

# 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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*The Ice Miller Collegiate Sports Practice offers a full complement of NCAA compliance, legislative and infractions related services that include preventative initiatives, education and training programs, and guidance and representation regarding potential NCAA rules violations. For information, contact mark.jones@icemiller.com*

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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**



## Federal Court Dismisses Student Athlete's Suit against Ex-Auburn Trainer

**A** federal judge in Alabama has dismissed the claim of a former Auburn University football player, who sued a former trainer at the school for allegedly mismanaging his rehabilitation plan.

Central to U.S. District Judge Myron Thompson's ruling, which came one week before a scheduled jury trial, was that there was no direct evidence that the trainer, Arnold Gamber, ordered plaintiff Chaz Ramsey to perform the exercises that would lead to his back injury, or that there was a "chain of command" among Auburn medical officials, which would make Gamber liable for the injuries.

Ramsey first came to Auburn in 2007 and promptly earned a starting spot on the offensive line. By season's end, he was named to the Southeastern Conference All-Freshman Team.

Seemingly on course for a successful career at Auburn, Ramsey injured his back in December of that year. After receiving treatment, including minor surgery, in the spring of 2008, Ramsey was given clearance by his surgeon, Dr. Stanley Faulkner, to resume "a gradual supervised increase in activities that was to consist of some running and exercise without any weight room activities."

The plaintiff alleged that multiple defendants disregarded those instructions and on June 2, 2008 he injured his back again. Further, he claimed that when the defendants were informed that he could not resume activities, they removed him from the offensive line, revoked his meal ticket, and cleaned out his locker.

Further, they allegedly held Ramsey "up for ridicule and embarrassment before his teammates and coaching staff; questioned his injury and characterized him as a malingerer who was not really injured."

In early 2009, Ramsey had surgery

that allegedly ended his "participation in a sport where he held great promise for a professional career."

In a six-count complaint, the plaintiff alleged negligence, wantonness, interference with a physician/patient relationship, outrageous conduct, civil conspiracy, and violation of civil rights.

In the instant opinion, the court held that both Gamber and Auburn team physician Michael Goodlett stated that Gamber did not supervise strength and conditioning coach Kevin Yoxall, and that Yoxall managed the weight room independently.

"True, Gamber admitted that, if he and Yoxall differed regarding the exercises a recovering athlete should perform, Gamber's own recommendations would control over Yoxall's," it held.

"But there is no evidence that the circumstances that led to Ramsey's re-injury resulted from a disagreement between Gamber and Yoxall. Therefore, Gamber and the weight-room staff did not have the employment relationship necessary to hold Gamber liable for their conduct."

Gamber was represented by Birmingham attorney Joe Smith in the case.

Chaz Ramsey, who is scheduled to graduate from Auburn in May, was represented by Birmingham attorney Stephen Heninger.

Heninger went public with his "disappointment" over the court ruling.

"It doesn't make sense to me because Gamber is the one who admitted he's in charge of the rehab plan and he has to have Goodlett's approval," he said. "We showed that Goodlett testified that he never saw the completed plan and didn't see it until after Chaz was hurt. That's when he wrote the note in the chart that he was really upset with Gamber. No one could explain why the plan was lost." ■

## Bleacher Litigation in Sporting Venues

By Tom Bowler

It is interesting to note bleacher injuries are in the public eye constantly. One only needs to go to the newspapers or Internet to find stories relating to bleacher injuries. For example, in the fall of 2010, 12 students were injured in a “bleacher” collapse at a football game at East Carolina University’s Dowdy-Ficklen Stadium. Actually, this was a concrete grandstand with galvanized bleacher seats bolted to the permanent structure. The seats were supported by a cantilever brace, and the bolts came loose. At the time of the collapse, the students were jumping up and down on the bleachers.

Mishaps can come in the form of fallen branches on bleachers. Last fall, the *Hartford Courant*, in Hartford, Conn., reported a tree branch fell upon two young girls, ages six and eight, injuring them and their aunt. The takeaway lesson from such an incident is that we need to be vigilant in the safe placement of bleachers at sporting events. In concert with this notion is the fact that if bleachers are to be placed under trees, we need to do a careful inspection by a trained arborist.

This article will explore the area of bleacher standards, as well as making the reader aware of bleacher litigation within the field. Bleachers are used at many different levels throughout the country. They are used in youth sports, high school sports and collegiate events. Bleachers may

take the form of the moveable variety or the permanent type. Bleachers are used indoors and outdoors for athletic events. While many of these bleachers are risk-free, some have definite risk issues for the spectator. It should be recognized that the athlete can be at risk in some cases with buffer zones being ignored, should the player run out of bounds. The participant can run into bleachers if the “buffer zone” is not properly circumscribed around the court or field. Buffer zones are areas between

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the court or field which are unobstructed areas for the safety of the participant. In this fashion, an athlete will not impact trees, picnic tables, light stanchions, or bleachers close to the playing area. Rule books will dictate the appropriate setback for safety for this buffer zone.

It is recognized there are standards within the field of bleachers. Briefly, a standard may be defined as,

“... Norms established by authority, research, custom, or general consent to be used as criteria and guides in establishing and evaluating programs, leadership, areas, facilities, and plans; as measures of quantity, quality, weight, extent, or value.” [Glossary, p. 9].

In a court of law, standards are crucial to our profession. If there are no standards to reinforce a point, the case will be based upon the “standard of practice” within the profession. The “standard of practice” may be somewhat tenuous in proving a point [i. e. what people usually do within the profession].

