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National Collegiate Sports Counseling Center: Providing Student-Athletes with Comprehensive Advocacy Throughout Their Collegiate Career

Kelli Rodriguez Currie*

As a high school graduate in June 2006, Andrew Oliver received an offer of \$390,000 from the Minnesota Twins to be a “summer draft-and-follow,”¹ with the promise of a contract to play professional baseball in lieu of attending college.² Choosing instead to pursue his education, Oliver declined the offer and enrolled at Oklahoma State University (OSU) on a full athletic scholarship.³ In May 2008, the National Collegiate Athletic

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¹ Prior to the 2008 season, the Major League Baseball draft rules allowed teams to select players late in the draft and sign them the following season after closely monitoring the player’s progress. Jonathan Mayo, *Draft-and-Follow Era Comes to an End*, MLB.COM (May 31, 2007, 4:40 PM), http://mlb.mlb.com/news/article.jsp?ymd=20070531&content_id=1997066&fext=.jsp.

² Richard G. Johnson, *Submarining Due Process: How the NCAA Uses its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 606 (2010).

³ *Id.* at 606.

Association (NCAA) initiated an investigation into Oliver's eligibility as a student-athlete between 2006 and 2008.⁴

The NCAA alleged that Oliver violated the NCAA "no-agency" rule⁵ when an attorney was present during a meeting between Oliver and the Minnesota Twins, following his 2006 high school graduation.⁶ While NCAA bylaws permit a student-athlete or prospective student-athlete to seek legal counsel in the form of an advisor,⁷ the rules do not permit the attorney to be present during discussions or have direct contact with a professional organization on behalf of the individual.⁸

During the investigation, the NCAA and OSU interviewed Oliver on the evening of May 29, 2008, for approximately three and a half hours without an attorney present⁹ and without notifying him of purpose of the interview.¹⁰ On the afternoon of May 30, 2008, only hours prior to a regional tournament, the NCAA and OSU declared Oliver ineligible to play in the tournament.¹¹ While Oliver's eligibility was later reinstated by both

⁴ *Oliver v. Natl. Collegiate Athletic Ass'n*, 155 Ohio Misc.2d 1, 3 (Ohio Com. Pl. 2008); Johnson, *supra* note 2, at 611.

⁵ NCAA Bylaw 12.3.1 requires that a student-athlete be "ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport." NAT'L COLLEGIATE ATHLETIC ASS'N, *2013-14 NCAA Division I Manual* § 12.3.1 (2013) [hereinafter *Div. I Manual*], available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

⁶ *Oliver*, 155 Ohio Misc.2d at 3. See Johnson, *supra* note 2, at 606.

⁷ *Div. I Manual*, *supra* note 5, at 66 (NCAA Bylaw 12.3.2).

⁸ *Div. I Manual*, *supra* note 5, at 66 (NCAA Bylaw 12.3.2.1).

⁹ *Oliver*, 155 Ohio Misc.2d at 3. See Johnson, *supra* note 2, at 615–16.

¹⁰ NCAA Bylaw 19.5.5.1 in the 2013–2014 Division I Manual provides that "[w]hen an enforcement staff member requests information that could be detrimental to the interests of the student-athlete or institutional employee being questioned, that individual shall be advised that the purpose of the interview is to determine whether the individual has knowledge of or has been involved directly or indirectly in any violation of the NCAA constitution and bylaws." *Div. I Manual*, *supra* note 5, at 316.

¹¹ Johnson, *supra* note 2, at 616.

the NCAA and OSU in December 2008, he was penalized with a 70 percent suspension of play for one year.¹²

Over Oliver's many objections, the NCAA and OSU were permitted to revoke his eligibility without question, without the due process afforded to him under the OSU Student Code of Conduct,¹³ and with little more than disputed allegations and information obtained during a late-night interview.¹⁴ Prior to the revocation of his eligibility, Oliver was one of the most talented college baseball players in the country and was expected to be a first round draft pick.¹⁵ The damage to Oliver's reputation and professional career because of the loss of eligibility within the structure of NCAA enforcement regulations cannot be measured.

Oliver sued the NCAA, challenging the "no-agency" rule in 2008.¹⁶ Setting the stage for the representation available to student-athletes, the *Oliver* court admonished the NCAA for its rule prohibiting the presence of an attorney during negotiations as arbitrary and capricious.¹⁷ The court noted specifically that the lack of representation for a student-athlete "allows for the exploitation of the student-athlete by professional and commercial enterprises in contravention of the positive intentions of the

¹² *Id.* at 619.

