

Legal Issues in

COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

Presented by Ice Miller LLP

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This special version of Legal Issues in Collegiate Athletics has been created in cooperation with Ice Miller LLP. The firm's lawyers and professionals have more than 30 years of cumulative NCAA experience, recently served as NCAA staff members, have firsthand student-athlete and coaching backgrounds, and are well-versed on NCAA rules, regulations and procedures. The Collegiate Sports Practice also has extensive experience with and detailed knowledge of the NCAA infractions and waivers processes, and the operation of the NCAA governance structure.

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Legal Issues in Collegiate Athletics is published monthly by Hackney Publications, P.O. Box 684611, Austin, TX 78768. Postmaster send changes to Legal Issues in Collegiate Athletics Report. Hackney Publications, P.O. Box 684611, Austin, TX 78768.

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ISSN: 1527-4551

**Legal Issues in
COLLEGIATE ATHLETICS**



EMU Admits NCAA Rules Were Broken

Eastern Michigan University has self-reported four violations to the NCAA after an internal investigation turned up transgressions in the women's basketball program.

The self-reported violations involved exceeding limits on practice time, improper coach involvement in voluntary practices, and two individual violations regarding prospective student athletes participating in organized workouts, i.e. pickup games against existing student athletes.

The violations were uncovered during an internal investigation conducted by the Eastern Michigan University Compliance Office, following information received from a female basketball player.

Athletic Director Derrick Gragg announced the following disciplinary action as a result of the violations:

- AnnMarie Gilbert, Head Coach
 - Suspended without pay for one month
 - Salary freeze for 2010-2011
 - Mandatory counseling during 30-day suspension
 - Letter of Reprimand
 - Apology to team members
 - Attend NCAA Regional Rules Seminar—pay own costs, provide full summary of all rules sessions attended to Compliance Office
 - Darin Thrun, Assistant Coach
 - Indefinite suspension with pay
 - Salary freeze for 2010-2011
 - Letter of Reprimand
 - Attend NCAA Regional Rules Seminar—pay own costs, provide full summary of all rules sessions attended to Compliance Office
 - LaTonya Tate, Assistant Coach
 - Letter of Reprimand
 - Salary freeze for 2010-2011
 - Attend NCAA Regional Rules Seminar—pay own costs, provide full summary of all rules sessions attended to Compliance Office
- mary of all rules sessions attended to Compliance Office
- Blair Wagner, Assistant Coach Strength and Conditioning
 - Educational session with supervisor regarding voluntary workouts
- "We obviously take this matter very seriously, are cooperating fully with the NCAA and have provided a formal self report and self-imposed sanctions," said Gragg. "While I am disappointed, I am confident that Coach Gilbert will learn from this and that this will make her an even better coach in the future. The issuance of self-imposed sanctions does not preclude further disciplinary action should additional information be developed or sanctions imposed regarding the women's basketball program."
- In addition to the disciplinary action involving the coaches, the following self-imposed sanctions were announced:
- Two-years probation
 - A reduction in countable athletically-related activities as follows:
 - Fall 2010: Total of 14 hours a week (-6 hours a week)
 - Winter 2011: Total of 15 hours a week (-5 hours a week)
 - Student-athletes will receive two days off weekly during the MAC season for 2010-11
 - A reduction in the number of expense-paid recruiting visits from 12 per year to 10 per year in 2010-11 and 2011-12
 - Recreational/open gym activities for prospects prohibited for the women's basketball program for two years
 - Additional educational sessions for women's basketball staff and strength and conditioning staff members (AD will attend to re-enforce the seriousness of the situation)
 - Detailed practice schedules submitted

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Reflecting on the Past Year and Planning for the Future

By Barbara Osborne, Of Counsel, Ice Miller Collegiate Sports Practice and Mark P. Jones, Ice Miller Collegiate Sports Practice Chair

The end of a year is the perfect time to reflect on the legal issues that were raised in 2010. This year was similar to other years with a variety of contract and tort cases, Title IX and other discrimination claims, for college and university counsel and athletics administrators to tackle. However, change is always a constant. Along with the traditional student-athlete behavioral issues came new legal challenges related to social media. NCAA investigations focused on traditional issues such as recruiting violations, extra benefits, coaches who deliberately violate rules, and findings of a lack of institutional control. New trends from 2010 involved agent-related violations and the potential for institutional liability for those transgressions, either from staff involvement or issues related to institutional monitoring or oversight. This article takes a look at the legal issues of the past year with a focus on proactive planning to avoid these

The unpredictable behavior of student-athletes led to a variety of legal issues. A student-athlete protest led to the dismissal of a coach. Schools tried to minimize tailgating liability by instituting stricter tailgating policies. First Amendment issues were raised as schools banned athletes from using social media. Regulating noise also made the legal news.

types of issues in the future.

Title IX remained a hot legal issue. The Office of Civil Rights promised to aggressively enforce Title IX, and the National Women's Law Center filed a dozen complaints. With the challenging economic conditions and many schools facing budget cuts, lawsuits were filed against schools for cutting teams, both men's and women's. Settlements and court decisions focused

on equitable participation opportunities and required schools to reinstate teams and to create long-term plans to add more teams in the future. The definition of a comparable participation opportunity was explored in the *Biedinger v. Quinnipiac* case, while inspiring philosophical debate as to whether cheerleading should be considered a sport. The limits of Title IX protection were tested with some unusual claims as well. A claim that a student-athlete was discriminated against because she was not a lesbian was dismissed, but a softball team was permitted to bring a claim forward against an athletic conference, even though the conference was only an indirect recipient of federal funding. Sexual harassment claims persisted, with alleged victims of assault more aggressively seeking damages against universities for their roles in bringing the attacker/student-athlete onto campus. Retaliation claims continue to proliferate. Schools that have passively ignored Title IX need to proactively evaluate their programs and create long range plans in order to

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Accord Reached Between School, Women's Equestrian Team

A federal judge has approved a settlement of a gender equity lawsuit involving Delaware State University and its women's equestrian team. The agreement calls for the university to pay the team's attorney fees and court costs, amounting to approximately \$500,000. DSU has also made a commitment to continue funding the team for the foreseeable future.

