a former athletic trainer committed academic misconduct by partially or totally completing assignments for two student-athletes. The two student-athletes, as well as a third student-athlete, were found to have committed academic misconduct individually by failing to adhere to the school's academic integrity policy.¹⁵⁵ The trainer provided impermissible academic assistance to six other athletes, two of whom violated Notre Dame's academic integrity policy.¹⁵⁶ When the former trainer completed coursework for six football student-athletes in eighteen courses during the 2011–12 and 2012–13 academic years, the COI concluded she provided academic benefits not expressly authorized by NCAA legislation.¹⁵⁷ The COI was not swayed by the former trainer's explanation that she only provided the additional assistance to “‘help’ the athletes in the institution's academic environment.”¹⁵⁸ In this regard, the COI stated “[t]he best help she could have given the student-athletes and herself was to ask a question of the athletics compliance staff *before* engaging in behavior that would

¹⁵³ *University of Southern California Public Infractions Report*, NCAA COMM. ON INFRACTIONS 4–6 (June 10, 2010), <http://i.usatoday.net/sports/college/2010-06-10-usc-ncaa-report.pdf>.

¹⁵⁴ *University of Notre Dame Public Infractions Decision*, NCAA COMM. ON INFRACTIONS 1 (Nov. 22, 2016), https://www.ncaa.org/sites/default/files/2016INF_PublicInfractionsDecisionNotreDame_20161122.pdf.

¹⁵⁵ *Id.* at 1–4, 6.

¹⁵⁶ *Id.* at 1–2, 4–6.

¹⁵⁷ *Id.* at 11.

¹⁵⁸ *Id.*

jeopardize the welfare of the institution and the eligibility of student-athletes.”¹⁵⁹

Similarly, the COI was not persuaded by Notre Dame’s argument that the NCAA’s actions in penalizing the university for academic misconduct intruded upon “the institution’s autonomy over student academic misconduct.”¹⁶⁰ According to the COI, the essence of Notre Dame’s argument was that “purely academic decisions should not be affected by athletics considerations.”¹⁶¹ “The institution advances the argument that purely academic decisions by an institution could be affected or influenced with the incentive to consider potential NCAA infractions ramifications as it shapes its honor code.”¹⁶²

In response to Notre Dame’s argument, the COI stated:

The membership, through its bylaws, expects that member institutions will apply an academic integrity policy fairly to all students, including student-athletes. Bylaw 10 also requires a member institution to report instances of academic misconduct to the NCAA, which happened in this case. The institution’s obligation to report such instances exists regardless of any potential penalty consequences. Moreover, the panel, on behalf of the membership, is mindful that institutions should do the right thing regardless of whatever potential NCAA infractions penalties or consequences may result due to any purported academic misconduct. That academic misconduct may implicate potential NCAA

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 11–12.

¹⁶¹ *Id.*

¹⁶² *Id.* at 11–12.

violations or penalties does not mean that the NCAA somehow encroaches on purely academic determinations made by a member institution.

Here, it is uncontested that the former student athletic trainer was employed by the institution's athletics department and her activities were subject to NCAA legislation in effect at the time of the violations. The institution conceded at the expedited hearing that the former student athletic trainer was an institutional staff member under the bylaws in effect at that time. The former student athletic trainer was therefore governed by NCAA rules and acted with disregard to the training she received. She had special access to student-athletes by the very nature of her employment in the athletics department, although she had no responsibilities in academics or academic support. It is uncontested that she assisted members of the football team in a way that elevated their academic performance, which was then deemed eventually to invalidate their academic performance, which had retroactive eligibility implications.¹⁶³

In recent decisions involving Georgia Southern University,¹⁶⁴ Southern Methodist University,¹⁶⁵ and Southern Mississippi University,¹⁶⁶ institutional staff members, who completed

¹⁶³ *Id.* at 12.

¹⁶⁴ *Georgia Southern Public Infractions Decision*, NCAA 3 (Jul. 7, 2016), https://www.ncaa.org/sites/default/files/2016INF_GeorgiaSouthernPublicDecision_20160707.pdf.

¹⁶⁵ *Southern Methodist University Public Infractions Decision*, NCAA 33 (Sept. 29, 2015), https://www.ncaa.org/sites/default/files/SMU%20Public%20Decision_Corrected%20Penalties.pdf.

¹⁶⁶ *University of Southern Mississippi Public Infractions Decision*, NCAA 16 (Oct. 7, 2016), <https://www.ncaa.org/sites/>

coursework for student-athletes, engaged in unethical conduct in violation of NCAA Bylaw 10.1-(b) by virtue of also having knowingly provided an extra benefit to student-athletes in violation of Bylaw 16.11.2.1, prohibiting extra benefits.

The assertions in the Third Notice of Allegations present a more viable case that UNC's conduct, if factually established, falls within NCAA Bylaws 10 and 16.

VI. CONCLUSIONS AND IMPLICATIONS OF THE UNC CASE

Rather than attempt to predict the outcome of the NCAA's allegations, this article will make observations of what is perceived as the significance of the UNC case. An important implication of the case occurred in April 2016, when the NCAA Division I Council adopted the first major change to Division I academic integrity provisions since 1983.¹⁶⁷ The legislation, which became effective in August 2016, restricts what constitutes academic misconduct to those situations in which improper conduct is also a violation of an institution's academic conduct policies.¹⁶⁸ The NCAA Division I Council articulated the following rationale for the legislative change:

Under the current regulatory structure, it can be unclear when academic misconduct involving student-athletes fall within the purview of the NCAA and when academic misconduct should be an institutional matter. This proposal will

default/files/2016INF_MississippiInfractionsPUBLICDecision_20161007.pdf.