It should be recognized within the bleacher industry, states and local communities will abide by existing codes within their locales. Therefore, universally these codes may not be applied throughout all 50 states. Case in point, the building code

and fire code in the Connecticut have various requirements for spectator seating. Therefore, one should seek out the state’s building department or state’s fire marshal, if you have specific questions concerning your bleachers. It is interesting to note Little League types of bleachers with fewer than 100 seats are exempt from required codes for spectators in Connecticut.

The International Code Council is a promulgator of codes. In Connecticut, the codes have adopted the International Code Council’s ICC 300. It is interesting to note the codes are revised every three years. The title of the ICC 300 code is “Standard for Bleachers, Folding and Telescopic Seating, and Grandstands.” This standard is very concise and runs 14 pages.

This code points out several safety issues that can be summarized in bullet format.

- Inspections = minimum, 1 time per year
- Outdoors, bleachers 10 ft. from buildings/lot lines
- Seat boards & footboards, 30” + above ground/floor, opening closed
- Will not permit 4” sphere to pass through
- Bench seating, 18” is width of one person
- Stepped aisles, ramps etc. 30” above grade, 42” guardrail is needed

Obviously, children can slip through the seat board to the footboard spacing and a serious injury may occur. If the spacing will not permit a 4-inch sphere to fit through, this would prevent children from accidentally falling through the spacing and getting seriously injured.

Unless we are cognizant of the ICC 300 standard, bleacher litigation will continue to prevail. Additionally, we need to be most vigilant with maintenance in inspecting indoor and outdoor bleachers. In a case in the Midwest, a young female in high school was watching a high school baseball game on outdoor bleachers. She decided to exit the stands by using the seat boards as the

See BLEACHER LITIGATION on Page 9

## Court Turns Away Title IX Case with Player, Who Claimed Rape

A federal judge from the Eastern District of California has granted a defendant university's motion for summary judgment in a case in which it was sued for violations of Title IX after a female student athlete was allegedly sexually assaulted by male student athletes.

The plaintiff's complaint centered on the University of The Pacific's policy after an investigation which included suspending the defendants and "precluding all post-suspension contact with plaintiff as well as limiting interaction generally between the men's and women's basketball teams."

The court found that "the policy was not directed at plaintiff, and she has no evidence of how the policy affected her, if at all. Rather, the policy was of limited duration, had minimal impact on any student, and applied equally to both teams."

The plaintiff, referred to as Jane Doe, was sexually assaulted on May 10, 2008. According to Doe, a men's basketball player offered her a ride to another party at campus housing. She claimed, however, that the player did not take her to another party, but instead to his campus apartment. Another men's basketball team member rode with the pair to the apartment. Once they arrived at the apartment, Doe claimed that they took off her clothes. About this time, another player arrived. Shortly thereafter, she was allegedly assaulted.

While the plaintiff did not report the incident to the authorities, she did tell a friend, who informed the assistant basketball coach. From there, the head coach was informed, then the athletic director and finally the vice president of student affairs.

The university encouraged Doe to press criminal charges, but she declined. The university initiated its own independent judicial process. The investigation revealed that the plaintiff "admitted she did not recall specifically whether she said the word 'no' at any point during the sexual conduct that occurred" between her and the male student

athletes. At the same time, the plaintiff "claimed that she did not consent to all of this sexual conduct. In total, this key evidence caused the Board to doubt whether all of the sexual activity that occurred was non-consensual."

Never the less, suspensions were handed out and artificial barriers were instituted between the teams.

The plaintiff claimed in her lawsuit that Pacific violated "Title IX of the Educational

**The court pointed to "undisputed facts that demonstrate the reasonableness of defendant's decision. Therefore, the plaintiff cannot establish a violation of Title IX on this basis."**

Amendments of 1972, because it (1) did not prevent the assault (first claim for relief); (2) demonstrated 'deliberate indifference' to sexual harassment in failing to respond appropriately to her complaint (second claim for relief); and (3) retaliated against plaintiff by instituting a policy limiting unsupervised social interaction between the men's and women's basketball teams (third claim for relief)."

The defendant countered in a motion for summary judgment that each of the plaintiff's claims failed under Title IX's stringent standards: "The University took steps to generally ensure the safety of its students, and plaintiff cannot establish the University's liability based on an alleged assault on another former female student which occurred a month prior to the plaintiff's assault. Further, the University conducted a fair and impartial judicial hearing, pursuant to University procedures, and Title IX does not mandate a particular remedy as urged by the plaintiff; the court cannot second-guess the severity of the punishment imposed by the University on the plaintiff's assailants.

Finally, the defendant contends the University's decision to restrict the basketball players' unsupervised interactions does not constitute a disadvantageous retaliatory action sufficient to support a Title IX claim since the decision was designed to alleviate the rising tension among the players and to protect plaintiff from the wrath of players who did not believe her."

Regarding the first claim, the court found that the plaintiff "failed to offer any evidence to demonstrate that the University acted negligently in this matter. To the contrary, their actions prior to and in response to plaintiff's assault were 'clearly not unreasonable' and thus, liability cannot attach."

Turning to the second claim, the court pointed to "undisputed facts that demonstrate the reasonableness of defendant's decision. Therefore, the plaintiff cannot establish a violation of Title IX on this basis."