"There's no words to express how happy we are to remain at Delaware State to do what we came for," said Caroline Foltz, the team's captain and the lead plaintiff. "I would love for equestrian to stay at DSU forever, but there's a need for equity for all women's sports."

The plaintiffs, a dozen members of DSU's women's equestrian team, filed a claim on February 23, 2010, seeking relief from DSU's decision to shutter its women's equestrian team at the conclusion of the 2009-10 academic year. Specifically, they argued that the school had intentionally discriminated against them in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88.

On April 7, 2010, after the plaintiffs filed a motion for a temporary restraining order and preliminary injunction, a magistrate judge approved the parties' jointly-proposed consent order, which stated that DSU may not eliminate the equestrian team until the end of the 2010-11 academic year.

The plaintiffs subsequently filed a revised complaint that sought, among other requested relief, issuance of "a final injunction that restrains DSU from continuing to discriminate against female students on the basis of sex and from eliminating the women's varsity equestrian team or any women's athletic opportunities and requires DSU to provide females with an equal opportunity to participate in varsity intercollegiate athletics."

Over the summer, a federal judge granted the plaintiffs' motion for class certification, finding that they had met all the requirements of Federal Rule of Civil Procedure 23, or numerosity, commonality, typicality, and adequacy. ■

Reflecting on the Past Year and Planning for the Future

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achieve compliance. The potential cost of litigation, or even settlement, is far greater than the relatively small investments needed to achieve equity.

Injured student-athletes continue to be a common source of tort claims for negligence against athletic trainers, physicians and institutions. Wrongful death suits emerged and were decided both for and against the university. The liability of the institution for the death of a football player with sickle cell raised awareness of the condition and prompted the enactment of an NCAA rule requiring sickle cell testing prior to athletics participation. Coaches brought defamation claims against schools, and a former student-athlete brought a defamation claim against the NCAA for statements made in an investigation report. A former college coach brought a defamation claim against ESPN for their reports on excessive punishment of a football player.

The interpretation of employee contract terms continues to be a problem area for college and university athletics programs. Coaches continue to bring wrongful termination claims, although schools have begun to more aggressively seek damages from coaches who breach employment contracts as well. Colleges and universities have also sought damages from those who interfered with a coach's contract. A court found a school liable for a verbal employment offer to an assistant coach made by a head coach. One of the more interesting cases involved a dispute about whether an institution was liable for a deferred payment to a coach who resigned, that was based on the terms of a "secret contract" not approved through the usual institutional process. Contracts negotiated with the athletics staff are often different from the typical contracts negotiated within academia. Third parties (e.g., agents) often assist or represent coaches who have become much more savvy in their approach to contract negotiations. In

order to leverage their bargaining power, colleges and universities also need to have experienced and competent representation.

The number of intellectual property claims continues to grow. Schools are more aggressively defending their marks, including filing lawsuits for trademark infringement and violations of the Lanham Act. University counsel, as well as artists, watched the Alabama case with interest to determine whether or not original works of art infringe on school trademarks. Former student-athletes brought class action lawsuits against the NCAA for failure to compensate them for the use of their likenesses. These issues will continue to grow on campuses.

The unpredictable behavior of student-athletes led to a variety of legal issues. A student-athlete protest led to the dismissal of a coach. Schools tried to minimize tailgating liability by instituting stricter tailgating policies. First Amendment issues were raised as schools banned athletes from using social media. Regulating noise also made the legal news as the SEC fined Mississippi State for violating the cowbell ringing policy. As noted before in this column, athletics program need to consider adopting department-wide student-athlete Codes of Conduct. Once established, athletics administrators must be diligent in enforcing the rules and punishing consistently.

Decisions by the NCAA's Committees on Infractions for schools involved in major violations included the typical recruiting and extra benefit violations and student-athlete eligibility issues. Also included were violations of playing and practice rules and cases involving impermissible text messages and phone calls. A concluded case and ongoing investigations of impermissible benefits and sport agent involvement have captured many headlines. Although no compliance department can detect violations that are deliberately designed to circumvent

institutional safeguards, a comprehensive rules education program in tandem with a vigilant monitoring program may deter violations or be a mitigating factor in cases when deliberate violations occur.

On a national level, a variety of interesting claims were made. The NCAA Final Four ticket process was determined to be an unlawful lottery. Conferences filed lawsuits against member institutions, which abandoned them for other leagues, and eventually settled. The NCAA survived anti-trust challenges by manufacturers, but a price fixing claim filed by former football players as a class action suit raises the issue of whether the NCAA's rule limiting the duration of an athletically-related scholarship to one academic year is legal.

The first decade of the 21st century has posed a myriad of challenges for college and university athletics programs. From investigating potential NCAA rule violations to assisting the department through the infractions process, the Collegiate Sports Practice professionals have the experience to help your institution tackle these challenges. Pro-actively creating policies and procedures, conducting Title IX and/or NCAA compliance reviews, establishing or enriching rules education programs, negotiating contracts, or providing an aggressive defense, Ice Miller is here to assist you with your legal needs. For more information please contact Ice Miller's Collegiate Sports Practice members, Barbara Osborne at barbara.osborne@icemiller.com or (317) 236-2465, or Mark Jones at mark.jones@icemiller.com or (317) 236-2488. ■

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U.S. Department of Education Eliminates Title IV Safe Harbors: Questions Remain on Compensation for Athletic Personnel

By Jennifer Harper and Gregg Clifton

The U.S. Department of Education has published a new rule that, among other measures aimed at strengthening federal student aid programs, prohibits all institutions participating in programs under Title IV of the Higher Education Act of 1965, as amended (HEA), from paying any incentive compensation based directly or indirectly on securing student enrollments or financial aid; The Department's final regulations, issued on October 29, 2010, abolish 12 safe harbor provisions specifically carved out from the general prohibition on incentive compensation in the 2002 amendments to the Higher Education Act.