¹³ OSU's Student Code of Conduct gives students the right to (1) a written notice of alleged violations, (2) have no code violation assumed until proven, (3) a timely hearing, and (4) be accompanied by an adviser. *Id.* at 613. *See id.* at 604 (including Oliver's post-trial brief where he argues that "[Oliver's] rights to due process on campus were governed and regulated by the OSU's Student Code of Conduct" because Oliver had a contractual relationship with OSU, and that OSU is an agent for the NCAA as a member institution, required to enforce the NCAA's rules).

¹⁴ *See id.* at 611–19.

¹⁵ *Id.* at 612.

¹⁶ *Oliver v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio Misc.2d 17, 30 (Ohio Com. Pl. 2009).

¹⁷ Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 29 (2012).

NCAA.”¹⁸ While holding that these limits on representation effectively limit the student-athlete’s ability to negotiate a contract, the court’s judgment was vacated when the parties later settled the litigation.¹⁹

While student-athletes are not permitted membership to the NCAA,²⁰ these young individuals are bound by the NCAA bylaws.²¹ Tasked with maneuvering a manual in excess of 400 pages,²² and ripe with detailed rules surrounding amateurism, eligibility, and violations, student-athletes are not only prohibited from obtaining adequate representation in the form of an agent when beginning their transition to a professional career,²³ they are also not permitted to seek comprehensive representation prior to or throughout their collegiate career.²⁴ While the NCAA allows member institutions to provide student-athletes with limited consulting services via a Professional Sports Counseling Panel (PSCP),²⁵ these panels fail to provide student-athletes with adequate and comprehensive representation as they navigate the treacherous waters of their intercollegiate athletic career within

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See Div. I Manual, supra* note 5, at 8 (NCAA Constitution, Article 3.1.1, restricting membership eligibility to only “colleges, universities, athletics conferences . . . and other groups”).

²¹ *Id.* at 4 (NCAA Constitution, Article 2.8.1, requiring that student-athletes must comply with applicable NCAA rules, and that the “member institution shall be responsible for such compliance”).

²² The 2013–2014 NCAA Division I Manual contains 417 pages. *See Div. I Manual, supra* note 5.

²³ NCAA Bylaw 12.1.2(g) prohibits student-athletes from entering into an agreement with an agent. *Id.* at 59, 66 (NCAA Bylaw 12.3.1, Use of Agents).

²⁴ NCAA Bylaw 12.1.2(g) prohibits student-athletes from entering into an agreement with an agent. *Id.* at 59. NCAA Bylaw 12.02.1.1 broadly defines agents as including “but not limited to” persons who may advise student-athletes in negotiation, financial matters, marketing, brand management, and others. *Id.* at 57. NCAA Bylaw 12.1.2(g) prohibits student-athletes from entering into an agreement with an agent. *Id.* at 59.

²⁵ *Id.* at 67 (NCAA Bylaw 12.3.4).

the framework of a regulatory structure rooted in the income-producing high-stakes world of collegiate sports.²⁶

Part I of this note discusses the history of the NCAA rules and regulations that govern the process and representation available to student-athletes throughout infractions proceedings. Part II considers the history and legal framework under which the NCAA operates free from the constitutional scrutiny of a due process analysis and the ramifications for student-athletes who have effectively no other option outside of the NCAA for intercollegiate competition. Part III evaluates the current resources available to student-athletes under the “no-agency” rule and explains why the current Professional Sports Counseling Panel permissible under NCAA rules is an insufficient resource to provide proper representation for student-athletes. Part IV proposes a National Collegiate Sports Counseling Center as a solution to provide student-athletes with increased guidance within the framework of the “no-agency” rules. Finally, Part V outlines the need for the NCAA to move pro-actively in the direction of increased representation for student-athletes in order to be supportive of its overall goal of integrating the athletic experience as a part of the educational experience.