Regarding the final claim, the court held that "the temporary policy barring unsupervised social contact between the two teams was not directed specifically at the plaintiff; indeed, the restriction applied equally to all members of both teams. The plaintiff remained free to attend all her classes, athletic events and University-sponsored activities. She was free to socialize with her teammates and other members of the University community as she wished. She would have been free to socialize with the men's basketball team in supervised settings. Thus, there is no evidence sufficient to raise a triable issue of fact that the policy seriously impaired her educational experience at the University." ■

Jane Doe v. University of The Pacific; E.D. Calif.; NO. CIV. S-09-764 FCD/KJN, 2010 U.S. Dist. LEXIS 130099; 12/8/10

Attorneys or record: (for plaintiff) Ivo Labar, LEAD ATTORNEY, Kerr and Wagstaffe, San Francisco, CA; Jacqueline Scott Corley, Kerr & Wagstaffe LLP, San Francisco, CA; John Christopher Clune, Victim Justice Initiative, PC, Denver, CO. (for defendant) Janine S. Simerly, LEAD ATTORNEY, Jennifer Rose Cotner, Miller Law Group, San Francisco, CA.

# Educating and Monitoring Student-Athletes Regarding NCAA Rules Over The Summer Vacation Period

*By Carrie R. McCaw, Ice Miller LLP, Collegiate Sports Practice Group Specialist and Mark P. Jones, Ice Miller LLP, Collegiate Sports Practice Group Chair*

As many of the LICA readers know, one of the services that Ice Miller's Collegiate Sports Practice provides is a comprehensive compliance review, [as required every four years by NCAA Bylaw 22.2.1.2(e)]. During a compliance review, Ice Miller evaluates the university's NCAA compliance structure and systems, including the compliance-related policies and procedures and the rules education program. One of the most frequent recommendations we make is for institutions to conduct a year end rules education session with student-athletes prior to the summer vacation period, similar to what is routinely done at the beginning of the academic year with each team. Ice Miller believes that a rules education session prior to the summer break is very important because there is often less interaction with student-athletes during the summer, and it's more difficult to employ effective monitoring. Ice Miller recommends that institutions consider the following topics be covered during an end of the year rules education meeting:

## **EMPLOYMENT**

### **NCAA Bylaw 12.4.1 – Criteria Governing Compensation to Student-Athletes**

The provisions of this bylaw require that a student-athlete be compensated for work actually performed and at the going rate for performing "similar services," and that student-athletes cannot be paid based on "the publicity, reputation, fame or personal following" that is due to their athletics ability.

During the summer vacation period many student-athletes obtain employment. Some athletic departments work with

employers to identify student-athletes who are interested in obtaining summer jobs. Regardless of how a student-athlete obtains employment, it is recommended that steps be taken to ensure that all student-athlete employment is reported to and documented by the compliance office. Rules education on employment should also be provided to the employer. The duty to monitor employment is even greater if a single employer, especially if that employer is a representative of the school's athletics interests, hires several student-athletes. The duty to monitor employment in these situations is even greater as was noted in the NCAA Committee on Infractions decision in the 2007 University of Oklahoma case. It is clear that the NCAA requires a greater onus on institutions to monitor student-athlete employment in these situations.

Among the monitoring actions to take with an employer: Provide them with a copy of the NCAA rules governing employment; verify if there will be any benefits incidental to their job (e.g., use of a vehicle) and available to other employees; have on file from the employer the student-athlete's job position, number of days worked during the week and rate of pay. Finally, conducting a post summer follow up with the employer to verify the actual earnings paid is advisable.

### **NCAA Bylaw 12.4.3 – Camp/Clinic Employment, General Rule, 13.12.2 – Employment at Camp or Clinic**

Enrolled student-athletes are permitted to work at institutional camps or clinics or with a camp conducted by a private organization provided the camp meets NCAA legislative provisions of Bylaw 13.12. Restrictions concerning how many student-athletes are employed at a camp may apply depending on the sport (see Bylaw 17). A student-athlete may be hired and paid for supervisory positions (e.g., coaching, officiating). A student-athlete may not be paid for only lectures or skill

demonstrations, and the student-athlete's compensation must be commensurate with others performing the same work. A comprehensive record of all student-athlete camp employment and earnings, as well as a record of camp expenditures should be on file with the institution. If possible, a compliance spot check of camp activities is always a proactive measure.

## **OUTSIDE COMPETITION**

### **NCAA Bylaw 14.7 – Outside Competition**

NCAA legislation permits student-athletes to compete as amateurs for teams outside of their institution during the summer vacation period. However, there are some restrictions that may apply (e.g., the number of teammates permitted on the same outside team). It is important that student-athletes understand how the rules apply to outside competition in the summer, and that student-athletes report anticipated outside competition activities to the compliance staff. [Note: Per NCAA Bylaw 12.7.4, basketball student-athletes are required to gain approval from the athletic director prior to participating in any certified summer basketball league.]

## **EXTRA BENEFITS**

### **NCAA Bylaw 16.02.3 – Extra Benefit**

A review of this legislation is always timely and a good idea. Many violations (secondary and major) have recently been reported regarding student-athletes receiving benefits from local establishments or boosters. Examples of extra benefit violations during the summer in recent years include free or reduced cost housing, or meals. Educating the student-athletes of the consequences associated with violating extra benefit legislation would serve as a reminder of their compliance obligations during the summer months.

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## Educating and Monitoring Student-Athletes Regarding NCAA Rules Over The Summer Vacation Period

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Please also note that another common violation (a hot topic in recent years) has been the unintentional provision of recruiting inducements by student-athletes to prospective student-athletes the summer before their initial enrollment at the institution. There have been numerous findings, especially in Division I major infractions cases, of housing violations because prospects “bunk” with future teammates free of charge after arriving on campus prior to pre-season practice or the official start to the academic year (Violations of NCAA Bylaw 13.2.1.1). It is recommended that when prospects arrive on campus early, that they check-in with the compliance staff, which can document the prospects’ living arrangements and sources of income and payment of their expenses during the vacation period. A year-end rules education session should include what is permissible and impermissible with regards to prospects arriving early to campus.