The final regulations, which go into effect on July 1, 2011, apply to personnel at all levels, including athletic directors and coaches, who are "engaged in any student recruitment or admission activit[ies]," including "higher level employee[s] with responsibility for recruitment or admission of students;" The Department's interpretation of the statutory prohibition on incentive compensation is expansive. Of particular interest to collegiate athletic programs, the final regulations contain a broader definition of "securing enrollment" that covers incentive pay based on non-enrollment factors such as program completion and graduation. At the same time, however, the Department stated in its comments that incentive compensation based on team athletic performance would not be considered prohibited.

HISTORY OF THE BAN ON INCENTIVE COMPENSATION

In 1992, Congress amended the Higher Education Act to ban educational institutions from using any "commission, bonus, or other incentive payment" based directly or indirectly on "securing enrollments or financial aid;" The purpose of the law was to

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eliminate reported abuses in the recruiting and admissions process, particularly in the enrollment of unqualified students.

Prior to the 1992 amendment, a loophole in the law permitted educational institutions to keep federal financial aid even if the student did not enroll or attend the institution's program. Congress believed that some institutions were engaging in unethical student recruiting practices designed to increase federal financial aid to the schools. Incident to this practice, some schools paid incentive commissions to recruiters and admissions officers based solely on rising enrollment counts. Not surprisingly, the student loan default rate skyrocketed as an increasing number of unqualified students enrolled in programs but eventually dropped out or failed to attend. By 1990, the average default rate at all schools was at an all-time high of 22.4 percent; Press Release, U.S. Dept. of Education, "[Student Loan Default Rates Increase](#)," (September 14, 2009).

Meanwhile, the government was unable to recoup its financial investment while "rogue" schools pocketed the remaining financial aid;

To eradicate the misuse of federal funds and reform the student admissions process, Congress amended the Higher Education Act to prohibit schools from linking any kind of incentive payments to student enrollment numbers or financial aid receipts. Schools were required to return unused financial aid and the Department of Education was empowered to prohibit

a school from participating in the Title IV program if its default rates were too high. The Department of Education was authorized to investigate complaints and impose penalties upon schools and third parties found in violation of the statute.

After the amendments, more than 1100 schools were terminated from participation in the Title IV program. Many "rogue" schools were shut down and the student loan default rate dropped; By 2002, the U.S. Department of Education recognized that "most of [the] unscrupulous institutions were terminated from participating in Title IV HEA programs because of their high cohort default rate" and the opportunity for institutions to keep Title IV financial aid money awarded to unqualified students was "no longer possible;" Federal Student Aid Programs, U.S. Dept. of Education, 67 Fed. Reg. 67054 (Nov. 1, 2002).

THE RISE OF SAFE HARBORS

Despite initial success, the 1992 amendments proved difficult to apply in practice. Terms such as "incentive pay" and "securing enrollment" were vague and undefined; The statute was silent on what constituted an incentive that was "indirectly" based on securing enrollment; It was equally unclear whether the prohibition applied to compensation arrangements only partly based on student enrollment or financial aid receipts.

From 1992 to 2002, the Department attempted to resolve questions about the scope and meaning of the statute through informal guidance. But this led to contradictions in interpretation and confusion in application. Thus, in 2002, the Department issued new regulations designed to clarify its position. After extensive consultation with educational institutions and other interested organizations, the Department

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identified 12 compensation arrangements that it deemed not to violate the ban. These “safe harbors” were set out in the 2002 regulations, and can be summarized as follows:

12 SAFE HARBORS

1. Adjustments to employee compensation—34 CFR 668.14(b)(22)(ii)(A)
2. Enrollment in programs that are not eligible for Title IV program funds—34 CFR 668.14(b)(22)(ii)(B)
3. Payment for arranging contracts with employers to provide training—34 CFR 668.14(b)(22)(ii)(C)
4. Profit-sharing or bonus payments—34 CFR 668.14(b)(22)(ii)(D)
5. Compensation based upon students completing their educational programs—34 CFR 668.14(b)(22)(ii)(E)
6. Payments to employees for pre-enrollment activities—34 CFR 668.14(b)(22)(ii)(F)
7. Compensation to managerial and supervisory employees not involved in admissions or financial aid—34 CFR 668.14(b)(22)(ii)(G)
8. Token gifts—34 CFR 668.14(b)(22)(ii)(H)
9. Profit distributions—34 CFR 668.14(b)(22)(ii)(I)
10. Internet-based recruiting activities—34 CFR 668.14(b)(22)(ii)(J)
11. Payments to third parties for non-recruiting services to the school—34 CFR 668.14(b)(22)(ii)(K)
12. Payments to outside entities for recruiting or admissions activities—34 CFR 668.14(b)(22)(ii)(L)

Among the safe harbors is compensation based upon students completing their educational programs, or Safe Harbor (E). Incentives based on successful completion

of all or a portion of a student’s educational program are often considered in drafting compensation plans for athletic personnel, particularly head coaches. In 2002, the Department permitted this form of compensation on the premise that the statutory prohibition was intended to prevent abuses on the “front-end” of the enrollment process; that is, the admission of unqualified students. Under Safe Harbor (E), the Department reasoned that “a student who successfully completes an educational program in which he or she was enrolled means, for this purpose, that the student was qualified to attend the institution;” 67 Fed. Reg. 67056.

For similar reasons, Safe Harbor (G) allowed schools to make incentive payments to personnel who were not directly involved in the admissions or financial aid process, such as presidents, supervisors, and athletic personnel.