I. THE CURRENT NCAA REGULATIONS & PROCESSES

Established in 1910 by President Theodore Roosevelt, the NCAA was created in an effort to protect student-athletes against increasingly

²⁶ *Collegiate Athletics Revenue and Expenses - 2008*, ESPN COLLEGE SPORTS, <http://espn.go.com/ncaa/revenue> (last visited Mar. 1, 2013) (reporting revenue figures of NCAA athletic departments, where the top ten members each reported over \$90M in revenue). Steve Berkowitz, *NCAA Had Record \$71 Million Surplus in Fiscal 2012*, USA TODAY (May 2, 2013, 8:58 AM), <http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/> (reporting that the “the NCAA recorded a nearly \$71 million surplus for its 2012 fiscal year”).

dangerous and exploitive practices in collegiate athletics.²⁷ The current bylaws require that all parties employed by, associated with, or participating in intercollegiate athletics act with “honesty and sportsmanship” so as to represent the “honor and dignity of fair play” associated with competitive sports.²⁸

Currently reporting over 1200 members, the NCAA is an unincorporated voluntary member association comprised of schools, conferences, and related organizations.²⁹ Despite the fact that the NCAA governs more than 430,000 student-athletes under its regulatory authority, these student-athletes are not permitted membership to the organization.³⁰ While aiming to stimulate and improve intercollegiate athletics, the NCAA is committed to the development of educational leadership and athletics participation as a recreational pursuit through the administration of regulations that govern events, institutional control, and the recruiting and eligibility of student-athletes.³¹ Under the NCAA Constitution, member institutions are obligated to apply and enforce legislation promulgated by the association,³² thus, each member institution is required ensure all student-athletes fully comply with NCAA policies.³³

²⁷ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10–12 (2000).

²⁸ *Div. I Manual*, *supra* note 5, at 43 (NCAA Bylaw 10.01).

²⁹ *Id.* at 8 (NCAA Constitution 3.1.1, limiting membership to “colleges, universities, athletics conferences or associations, and other groups related to intercollegiate athletics”).

³⁰ *Id.* (NCAA Constitution 3.1.1). See John P. Sahl, *Collegiate Athletes and Due Process Protection: What's Left After National Collegiate Athletic Association v. Tarkanian* *U.S.*, 109 S. Ct. 454 (1988)?, 21 ARIZ. ST. L.J. 621, 624 (1989).

³¹ *Div. I Manual*, *supra* note 5, at 1 (NCAA Constitution 1.2).

³² *Id.* at 1 (NCAA Constitution 1.3.2, “Member institutions shall be obligated to apply and enforce this legislation.”).

³³ See Sahl, *supra* note 29, at 635.

Many aspects of a student-athlete's life are directed by NCAA policies and bylaws. Long before a prospective student-athlete signs the National Letter of Intent (NLI) formally declaring their intention to play collegiate sports or steps foot onto a college campus, he or she must ensure the utmost compliance with NCAA eligibility requirements,³⁴ plan high school courses around the NCAA's course requirements,³⁵ and successfully survive the often intense courtship of collegiate athletics recruiting.³⁶ Once committed to a team, a student-athlete's days, weeks, and seasons are governed by a tenuous balance of time dedicated to practice, travel, and study hours.³⁷ Like Andrew Oliver, any student-athlete or prospective student-athlete who commits the slightest misstep may vitiate his or her eligibility,³⁸ effectively

³⁴ Upon registration with the NCAA Eligibility Center, prospective student-athletes are required to answer questions about their prior athletics participation in order to determine their amateur status, and thus their eligibility for intercollegiate competition once enrolled as a student-athlete. NAT'L COLLEGIATE ATHLETIC ASS'N ELIGIBILITY CENTER, 2013–14 GUIDE FOR THE COLLEGE BOUND STUDENT-ATHLETE 18–21 (2013). [hereinafter STUDENT-ATHLETE GUIDE], available at <http://www.ncaapublications.com/product/downloads/CBSA.pdf>.

³⁵ In an effort to ensure that prospective student-athletes achieve academic eligibility, the Student-Athlete Guide provides detailed information including test-score and grade point average requirements, course-planning worksheets, and academic requirements for the different divisions. *Id.* at 9–17.

³⁶ The NCAA recruiting rules specifically outline times when contact between prospective student-athletes and member institutions is permitted, the type and form of contact permitted, and the various exceptions to the rules for different sports. *Id.* at 22–25.

³⁷ The NCAA attempts to minimize interference with the academic pursuits of student-athletes; Article 17 of the NCAA Operating bylaws requires member institutions to limit the length of playing seasons, in addition to athletic practices, competitions, and travel. *Div. I Manual, supra* note 5, at 227–300.