### **VOLUNTARY ACTIVITIES AND CONDITIONING**

#### **NCAA Bylaw 17.02.13 – Voluntary Activities**

During the summer vacation period and outside the playing season, participation by student-athletes in athletic and conditioning activities must be voluntary in nature. In light of the shared belief by many student-athletes and their coaches that summer workouts are essential to be competitive in the upcoming season the line between voluntary and non voluntary is not always black and white as it once was. In order to stay in compliance with the legislation a student-athlete cannot be required to report information about such activities back to the coaches, a student-athlete’s participation may not be recorded for purposes of reporting back to the coaching staff and

the student-athlete cannot be punished or penalized for failing to participate in any voluntary activities. Coaches in teams sports (e.g., basketball) cannot be present while student-athletes are participating in athletic or conditioning activities. Exceptions are possible in some individual sports (e.g., equestrian, Bylaw 17.6.7) for coaches to observe voluntary individual workouts and provide safety and skill instruction only. The coach is not permitted to conduct the workouts.

Reports of violations have surfaced in recent years regarding a coach’s knowledge or involvement in student-athletes’ voluntary activities. Typically the penalty for such violations is missed practice opportunities during the team’s playing season. However, during the past decade there have been cases of major rules violations regarding the mandatory nature of summer activities and improper coaching observations. Rules education should be provided to both the coaches and student-athletes as to the meaning of voluntary activities, the application of the rules and the potential consequences associated with such violations.

A rules education session with each team toward the end of the spring semester can be beneficial in preventing violations from occurring during the summer vacation period. This article only highlighted some of the areas which may be covered in this rules education session. Alerting both the coaching staffs and student-athletes of these rules may be an effective deterrent to violations occurring during the summer. If you have any questions regarding rules education or monitoring the compliance areas stated within this report, please contact Ice Miller Collegiate Sports Practice members, Mark P. Jones at mark.jones@icemiller.com or (317) 236-2488, or Carrie R. McCaw at carrie.mccaw@icemiller.com or (317) 236-5944. ■

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### **ESPN Sues Conference over Television Rights**

ESPN filed a federal lawsuit against Conference USA last month, claiming that the conference violated the contract between the two parties when it signed a new contract with Fox Sports Media Group in January.

Specifically, ESPN alleged that it reached a contract extension agreement with Conference USA via e-mail. However, the league decided later to pursue a contract with Fox. The network also alleged that it was never presented with a final offer before the conference began negotiations with another network.

In a statement released to the media, Conference USA Commissioner Britton Banowsky said the conference was “very disappointed that ESPN has taken this action.”

“We have had the benefit of legal counsel throughout this process, and we disagree with the positions they have taken. We are prepared to vigorously defend any litigation initiated by them. As we said earlier, the idea that they were disadvantaged is incorrect. They had every opportunity to step up and address our concerns, and they simply did not.”

## Texas Tech Protected by Sovereign Immunity in Leach Suit

**A** Texas state appeals court dealt a blow to former Texas Tech University Head Football Coach Mike Leach earlier this year when it dismissed the coach's breach of contract claim against the school because Texas Tech is shielded by the doctrine of sovereign immunity.

The 7th Court of Appeals did, however, allow that Leach could pursue non-monetary claims against the school. To that end, the case was remanded back to State District Judge William C. Sowder, who will determine if Leach received his due process.

Texas Tech fired Leach on Dec. 30, 2009, two days after it had suspended him because of allegations that he mistreated a player, who had a concussion. Leach claimed that one of the reasons he was fired was because he was due an \$800,000 bonus on Dec. 31. The school has maintained that Leach was fired because he refused to abide by its directives in the wake of the incident.

Not surprisingly, Leach's attorneys were highlighting the small legal victory in their public reaction.

"We appreciate and are gratified by the appellate court's ruling permitting Mike Leach to pursue his claims for declaratory relief against Texas Tech that: (a) Mike's constitutional rights were violated; and (b) Mike was improperly dismissed by Texas Tech University," said attorney Paul J. Dobrowski. "This ruling is very important because it permits Mike to pursue his request that a court declare Texas Tech's dismissal of him was improper and allows Mike to clear his name."

Clearly, however, the attorney wanted more.

"We are disappointed by the appellate court's ruling that Mike cannot pursue his claims for breach of contract and monetary damages based on Texas Tech's waiver of sovereign immunity by conduct.

"As the appellate court stated in its opinion, it was forced to rely on the archaic

doctrine of sovereign immunity in denying Mike's right to pursue monetary damages for breach of contract. The vast majority of states, besides Texas, have withdrawn the doctrine of sovereign immunity because it is inherently unfair to contracting parties and today we see why. Indeed, we agree with the court of appeals' observation in footnote 4 of their opinion, that art. 1, § 2 of the Texas Constitution is diminished by this purely judicial creation. Sovereign immunity contradicts and violates the principle that all political power is inherent in the people.

"The doctrine permits a Texas state institution to deny a person's written contractual rights and steal his hard-earned labor while paying nothing. In essence, this is nothing more than university-sanctioned theft of a person's labors and contractual rights. That is not fair and not the principles upon which Texas or its citizens stand. We are certain the people of Texas and its Legislature are disturbed that Texas Tech can sign a legally binding contract for services with Mike Leach, accept the benefits of Mike's performance under the contract, but deny Mike his right to enforce and obtain monetary damages for Texas Tech's breach of the contract simply because Tech is a state institution.