Together, Safe Harbors (E) and (G) allowed schools to make incentive payments to athletic staff based on academic performance factors such as program completion, graduation, and student grades. Debates abound on whether bonuses designed to increase student performance are effective, but one of the convincing reasons to include pay incentives for academic completion and graduation rates is the need to appropriately balance educational objectives. This is especially pertinent in collegiate athletics where students and coaches alike can feel extreme pressure to exceed on the field, sometimes at the expense of academic study. Indeed, the Department once commented, “[A]s a general matter, retention and completion of programs by students is a positive result that should be encouraged.” 67 Fed. Reg. 67056. However, under the new regulations, this is no longer an acceptable objective.

THE NEW REGULATIONS

On October 29, 2010, the Department issued final regulations regarding the ban

on incentive compensation. The new rule requires that an institution accepting Title IV funds

will not provide any commission, bonus or other incentive payment based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, to any person or entity who is engaged in any student recruitment or admission activity, or in making decisions regarding the awarding of title IV, HEA program funds.

34 CFR 668.14(b)(22)(i) (as amended). Among other changes to existing law, the Department eliminated *all* of the safe harbors it established in the 2002 amended regulations.¹ Barring certain interpretive flexibility, Safe Harbors (E) and (G) are no longer available.

In addition to removing the safe harbors, the Department made some important changes to the scope of the prohibition. Under the new regulations, the Department defined “securing enrollment” in part to mean “activities that a person or entity engages in... for the purpose of the admission or matriculation of students for any period of time....” 34 CFR 668.14(b)(22)(iii)(B). The Department further defined “securing enrollment” to include recruitment “contact in any form with a prospective student....” *Id.* The Department offered a few examples such as preadmission activities, scheduling an appointment and visiting the enrollment office, or signing an enrollment agreement or financial aid application; however, the definition contemplates any form of contact.

The Department also explained what is meant by incentive payment: “Commission, bonus, or other incentive payment means a sum of money or something of value, other than a fixed salary or wages, paid to or given to a person or an entity for services rendered;” 34 CFR 668.14(b)(22)(iii)(A). The definition of incentive

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payment appears to reject the more limited interpretation once held by some in which “incentive payment” was a mere synonym for commission or bonus.

Some institutions noted the Department’s definitions create the same ambiguities that led to the safe harbors in the first place. But the Department disagreed, stating:

We believe that institutions can readily determine if a payment or compensation is permissible under section 487(a)(20) of the HEA by analyzing—

(1) Whether it is a commission, bonus, or other incentive payment, defined as an award or a sum of money or something of value paid to or given to a person or entity for services rendered; and

(2) Whether the commission, bonus, or other incentive payment is provided to any person based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid, which are defined as activities engaged in for the purpose of the admission or matriculation of students for any period of time or the award of financial aid.

If the answer to each of these questions is yes, the commission, bonus, or incentive payment would not be permitted under the statute.

75 Fed. Reg. 66873.

The Department explained the two-part test is for guidance only, and that institutions may decide to use the test or not. But even if schools do follow the two-part test, it does not offer anything that cannot be gleaned from the statute itself.

THE IMPACT ON COMPENSATION TO ATHLETIC PERSONNEL

The new regulations bring incentive compensation to athletic staff within the ambit of the prohibition. With regard to Safe Harbor (E), the Department reversed

its prior position that incentive payments based on program completion did not constitute “enrollment.” Instead, the Department commented, “[W]e believe that paying bonuses to recruiters based upon retention, completion, graduation, or placement remain in violation of the HEA’s prohibition on the payment of incentive compensation;” 75 Fed. Reg. 66874.² Thus, under the new regulations, the Department makes it a violation of the Act if incentive payments are tied to program completion or graduation rates, directly or indirectly.

On the other hand, the Department’s comments regarding the elimination of Safe Harbor (G) indicate that coaches who are paid bonuses for *team academic performance* are exempt from the prohibition on incentive compensation. As noted, Safe Harbor G was designed to exclude from the prohibition those managerial and supervisory personnel who were not directly involved in the recruiting process. In eliminating Safe Harbor G, the Department explained the prohibition will cover all employees who are engaged in any student recruitment, including any “higher level employee with responsibility for recruitment or admission or students;” The Department specifically included athletic personnel as employees governed by the restrictions, reasoning that “recruitment of student athletes is not different from recruitment of other students;” 75 Fed. Reg. 66875. The Department stated in its comments, however, that incentive compensation based on team athletic performance would not be considered prohibited:

...the Department does not consider “bonus” payments made to coaching staff or other athletic department personnel prohibited if they are rewarding performance other than securing enrollment or awarding financial aid, such as a successful athletic season, team academic performance, or other measures of a successful team.

75 Fed. Reg. 66875.

The Department’s comments were in response to questions by some institutions as to whether incentive compensation to coaches based on program completion and graduation rates is prohibited. The Department’s answer does not directly address whether bonuses paid according to program completion and graduation rates are exempted in the athletic context. While it is reasonable to consider program completion and graduation a form of academic performance, the Department’s strong stance against the exclusion of such factors in its elimination of Safe Harbor E appears to have created a split position. Perhaps unintentionally, the Department has drawn a line between two factors that, for student athletes, are often part of the same continuum.