¹⁶⁷ Michelle B. Hosick, *DI Council Adopts Academic Integrity Proposal*, NCAA (Apr. 8, 2016, 12:27 PM), <http://www.ncaa.org/about/resources/media-center/news/di-council-adopts-academic-integrity-proposal>.

¹⁶⁸ *Id.*

address membership concerns by expanding the application of academic misconduct legislation to any situation in which an institutional staff member is involved and replacing the current academic extra benefit analysis with a specific and limited definition of impermissible academic assistance. In addition, the proposal will require institutional policies and procedures regarding academic misconduct for the general student body and prohibit an individual from knowingly providing false or misleading NCAA Division I Academic Program information.¹⁶⁹

As noted in the above quotation, to facilitate the new policy, NCAA member institutions are now required to develop academic integrity policies applicable to the entire student body and student-athletes, and adhere to those policies.¹⁷⁰ Thus, NCAA Bylaw § 14.02.1 states that “[p]ost-enrollment academic misconduct includes any violation or breach of an institutional policy regarding academic honesty or integrity (e.g., academic offense, academic honor code violation, plagiarism, academic fraud).”¹⁷¹

Misconduct that falls short of academic misconduct may nevertheless violate NCAA bylaws regarding impermissible academic assistance, which has been disassociated from extra benefit bylaws. Impermissible academic assistance is defined as “[s]ubstantial assistance that is not generally available to an institution’s students and is not otherwise expressly authorized by Bylaw 16.3, which results in the certification of a student-athlete’s eligibility to participate in intercollegiate athletics, receive financial aid, or earn an Academic Progress Rate point . . .”¹⁷² The illustrations of unethical conduct have been redefined,

¹⁶⁹ *Academic Eligibility – Academic Misconduct*, COMPLIANCE CORNER 4 (Oct. 2, 2015), <http://compliance.pac-12.org/wp-content/uploads/2015/11/Proposal-No.-2015-66.pdf>.

¹⁷⁰ NCAA Manual, *supra* note 3, at 175.

¹⁷¹ *Id.*

¹⁷² *Id.* at 144.

in part, to omit the previous illustration relating to “knowing involvement in arranging for fraudulent academic credit . . . for a prospective or enrolled student-athlete.”¹⁷³ This, combined with the untethering of impermissible academic assistance, means that the NCAA can charge an institution with impermissible academic assistance, even though the student-athlete who received the assistance is not affected.¹⁷⁴

Commentators consider the new legislation a direct result emanating from the NCAA’s academic related allegations against UNC. One commentator noted that historically, ‘extra benefits’ suggested “gaining something of monetary value, not free academic grades.”¹⁷⁵ This commentator added that by charging UNC with impermissible benefits, the NCAA created confusion regarding the types of improper academic conduct that falls within the scope of NCAA bylaws.¹⁷⁶ The new legislation attempts to decrease the likelihood that any such confusion will occur in the future.

The UNC case also illustrates pressures placed on academic counselors to assist student-athletes in remaining athletically eligible. Apart from academic eligibility, which may translate into more wins than losses, other benefits result from successful student-athlete academic performance. The NCAA’s plan to tie the distribution of revenue to colleges based on their athletes’ academic performance, and the penalties associated with low Academic Progress Rates are other examples of the importance of student-athlete academic performance and the

¹⁷³ *Id.* at 146; see also *2010-11 Division I NCAA Manual*, *supra* note 142, at 49.

¹⁷⁴ Jon Solomon, *UNC Scandal Forces NCAA to Redefine its Academic Misconduct Policy*, CBSSPORTS.COM (Apr. 8, 2016), <http://www.cbssports.com/college-football/news/unc-scandal-forces-ncaa-to-redefine-its-academic-misconduct-policy>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

resulting pressure on those who provide academic assistance to student-athletes.¹⁷⁷ The UNC case brought to the forefront concerns relating to the oftentimes “cozy” relationship between athletes, academic advisors, and athletic departments as well as the influence that coaches and others within athletic departments exercise over athlete academic advisors.¹⁷⁸ Moreover, the UNC case demonstrates the careful balance that athlete academic advisors must try to achieve in providing assistance that does not hinder student-athletes’ analytical development and self-sufficiency while at the same time providing them with the level of assistance that will enable them to take advantage of educational opportunities at their institutions.¹⁷⁹ From a practical perspective, the case has and is likely to continue to hasten the call for changes in the reporting structures of academic advisors as a means of lessening the influence of coaches.

Undoubtedly, as the UNC case reaches its conclusion, it will provide a good case study. A case study not only for what does and does not constitute ethical behavior in college athletics, but also for developing structures and techniques by which academic assistance can be provided to student-athletes that genuinely enables them to develop academically.

¹⁷⁷ Michelle Brutlag Hosick, *DI to Distribute Revenue Based on Academics*, NCAA (Oct. 27, 2016 12:36 PM), <http://www.ncaa.org/about/resources/media-center/news/di-distribute-revenue-based-academics>.

¹⁷⁸ Jack Stripling, *Athletics Advisers’ Ethical Dilemma*, THE CHRON. HIGHER EDUC. (Oct. 24, 2104), <http://www.chronicle.com/article/Athletics-Advisers-Ethical/149613>.

¹⁷⁹ *Id.*