"In its opinion, the appellate court also noted that the Texas Supreme Court case law is unclear regarding waiver of sovereign immunity for breach of contract through conduct. Specifically, the appellate court noted that Texas case law on waiver by sovereign immunity is contradictory and requested that the Texas Supreme Court clarify it. We intend to ask the Texas Supreme Court to clarify the law on this issue, hope they will accept our appeal and decide in Mike's favor so he can pursue his claim for monetary damages due to Texas Tech's breach of contract."

Leach still has a chance at another victory on a different legal front.

"We won," Texas Tech attorney Dicky

Grigg said in a press conference. "The court has held that he has no monetary claims against the school."

The opinion can be viewed at <http://www.7thcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=14325>

Last November, attorneys representing Leach announced that they were suing ESPN and a public relations firm, Spaeth Communications, for libel and slander for their actions during the tumultuous time when Leach was fired. Specifically, he claimed "willful and negligent defamation," causing the former coach's "reputation" to take "a severe hit."

A Spaeth Communications spokesperson issued the following statement at the time:

"Because his effort to sue Texas Tech University individuals failed, it now appears that Coach Leach is looking for someone else to blame, and has shifted his focus to the Craig James family, ESPN and Spaeth Communications. This lawsuit is the predictable strategy of a man who is desperate to avoid accountability for his own behavior." ■

### Junior College Players Target NCAA with Lawsuit

Several junior college football players have alleged in a lawsuit that the NCAA has made it unduly difficult for them to transfer and compete for Division I institutions, that, in effect, the association has singled them out for "disparate treatment" in the awarding of scholarships.

The plaintiffs, led by City College (San Francisco) student Reginald Davis, are seeking class action status. At issue are changes that were made several years ago to NCAA bylaws, which require student athletes at two-year colleges to complete certain English and math credit hours to become eligible. The plaintiffs have named several institutions in the University of California and California State University systems as defendants.

## Appeals Court Affirms Ruling for James Madison

The 4th U. S. Circuit Court of Appeals has affirmed the dismissal of a lawsuit that challenged the decision of James Madison University (JMU) to eliminate seven men's and three women's varsity athletic teams in order to bring the school into compliance with Title IX.

The plaintiffs "failed to show how the Department's three-part test exceeded the permissive statutory bounds. The test did not violate the Equal Protection Clause because achieving gender equality in college athletics was a compelling interest."

In September 2006, the school announced that it was cutting 10 sports, blaming Title IX.

"I'm sure that athletes and their families will be disappointed, just as our coaches will," said JMU President Linwood Rose at a press conference. "And they won't be the only ones, because I think there are many other people who aren't directly connected who are also going to be disappointed with the decision. The fact is, we had to comply with the law."

At issue was the proportionality prong of Title IX, which requires that the percentage of the scholarships offered to female student athletes in the overall student-athlete population be in line with the percentage of female students in the overall student population. At JMU, the percentage of scholarships offered to female student athletes was 51 percent, while the percentage of female students was 61 percent.

School officials insisted that Title IX had forced its hand. Athletic Director Jeff Bourne noted at the time that "these 10 sports cost us about \$550 thousand in a sports budget of \$21 million. There's no way we're going to take all this heat and cause all the negative feelings for those affected athletes over \$550 thousand."

Those affected by the decision mobilized to challenge the decision, former Equity in Athletics, or Equity in Athletics Inc.

On March 19, 2007, EIA filed an action against DOE, the Secretary of Education, the Assistant Secretary for Civil Rights, and the United States, challenging Title IX's interpretive guidelines. In particular, EIA asserted that DOE's 1979 Policy Interpretation, i.e., the Three-Part Test, and its subsequent Policy Clarifications violated Title IX, the U.S. Constitution, and the APA. At about the time it filed suit against the federal defendants, EIA requested that JMU defer its proposed elimination of the 10 teams and, when JMU refused, EIA amended its complaint to join JMU and numerous JMU officials as defendants. EIA's complaint sought declaratory and injunctive relief that would invalidate the allegedly unlawful guidelines and forestall JMU's proposed team eliminations. In the alternative, EIA sought damages under Title IX to compel JMU to equalize scholarship payments to student-athletes affected by the alleged scholarship gap created

by JMU's decision to eliminate teams.

On June 15, 2007, EIA filed a motion for a preliminary injunction to prevent JMU from going forward with its plan to cut the athletic teams slated for elimination. The district court denied the motion for preliminary injunction, *Equity in Athletics, Inc. v. United States Department of Education*, 504 F. Supp. 2d 88 (W.D. Va. 2007), and we affirmed the district court, 291 Fed. Appx. 517 (4th Cir. 2008) (unpublished), cert. denied, 129 S. Ct. 1613, 173 L. Ed. 2d 993 (2009). Following the appeal of the denial of its motion for a preliminary injunction, EIA filed a second amended complaint, and the parties filed dispositive motions. On Dec. 30, 2009, the district court granted the defendants' motions to dismiss and entered final judgment. EIA appealed.

Elaborating on its aforementioned reasons for affirming the lower court's ruling, the panel wrote:

"First, EIA cites to no authority for the proposition that a scholarship allocation disparity of no more than 1 percent is required by DOE policy," it wrote. "As with the participation gap, DOE has not specified a magic number at which substantial proportionality is achieved. Second, EIA fails to address whether and how this gap has changed in the years since the initial cuts were made. There is no dispute that some of the scholarship funds in 2007-08 went to 'pay scholarships to former athletes on discontinued teams.' However, that need would have been eliminated as those students graduated, no doubt reducing the scholarship gap created after the cuts were initially made.