The Department’s interpretation of the ban on incentive compensation suggests that any incentive offered or provided to athletic personnel based in whole or in part on recruiting and retaining students (including student-athletes) will be covered by the Act. With the elimination of Safe Harbor E, the Department made any incentive compensation based on program completion or graduation rates a violation of the Act. But the Department’s comments in eliminating Safe Harbor G offer some flexibility when it comes to team academic performance. Thus, bonuses paid according to academic performance—such as team GPAs or team academic improvement—appear to be acceptable, but bonuses paid according to program completion and graduation rates likely are not. The conflict between the Department’s strict reading of the prohibition under Safe Harbor E and its more practical reading under Safe Harbor G will make it difficult to apply the prohibition when it comes to the unique compensation arrangements that often accompany high-level athletic personnel, such as head coaches. While the Department may clarify See U.S. DEPARTMENT on Page 8

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its position in the future, it has indicated the agency will not entertain individual questions regarding specific circumstances:

To the extent that ongoing questions arise on a particular aspect of the regulations, the Department will respond appropriately in a broadly applicable format and will distribute the information widely to all participating institutions. This response may include a clarification in a Department publication, such as the Federal Student Aid Handbook or a Dear Colleague Letter. The Department does not intend to provide private guidance regarding particular compensation structures in the future and will enforce the regulations as written.

75 Fed. Reg. 66875.

In light of the Department's reluctance to offer specific guidance, it is likely some of the less certain aspects of the final regula-

tions will play out in enforcement.

The Department's final regulations take effect July 1, 2011. During this grace period, it is critical that all Title IV recipients, including non-profit educational institutions, re-examine their policies and procedures regarding incentive compensation and conduct a thorough review of their contracts with employees and third parties to ensure they are in compliance with the new rules. The review should include compensation plans for athletic personnel. Title IV recipients should engage in a three-part review that focuses (1) on whether the compensation plan as written complies with the new regulations; (2) if not, how the plan can be drafted or revised to ensure compliance; and (3), how the institution can effectively negotiate compensation plans with athletic personnel that will achieve the school's long and short-term goals while remaining consistent with the law. Because contracts

with head coaches are often negotiated in great detail, and include specific achievement incentives, we do not recommend a generic review of compensation plans. ■

- 1 Incentive compensation remains permissible with respect to the recruitment of foreign students, who are ineligible for financial aid. Merit-based compensation that is not based on securing enrollments or financial aid is also permissible.
- 2 The Department's reasoning was as follows: Such compensation is "indirectly" based upon securing enrollments—unless the student enrolls, the student cannot successfully complete an educational program, and with the proliferation of short-time, accelerated programs, the potential exists for shorter and shorter programs, and increased efforts to rely upon this "safe harbor" to incentivize recruiters; This safe harbor may lead to lowered or misrepresented admissions standards and program offerings, lowered academic progress standards, altered attendance records, and a lack of meaningful emphasis on retention. U.S. Dept. of Education Issue Paper #4.

Coach, AD Released from Fair Labor Standards Act Lawsuit

A federal judge from the Southern District of Texas has granted a motion for summary judgment to a Texas Southern University's strength and conditioning coach and athletic director, who were each named in an employment lawsuit by an assistant coach.

Plaintiff Vonna "Ray" Baxter had claimed that the individual defendants and the school violated the Fair Labor Standards Act by not paying him for the overtime hours he worked. The court, however, found that the individual defendants could not be deemed an "employer" for purposes of the FLSA.

Baxter began working as an assistant for Coach Johnny Olguin on April 28, 2008, and continued through early November of 2009. That initial spring, Olguin had informed the plaintiff that "he had obtained approval for Baxter to start as his assistant." However, Olguin also claimed that he told Baxter "that (1) there was not enough funding in the athletic department's then-current

budget to pay Baxter for his work through the summer of 2008; (2) Baxter could volunteer with the possibility of becoming an employee in September 2008; and (3) Olguin would approach defendant Charles McClelland, the TSU athletic director, in September to ask if Baxter could be paid for the summer months retroactively.

"Baxter agrees that Olguin informed him about the budgetary concerns. Baxter's understanding about his status and the possibility of being paid for the summer in September, however, is unclear because Baxter has presented the court with conflicting information. In Baxter's declaration, which was filed in support of his opposition to the summary judgment motion, Baxter states that he was 'hired' in April of 2008 and that, when he was hired, 'Olguin told [him] that [he] would be paid in September when the new budget was implemented.' During Baxter's deposition, Baxter claimed,

consistent with his declaration, that he had understood that he 'would be paid in September of 2008 retroactively,' but he noted that those 'may not have been Olguin's exact words.' Then, later in the deposition, Baxter stated: 'I know Mr. Olguin does not have the final say on the budget. All he did was make recommendations, so I'm not trying to hold his feet to the fire. I mean, he made recommendations. Now, whether that happened or not was up to the athletic director.'"

According to the individual defendants, "McClelland determined in August 2008 that the TSU athletic department did not have sufficient funding to pay Baxter retroactively for assisting Olguin during the summer months, and Olguin informed Baxter of this decision."

The defendants were able to hire Baxter in September, but only for part-time status, since there was a hiring freeze on full-time

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Coach, AD Released from Fair Labor Standards Act Lawsuit

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positions.

“Despite his official part-time status, Baxter claims that he worked an average of 52 hours each week, except during school breaks and the Christmas holidays, until his separation of employment in October of 2009....

“However, McClellan and Olguin state that even if Baxter did (work overtime), Olguin had no way of knowing whether Baxter was working or merely working out for his own benefit. Moreover, they argue that Baxter was required to obtain permission to work overtime and did not do so.”

Baxter ultimately sued, and McClellan and Olguin moved for summary judgment, arguing that they “are not ‘employers,’ as that term is defined in the FLSA.” Their argument centered on the fact that they “(1) did not have the power to hire and fire Baxter;(2) did not determine the rate and method of payment; and (3) did not maintain Baxter’s employment records.”

Baxter countered that the definition of employer under the FLSA is sufficiently broad to encompass both McClellan and Olguin. Specifically, they “had sufficient involvement in the terms and conditions of Baxter’s employment to be considered employers under the FLSA. Specifically, Baxter claims that Olguin hired Baxter, after receiving permission from McClellan, and that Olguin determined what hours Baxter worked and directed his day-to-day activities. Thus, Olguin and McClellan together ‘hired Baxter, determined his work schedule, assigned Baxter’s job duties and set his rate of pay.’”