"Finally, while the 11.94 percent disparity in scholarship allocation cited by EIA appears more substantial than the participation gap, the figure is based on the number of athletic slots at JMU, and not the number of individual athletes. For the 2007-08 academic year, for example, whereas each male athlete participated on only one team, a number of women athletes participated on more than one team such that there were actually only 240 individual female athletes compared to 196?should this be 296? male athletes. Based on the 240 actual female athletes—as opposed to female athletic slots—at JMU, women only received 4.10 percent fewer scholarship dollars than men. When calculated using individual athletes, the scholarship gap is substantially smaller than that claimed by EIA." ■

*Equity in Action v. Department of Education*; 4th Cir.; No. 10-1259, 2011 U.S. App. LEXIS 4493; 3/3/11

Attorneys of Record: (for appellant) Lawrence John Joseph, Washington, D.C. and Douglas G. Schneebeck, MODRALL SPERLING, Albuquerque, New Mexico. (for appellees) William Eugene Thro, CHRISTOPHER NEWPORT UNIVERSITY, Newport News, Virginia.

For more background on this litigation, visit <http://www.hackneypublications.com/sla/archive/000526.php>

## Bleacher Litigation in Sporting Venues

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aisle. When she got to the end of the railing system with chain mesh wire fence, she dismounted. In doing so, she amputated her little finger on her right hand, since the mesh wire on the fence created a hook protruding upward.

Some classic cases in bleacher personal injury law have occurred, within the field of litigation. For example, the classic case of *Rispono v. Louisiana State University, 1994*. In this case involving bleachers, Joseph Rispono was attending the Alex Box Stadium on the campus of LSU. He went to the stadium to watch the college's baseball team. LSU would be in the College World Series if they won this game. The fact pattern supports the fact that since it had rained, the game had to be rescheduled twice. Rispono decided to sit out in left field in some temporary bleachers. He had to walk through puddles to get out to this part of the complex. Thus, his shoes were wet. He was descending the bleachers and fell sustaining an Achilles tendon rupture and two broken ribs. The breach was a non-uniform step. In this particular case, the award for Rispono was \$80 thousand for general damages.

From the standpoint of the appeals process within the legal court system, the case of *Jeanine Pryor v. Iberia Parish School Board [2011]* is particularly interesting. The fact pattern of the case is as follows. Jeanine Pryor was a 69-year-old plaintiff who was attending a high school football game to watch her grandson play. The game was between New Iberia High School and Barbe High School in Louisiana. The date of the incident was Oct. 29, 2004. Her grandson was playing for the visiting team i. e. Barbe High School at the Lloyd G. Porter Stadium, which was under the auspices of the Iberia Parish School Board. When she arrived at the game, on the home's west side of the field, there were concrete stands provided

with ramps for the disabled. It should be noted that Pryor had hip surgery and was in a recovery period. She opted to sit on the east side which was traditionally for the visiting teams. However, this bleacher area did not provide for handicapped accessibility. She noted ascending the bleacher seat boards an 18-inch gap she had to navigate near the bottom section of the bleachers. She successfully managed to get her body over this obstacle on her ascent. When, it came to half time, she needed to descend the bleachers, at which time she fell and suffered a broken leg.

The case went to court. Pryor claimed "the bleachers were defective."

The trial court did not find in favor of Pryor and the case was dismissed. However, on appeal, Pryor prevailed and the damages were apportioned as the Iberia Parish School Board was 70 percent at fault and she was 30 percent at fault.

However, at this point in time, one would think the case is over. On March 15, 2011, the Supreme Court of Louisiana basically wiped out the award and overturned and reversed the Appeals Court verdict. The main consideration was the factor "whether the bleachers are unreasonably dangerous."

The Supreme Court applied four basic tenets to the case as a yardstick. These may be summarized as:

- Gap in the bleachers was not defective; it was part of the existing design in 1969 or 1970.
- The harm involved versus the known obvious risk to the user.
- It was recognized on the home side of the field there were accessible stands.
- Pryor indeed chose to increase her risk by opting to sit on the visitors' side of the stadium where no accessibility existed.

This court reversed the Appeals Court decision on the fault and damages. It is curious how the legal and justice system works. The case went on for six and a

half years!

In closing, indoor and outdoor bleachers need to be inspected on a regular basis. There are codes that apply to bleachers. One needs to be familiar with these codes, if one assumes the risk manager's role within an agency [i.e. school department, park department etc.]. It is evident by case law, as well as incidents reported in the newspaper and on the internet, bleacher injuries are occurring. We need to be prepared and knowledgeable within this field. ■

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## News Briefs

### Presbyterian College Will End Men's Lacrosse

Presbyterian College announced last month that it will eliminate its men's lacrosse program at the end of the 2011 school year. The decision was made by the Presbyterian College Board of Trustees, based on the recommendation of college president Dr. John Griffith and director of athletics Brian Reese. "This was a very difficult decision to make," Reese said. "But we believe it is appropriate under the circumstances to make our program stronger and improve competition in all of our other conference sports." It probably didn't help matters that the program had compiled a 9-57 record since it was launched in 2006. The College will honor athletic scholarships and grant-in-aid awards to men's lacrosse student-athletes based on the remaining years of lacrosse eligibility they have until graduation. Student-athletes who wish to transfer will be granted a release according to the NCAA's "discontinued/non-sponsored sports exception."

### Indiana Faults UND for Practice Field Death

The Indiana Department of Labor has concluded that the University of Notre Dame violated Indiana safety laws when it allowed a student employee to scale a tower to film football practice in dangerous winds. Declan Sullivan fell to his death last fall when the winds pushed over the 35-foot tower. "The evidence overwhelmingly demonstrated that the university made a decision to utilize its scissor lifts in known adverse weather conditions," said Lori Torres, a state Department of Labor commissioner, labeling it "the most serious safety violation." The department charged Notre Dame with six safety violations and levied fines totaling \$77,500. In a statement, Notre Dame President John I. Jenkins reiterated his concession of last November that "we failed to keep Declan Sullivan safe, and for that we remain profoundly sorry."

### Conference to Feature NCAA Enforcement VP

The National Association for Athletics Compliance will highlight NCAA Vice President of Enforcement Julie Roe Lach as its keynote speaker during its annual convention this summer. "As the industry voice in athletics compliance, we are happy to offer our membership an opportunity to hear directly from Julie," said NAAC President Tony Hernandez and Deputy Athletics Director at the University of Miami. "With our recent release of the reasonable standards and the continued support of the enforcement staff on those initiatives, we appreciate that Julie has committed to addressing our attendees." Lach was promoted to vice president over the winter, becoming the first woman to lead the NCAA enforcement division. "During her first few months on the job,

Lach has been interacting with the NAAC membership to create a better understanding of enforcement functions. The convention will take place June 15 through 16 at the World Center Marriott Resort in Orlando, Fla.

### UNCG to Cancel Wrestling Program

The University of North Carolina at Greensboro announced last month that it will shutter its wrestling program. In a statement released by the conference office, commissioner John Iamarino said, "The Southern Conference shares in the disappointment surrounding the elimination of the UNCG wrestling program. We recently completed our 74th conference wrestling championships, from which 14 individuals qualified for the NCAA championships. We are committed to maintaining that access for all our wrestling programs."

### AD Arrested for Solicitation, then Fired

Southern University Athletic Director Greg LaFleur was arrested last month for soliciting a prostitute in downtown Houston. LaFleur, a former tight end who played in the NFL, has been the school's AD for six years. A week later, Chancellor Kofi Lomotey announced the dismissal of LaFleur, and added that he would recommend to the university's Board of Supervisors that Lady Jaguar Basketball Coach Sandy Pugh become the interim athletic director.

### Auburn Accused of 'Rampant Discrimination'

Nine former employees from the Auburn University Athletic Department have filed a federal lawsuit against the school accusing it of discrimination. The workers, most of which were custodians, alleged in their lawsuit "that the race discrimination practiced against them has been systematic, endemic and reflective of a long-term practice of intentional race discrimination practiced by defendant Auburn University against black employees, especially in the Athletic Department." Montgomery attorney Julian McPhillips, who is representing the plaintiffs, told the Mobile Ledger-Enquirer that "it just hits you in the face that it's so overwhelmingly absurd and ridiculous that Auburn would do that." The suit seeks compensatory and punitive damages, court costs, and restoration of their old jobs with back pay and benefits. University spokesman Mike Clardy told the paper that school attorneys could not comment until they have seen the lawsuit.

### Ex-Players at Ceremony Results in Violations

The University of Georgia has reported secondary violations to the NCAA, associated with a Bulldog recruit's announcement on See NEWS BRIEFS on Page 11

## News Briefs

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Jan. 28. The recruit, Ray Drew, made his announcement in the presence of former Bulldogs and NFL players David Pollack and Randall Godfrey. This constituted illegal contact. "UGA became aware of the issue shortly after the decision was announced and articles of the decision with pictures of the announcement were posted on the Atlanta Journal-Constitution's website," Athletic Director Greg McGarity wrote in a letter to the NCAA. "Immediately after viewing the article, UGA began to investigate the potential violation."

### Colorado, Former Coach Reach Settlement

The University of Colorado has reached a settlement with former women's basketball coach Kathy McConnell-Miller in which she will receive an additional \$371,280.52. McConnell-Miller, who

was fired in March of 2010, had already received \$203,142 from the school upon her termination. The Boulder Daily Camera reported that McConnell-Miller's claim to the additional settlement money arose from an allegation that the university treated the women's basketball program different than the men's program in violation of Title IX. A joint statement by McConnell-Miller and the university read, "The University of Colorado Department of Athletics has agreed to pay former head women's basketball coach Kathy McConnell-Miller the amount of \$371,280 in final compensation. The University and former coach McConnell-Miller had initially disagreed about the amounts of compensation owed under her contract for employment, but were able to amicably resolve their differences. The parties have agreed not to further discuss their agreement." ■

## Personnel Moves

**Martin Newton** has been named athletic director at Samford University. Newton, who played basketball at Samford from 1979-83, was previously the director of men's basketball operations at the University of Kentucky. He replaces **Bob Roller**, who resigned last fall after more than a decade at the helm of the Samford Athletic Department.

**Andrew Smith**, a graduate of Boston College and St. John's Law School, has been named director of compliance at Fordham University. Smith, who previously worked as a freshman guidance and AP Government teacher at Archbishop Stepinac High School in White Plains, N.Y., replaces **Ed Rose**, who assumed the position as associate athletic director for business at Fordham in January. A licensed New York State attorney, Smith was additionally operating a solo law firm practice in White Plains.