The court was unmoved.

“First, these activities, taken together, do not rise to ‘substantial control’ over TSU’s operations. Second, even if they did, it is inappropriate to analyze the areas in which McClellan had control and the areas in which Olguin had control in order to find them both, individually, liable under the

statute as employers. The question is not whether the individual defendants, together, exert sufficient control to be considered an employer, it is whether each defendant, standing alone, has sufficient control to be held liable as an employer for alleged violations of the FLSA. *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 972 (5th Cir. 1984). If courts were to look at the control exerted by a group of defendants collectively, then plaintiffs would be able to string together a line of defendants in any company that, together, exercise enough control to be considered employers under the FLSA. Individuals such as payroll processors and records clerks could be held personally liable as employers under the FLSA. Obviously, neither Congress nor the courts interpreting the FLSA intended for the term ‘employer’ to encompass such individuals. The court, therefore, considers Olguin’s level of control and McClellan’s level of control separately.

“Olguin managed Baxter’s day-to-day activities, but Baxter does not dispute that Olguin had to get permission to hire

Baxter and had no control over pay or record-keeping. McClellan allegedly gave permission to hire Baxter and set the pay bar for Baxter’s pay in accordance with the athletic department budget, but Baxter does not dispute that McClellan had no control over Baxter’s day-to-day duties or record-keeping. Both McClellan and Olguin claim that they did not have the authority to terminate Baxter’s employment, and Baxter does not present any evidence to the contrary. These activities do not rise to “substantial control” over the terms and conditions of Baxter’s employment. Thus, neither McClellan nor Olguin is an employer under the FLSA.” ■

Vonna “Ray” Baxter v. Charles McClelland & Johnny Olguin; S.D. Tex.; CIVIL ACTION H-09-3676, 2010 U.S. Dist. LEXIS 117709; 11/5/10

Attorneys of Record: (for plaintiff) Mark Siurek of Warren Siurek LLP, Houston, TX. (for defendant Texas Southern University) Allison V. Eberhart, Austin, TX. Mishell B Kneeland, LEAD ATTORNEY, Office of the Attorney General, General Litigation Division, Austin, TX.

Court Seeks Guidance About Ticket System

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“At this juncture, we believe that affording the Indiana Supreme Court the opportunity to interpret the application of the Indiana statutes involved here appears to be the most prudent course of action. Therefore, to that end, we grant the petition for rehearing, vacate our opinion issued on July 16, 2010, and respectfully certify the following questions to the Indiana Supreme Court:

1. Do the plaintiffs’ allegations about the NCAA’s method for allocating scarce tickets to championship tournaments describe a lottery that would be unlawful under Indiana law?
2. If the plaintiffs’ allegations describe an unlawful lottery, would the NCAA’s method for allocating tickets fall

within the Ind. Code § 35-45-5-1(d) exception for “bona fide business transactions that are valid under the law of contracts”?

3. If the plaintiffs’ allegations describe an unlawful lottery, do plaintiffs’ allegations show that their claims are subject to an *in pari delecto* defense as described in *Leshner*, 496 N.E.2d at 790 n.1, and *Swain v. Bussell*, 10 Ind. 331, 10 Ind. 438, 442 (1858)?” ■

Tom George et al. v. National Collegiate Athletic Association; 7th Cir.; No. 09-3667, 2010 U.S. App. LEXIS 21464; 10/18/10

Attorneys of Record: (for plaintiffs) Robert B. Carey, Attorney, HAGENS BERMAN SOBOL SHAPRIO, Phoenix, AZ. (for defendants) Benjamin R. King, Attorney, Michael L. Mallow, Attorney, LOEB & LOEB, Los Angeles, CA.

Years Later, School Gets Partial Victory in Title IX Case

A federal judge from Western District of Pennsylvania has sided, in part, with Slippery Rock University, which opposed a motion for attorney fees and costs brought by student athletes who had reached a settlement with the college regarding a Title IX lawsuit.

In so ruling, the court found that “certain of the students’ requests for fees (were) untimely... and that the requested number of hours submitted for compensation (was), in certain instances, redundant and excessive.”

The settlement agreement between the parties called for “ongoing monitoring by the students until the university achieved compliance.” Shortly after the settlement, the students moved for attorneys’ fees and costs incurred as a result of such monitoring and the negotiation of amendments to the settlement agreement. The university opposed the motion, arguing that the request for some fees was untimely, that some of the requested hourly rates were “unreasonable” and that the number of hours worked on particular tasks was “excessive and redundant.”

Addressing the issue of timeliness, the court found some of the plaintiffs’ requests untimely. However, it reached “a different conclusion with respect to the timeliness of fees requested for work done in connection with the 2009 Motion to Enforce, the 2009 Mediation and the 2009 Settlement Agreement.” Central to its finding was that the plaintiffs gave that they “intended to file a petition for attorney’s fees. The court did not impose a deadline for the filing of the petition nor did the university ask for one. Because the university was on notice of the imminent filing of the motion, I find that the requests in this regard — even though filed two months after the entry of the consent order — were timely filed.”

Next, the court examined the reasonableness of the hourly fees.

“I find that the students have sustained their prima facie burden of establishing that the rates requested above are reasonable,

given the experience, skill and reputation of the attorneys involved, the complex matter of this litigation, and the prevailing market rates,” wrote the court. “The university has not submitted any affidavits stating that the fees requested by the students’ attorneys are unfair or unreasonable or are otherwise not in accord with the prevailing market rates. Accordingly, given the absence of any conflicting evidence as well as the fact that the parties have not requested a hearing on the issue of an hourly rate, I find that the students have satisfied their burden of establishing the reasonableness of the requested hourly fees.”

Similarly, it found the complexity of the case necessitated the overall hours spent on the case.

“We are four years into a case that was amicably settled based upon the proposition that the university would achieve Title IX compliance,” wrote the court. “Compliance has not yet occurred. Presumably, the university would argue that compliance is elusive given the complicated and complex nature of Title IX and the evolving nature of the university’s student population. If the university were to advance such an argument, then dividing the complexity of the case among several attorneys, thereby allowing each to focus on a narrow area, would seem perfectly reasonable. Pooling their knowledge for the mediation would have to occur, either by attending the mediation or by conferring beforehand. The university has objected to both methods. If the university were to dispute the characterization of this case as complex, one would question why compliance remains elusive after so many years. In any event, I do not find the billing in this regard to be unreasonable.”

Finally, the court reviewed the university’s request for a reduction of the lodestar based upon two factors: limited success and the fact that the award comes from public funds.

“I reject the request on both counts.

Obviously, an amendment to a settlement agreement is, by its very nature, a compromise. Nevertheless, the students did obtain success and should not be punished in terms of a fee reduction because they were willing to compromise.

“I am also cognizant of the fact that the University is a public entity and, as such, the State System of Higher Education will bear the cost of any award of fees in this action. This will, in turn, have a negative effect on the taxpayers of Pennsylvania. Yet the taxpayers should look to the University’s administrators, rather than to this court or to the students’ attorneys, for an answer as to why fees are being paid. It is the university and its administrators who have failed — for more than 30 years — to achieve compliance with Title IX. The original settlement agreement was reached here in 2007. The students filed a Motion to Enforce in 2009 because, despite its explicit acknowledgment that Title IX compliance had not been achieved, and despite agreeing to a specific plan for achieving compliance going forward, the university failed to achieve such compliance. Thus, while this court is saddened by the thought of burdening the taxpayers with the fees in this case, the university bears the responsibility for the same.” ■

Elizabeth Laura Choike, et al., on behalf of themselves and all similarly situated individuals V. Slippery Rock University of Pennsylvania of the State System of Higher Education; W.D.Pa.; Civil Action No. 6-622, 2010 U.S. Dist. LEXIS 118131; 11/5/10

Attorneys of Record: (for plaintiffs) Abbe F. Fletman, LEAD ATTORNEY, Flaster Greenberg, P.C., Philadelphia, PA; Lizanne V. Hackett, LEAD ATTORNEY, Flaster/Greenberg, Cherry Hill, NJ; Susan J. Frietsche, LEAD ATTORNEY, Women’s Law Project, Western Pennsylvania Office, Pittsburgh, PA; Terry L. Fromson, LEAD ATTORNEY, Women’s Law Project, Philadelphia, PA. (for defendants) Mariah L. Passarelli, LEAD ATTORNEY, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pittsburgh, PA; Scott A. Bradley, LEAD ATTORNEY, Office of the Attorney General, Pittsburgh, PA.

Judge Clears Way for College Athlete's Breach of Contract Suit

A federal judge from the Northern District of Texas has rebuffed Southern Methodist University in its bid to have student-athlete's breach of contract claim dismissed.

Former SMU women's basketball player Jennifer Colli sued the school and her former coach in 2008, alleging breach of contract, intentional infliction of emotional distress, promissory estoppel, and fraud associated with the loss of her scholarship.

Colli, who is seeking a minimum of \$2 million in damages and \$450,000 in attorney's fees, wrote in her complaint that she received notice in August 2006 that her scholarship was not being renewed because of "serious misconduct." She claimed, however, that that pattern of misconduct was never documented and that she was never given a chance to defend herself in front of a "Judicial Committee."

Colli also alleged that, on at least one occasion, her coaches criticized players during a game, questioning whether the reason they weren't performing well was because they didn't "get any" the night before. In addition, she claimed that one month after having her scholarship renewed, she complained about the coach's

comments during the prior season. Then, two days before the next school year was to begin, Colli said she was notified that she did not have a scholarship.

She further alleged that the defendants ruined any chances she would have playing professional basketball and winning endorsements.

SMU moved to dismiss the suit, but Federal Judge Jorge Solis in Dallas was unreceptive. Specifically, he noted that Colli signed her scholarship renewal statement before the NCAA's July 1 deadline, and therefore it "was no longer an option" for SMU to revoke her scholarship.

Judge Solis found also flaws in the university's investigation, noting Athletic Director Steve Orsini's admission that he never asked any players about Colli's allegations. Instead, SMU zeroed in on Colli, accusing her of dishonesty and harassment.

The court finally concurred with the plaintiff's allegation that she never got a fair hearing to defend herself. ■

Colli is represented by attorneys Mike Kelly and Robert Brunig.

Jennifer Colli v. Southern Methodist University et al; N.D.Tex.; 9/17/10

LSU Recommends Self-Punishment to NCAA

Louisiana State University would surrender two football scholarships in 2012 for certain impermissible benefits it provided to a recruit under a plan it submitted to the NCAA last month.

The violations that occurred involved the transportation and housing of former defensive tackle Akiem Hicks, a junior college transfer, who was being wooed by the football program.

LSU first reported the violations to the NCAA and Southeastern Conference offices in the fall of 2009, and immediately launched its own investigation. Those findings were reported to the NCAA and SEC last spring.

LSU had reportedly already asked for and received the resignation of wide receivers coach D.J. McCarthy, the coach who recruited Hicks, after finding that he made phone calls to Hicks beyond the NCAA limit during the recruitment period.

"We've done the things we needed to minimize any penalty and wrongdoing. We're looking forward to this being resolved," Head Football Coach Les Miles told the media.

In a prepared statement, LSU Chancellor Michael Martin said: "LSU took quick and thorough action when we discovered these violations, and we are hopeful the NCAA will ultimately agree with our assessment of this case. The reports to the NCAA and SEC and our decision to self-impose penalties are the culmination of many months of arduous work by our compliance office, and I am confident their thorough examination of this case has produced appropriate sanctions for the football program."