**Donald J. Oberhelman** has been named Cal Poly's new director of athletics. Oberhelman succeeds **Alison Cone**, who retired in December. Previously, he was chief operating officer and senior associate athletic director at San Diego State University. In that role, he was responsible for the daily operations of SDSU intercollegiate athletics program.

Nicholls State women's basketball coach **DoBee Plaisance** has been named senior woman administrator for the Nicholls Athletics Department. Plaisance has been the basketball coach for three years. Prior to that, she served as head coach at Loyola University in New Orleans for 13 seasons.

The University of Miami has announced that **Shawn M. Eichorst**

will be its new director of athletics. Since 2009, Eichorst has served as deputy athletic director at the University of Wisconsin-Madison, where his responsibilities under director of athletics Barry Alvarez included serving as the department's COO, overseeing daily operations, legal affairs, trademark and licensing, and merchandising. Eichorst earned his J.D. at Marquette University Law School in 1995, and his bachelor's degree magnum cum laude from the UW-Whitewater.

Florida Gulf Coast Director of Athletics Ken Kavanagh announced earlier this year that **Shelana Poindexter** has been named the director of compliance. Poindexter takes over the compliance roll from **Jessica Rouse** who now serves as FGCU's athletic academic coordinator. Poindexter served the past two seasons as the associate A.D. for compliance and student-athlete welfare at Georgian Court University, while also having the role as senior woman administrator.

University of Missouri at Kansas City Director of Athletics Tim Hall announced recently that **Janet Justus**, senior associate director for administration and compliance has resigned her position, entering the private sector as a consultant. While at UMKC, Justus has established numerous systems and structures in the compliance area, including most notably creating and leading the campus-wide NCAA Compliance Working Group. Prior to UMKC, Justus practiced law at Verrill Dana LLP, a law firm based in Portland, Maine. In 2007, she formed Janet Justus LLC, a law and consulting firm focusing on issues in intercollegiate athletics and higher education. ■

## Division II Southern Indiana Coaches Committed Major and Secondary Infractions

By Jonathan Cook, Florida Coastal School of Law 3L

The NCAA Division II Committee on Infractions conducted a hearing regarding allegations of infractions by the former head basketball coach and one of his former assistants. The two were fired as part of an attempt to self impose punishment by Southern Indiana University. The violations include extra benefits, unethical conduct, and a failure to promote an atmosphere of compliance by the former head coach. On Feb. 4, 2011, the committee handed down the punishments.

### VIOLATIONS

The majority of the infractions in this case were committed by an assistant coach who was also forced to resign as a part of the self-imposed penalties. He was found to have provided extra benefits to a student-athlete in the form of airline tickets to return home during two different breaks from school in 2008. Several emails as well as charges on the assistant coach's credit card helped to prove that the allegations are true. During the NCAA investigation, the assistant coach lied to NCAA investigators and doctored a fake receipt to try and mislead them in their investigation.

Head coaches are required to monitor their staff and are held responsible for their actions. The head coach was found to have known that the student was having trouble finding a way to return home and assigned the assistant coach to handle it; he never followed up on the situation and in not doing so, he is considered just as much at fault.

Furthermore, the assistant coach was found to have arranged for fraudulent academic credit for a student-athlete when he contacted a booster, the head coach's father-in-law, to complete papers for the student's class work so as to improve his GPA and remain eligible to play. The as-

**The majority of the infractions in this case were committed by an assistant coach who was also forced to resign as a part of the self-imposed penalties. He was found to have provided extra benefits to a student-athlete in the form of airline tickets to return home ...**

sistant coach once again lied to investigators claiming he was not involved in academic fraud but evidence proved to the contrary.

The next set of violations occurred when the head coach asked a different assistant coach to violate the impermissible transportation of a prospective student-athlete and to have given the assistant coach money to pay for the gas to do so. Because of this action, the head coach was found to have failed to promote an atmosphere of compliance within his program at the university which is a major violation.

### PENALTIES

The penalties handed out are as follows:

1. Public reprimand and censure
2. One year probation
3. Postseason ban for Men's Basketball after the 2009-10 season
4. Vacation of wins in which the two ineligible players competed in while ineligible
5. Disassociation with the booster involved in the academic fraud for 5 years
6. Two-year show-cause order for the Men's Basketball Head Coach
7. Three-year show-cause order for the Men's Basketball Assistant Coach involved in the infractions
8. A fine of \$2,500

### COMPARABLE CASES

Division II school University of the Incarnate Word was sanctioned for similar infractions in February of 2009. Their violations also involved unethical conduct by the former head basketball coach and assistant coach. The head coach in this case was found to have failed to monitor the activities of his assistant coach, much like in the Southern Indiana case. The penalties imposed were similar to the Southern Indiana case except that scholarships were reduced in the University of Incarnate Word case and the University of Incarnate Word was also required to implement a comprehensive education plan on NCAA legislation for all its coaches and department personnel.

While the aforementioned case could be considered slightly worse than the Southern Indiana case, one wonders why every school hit with a major infraction is not forced to implement and monitor an educational program teaching coaches, staff and athletes about NCAA legislation complete with tips, advice and help to aid in the goal of compliance.

The responsibility given to head coaches in the Incarnate Word case and cited in the Southern Indiana case is that they have a duty to monitor all matters related to their specific program. This duty creates a scenario where it would be almost impossible to find violations committed by assistants without also implicating the head coach and finding the head coach responsible as well; no such duty or standard as heavy as this is placed upon the institutions. If head coaches are going to be held to this standard, then perhaps mandatory NCAA Legislation Education courses need to be provided for assistant coaches. ■

*This article was distilled from the Journal of NCAA Compliance.*