AD Joe Alleva added: "We took immediate corrective measures to ensure they would not occur again, which is what a good compliance office is supposed to do. I am disappointed that these violations took place, but I am proud of the way that LSU reacted to the situation. We now stand ready to assist the NCAA in the completion of this process." ■

EMU Admits NCAA Rules Were Broken

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- to Compliance each week; Compliance will continue to spot check practices/voluntary workouts
- CARA forms submitted weekly, entire team must sign to verify accuracy
- Tutor/academic advisor to travel with team to ensure that there are at least three hours of mandatory study time per day while on the road
- Monthly meetings between the academic support staff and the head coach had been implemented. This will be increased to twice monthly.

"We have taken swift and decisive action in this matter," said Susan Martin, President of Eastern Michigan University. "We expect the best of everyone involved in a leadership capacity at EMU and will cooperate fully with the NCAA with the utmost transparency." ■

Court Seeks Guidance Whether Tickets System Was a Lottery

An Indiana state appellate court has granted the NCAA request for a rehearing, en banc, on the crucial question of whether the NCAA's ticket distribution system was a lottery, and thus illegal in the state of Indiana.

But before deciding the matter, the appellate court certified three questions to the Indiana Supreme Court, which will help it make its determination.

The plaintiffs in the case were sports fans who unsuccessfully applied for tickets to collegiate basketball games, and forfeited handling fees along the way. After they failed to obtain the tickets, they sued, claiming that the ticket-distribution system, created and facilitated by the NCAA and Ticketmaster, constituted an illegal lottery under Indiana law.

The NCAA successfully moved to dismiss the suit, but the plaintiffs appealed. On July 16, 2010, the appellate court reversed the judgment and remanded the case for further proceedings. For more on that specific proceeding, please see our summary, "Appeals Court Finds NCAA Ticket Process Was Unlawful Lottery, Reverses Lower Court" in Sports Litigation Alert, which can be viewed by visiting www.sportslitigationalert.com/sample.html.

The defendants appealed, spawning the instant opinion.

"The NCAA's relevant distribution system has been used to sell tickets for multiple events, including the NCAA's Division I men's and women's basketball and hockey championship tournaments," noted the court. "For each ticket sale, hopeful purchasers submitted a single application with up to ten entries. Each entry was a chance to win a pair of tickets and required payment of the ticket price plus a six-dollar handling fee. While an applicant could win only one pair of tickets, many applicants purchased multiple entries in order to maximize their chances of getting one pair of tickets. No matter how many entries they applied for, applicants had to pay for each entry up

front, along with the per-entry handling fee. Successful applicants would receive their tickets and, after some delay, a refund for their superfluous entries, while unsuccessful applicants would receive a refund for all of their entries. Both successful and unsuccessful applicants forfeited all handling fees to the NCAA."

The lynchpin of the plaintiffs' argument was that "the handling fees, along with the NCAA's temporary retention of the applicants' money, qualified as consideration paid for the chance to win tickets. They also argued that the tickets were prizes, as they were difficult to obtain and worth far more than the face value paid.

"The district court dismissed the complaint, holding that the doctrine of *in pari delicto* foreclosed recovery. In its order, the district court also noted that a similar distribution system, used for the sale of Indianapolis Colts tickets, was held to not qualify as a lottery by the Indiana Court of Appeals in *Lesh v. Baltimore Football Club*, 496 N.E.2d 785, 789-90 (Ind. Ct. App. 1986)."

The plaintiffs appealed the lower court's ruling. In resolving the appeal, the panel "first examined whether the plaintiffs had sufficiently alleged all three elements of an illegal lottery—prize, chance, and consideration—under Indiana law, *see* *Tinder v. Music Operating, Inc.*, 237 Ind. 33, 142 N.E.2d 610, 614 (Ind. 1957). We distinguished the NCAA's ticket-distribution system from the one in *Lesh* on two grounds. First, the ticket-distribution system in *Lesh* involved handling fees that were returned to unsuccessful purchasers; here, those fees were retained by the NCAA and thus qualified as consideration paid for a chance to win. Second, the plaintiffs in *Lesh* conceded that the sale price of the tickets was their actual value; here, the ticket purchasers claimed that the difficult-to-obtain tickets were worth far more than their sale price and thus qualified as valuable prizes. We held these distinctions

made all the difference and the plaintiffs had pled sufficient facts to show that the NCAA system constituted an illegal lottery.

"We went on to hold that the statutory exception for bona fide business transactions and the defense of *in pari delicto* did not apply. Indiana law accepts from the definition of gambling any participation in 'bona fide business transactions that are valid under the law of contracts.' Ind. Code. § 35-45-5-1(d). Reading this in tandem with Ind. Code § 35-45-5-3(a)(4), which proscribes all lotteries except those run by the State, we held that the bona fide business transactions exception applied to regulated investing and other similar activities, but not to the NCAA's ticket system. The doctrine of *in pari delicto*, which precludes recovery when parties are of equal wrongdoing, was also inapplicable: nothing in the pleadings suggested a mutual agreement between the parties to engage in an illegal lottery, and there was nothing to indicate that the plaintiffs knew they were participating in an illegal lottery when they attempted to purchase tickets. Without an exception or other defense, we held that the district court erred in dismissing the plaintiffs' claims and remanded accordingly. Judge Cudahy dissented, asserting that the ticket system was not a lottery, that the broad statutory exception applied, and that the *in pari delicto* doctrine foreclosed recovery. The NCAA then petitioned "for rehearing and suggestion for rehearing en banc."

Of course, the NCAA argued that its ticket-distribution system "did not qualify as a lottery under Indiana case law, that the exception for bona fide business transactions applied, and that the *in pari delicto* defense precluded recovery. We do note that the question of whether this ticket-distribution system constitutes a lottery under Indiana law is a close one, and our holding could have far-reaching effects on sports-ticket-distribution systems utilized by the NCAA and others.

See COURT SEEKS on Page 9