³⁸ Under Bylaw 12.01, student-athletes are only eligible for intercollegiate completion in the NCAA if they maintain their amateur status. *Id.* at 57. This eligibility requires that the student-athlete sustain academic eligibility, not compete professionally, not accept certain awards or benefits, and not be represented by an “agent,” as defined by the NCAA. *Id.* at 58–60. NCAA amateur status may be lost as a result of activities prior to enrollment in college. *Id.* at 57–58.

forcing him or her to forfeit any possibility of a future in professional athletics.³⁹

This section begins with an introduction to the general rules surrounding student-athletes' eligibility and requirements to maintain amateur status, followed by a discussion of the obligation of member-institutions to report violations. The section continues with an overview of the processes by which the NCAA investigates reported rules violations and the restrictions to representation placed on student-athletes throughout the process. Finally, the section reviews the penalties for rules violations and the process by which a student-athlete may be reinstated following the loss of eligibility.

A. Student-Athlete Eligibility and Amateurism

In an effort to maintain athletics as a part of the academic experience and the student-athlete as a member of the student body, the NCAA draws a clear line of demarcation between collegiate and professional athletics by only offering eligibility for intercollegiate competition to amateur athletes.⁴⁰

³⁹ Major League Baseball (MLB) and the National Hockey League (NHL) permit athletes to be eligible for the draft without attending college. MLB, *Official Rules, First-Year Player Draft Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Feb. 24, 2014); *Hockey Operation Guidelines*, NHL.COM, http://www.nhl.com/ice/page.htm?id=26377#entry_elig (last visited Feb. 24 2014). However, the National Basketball Association's (NBA) "one-and-done" rule requires that any player who hopes to play in the NBA attend one year of college. Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT.' L. 159, 175 (2012). The National Football League (NFL) effectively requires that draft-eligible players attend college for a minimum of three seasons following graduation from high school before requesting special eligibility from the NFL commissioner. See NAT'L FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE ELIGIBILITY RULES, available at <https://www.nflregionalcombines.com/Docs/Eligibility%20rules.pdf> (last visited Mar. 14, 2014). Additionally, most players eligible for the Major League Soccer (MLS) draft are college seniors who have expired their collegiate eligibility. *2012 MLS Roster Rules*, MLSSOCCER.COM, <http://www.mlssoccer.com/2012-mls-roster-rules> (last visited Apr. 14, 2014).

⁴⁰ *Div. I Manual*, *supra* note 5, at 57 (NCAA Division I Bylaw 12.01).

It is the responsibility of the member institution to certify that a student-athlete meets all academic and general eligibility requirements, and any violation that permits a student-athlete to represent the institution in competition when the student is not eligible may result in the university receiving NCAA sanctions.⁴¹ Additionally, it is the responsibility of the member institution to verify the amateur status of a prospective student-athlete prior to representing the institution in competition.⁴² A student-athlete loses his or her amateur status, and is thus ineligible for intercollegiate competition, upon entering into an agreement with an agent⁴³ for the purposes of marketing the student-athlete's athletic ability or reputation.⁴⁴ However, the NCAA amateurism rules define the role of an agent more broadly as "include[ing] but not limited to, a certified contract advisor, financial advisor, marketing representative, brand manager or anyone who is employed or associated with such persons."⁴⁵

B. Duty of Athletics Representatives and Member Institutions to Report Violations

The NCAA imposes an obligation on member institutions to ensure that each student-athlete is compliant with all NCAA rules and remains eligible in order to compete in NCAA competition.⁴⁶ Bound by a responsibility to cooperate, all individuals and member institutions subject to the NCAA rules are required to assist the enforcement staff in rooting out the details of any possible rules violations and to protect the integrity of any

⁴¹ *Id.* at 135 (NCAA Division I Bylaw 14.01.1).

⁴² *Id.* at 58 (NCAA Division I Bylaw 12.1.1).

⁴³ *Id.* at 59 (NCAA Division I Bylaw 12.1.2(g)).

⁴⁴ *Id.* at 57 (NCAA Division I Bylaw 12.02.1).

⁴⁵ *Id.* at 57 (NCAA Division I Bylaw 12.02.1.1).

⁴⁶ *Id.* at 135 (NCAA Division I Bylaw 14.01.1).

investigation.⁴⁷ Any failure to uphold this affirmative obligation may be considered a violation of the NCAA principles of ethical conduct.⁴⁸

C. Investigations of NCAA Rules Violations

While the NCAA limits membership to colleges, universities, conferences, and other related institutions, and does not permit membership to student-athletes, the enforcement program “shall hold institutions, coaches, administrators and student-athletes who violate the NCAA constitution and bylaws accountable for their conduct, both at the individual and institutional levels.”⁴⁹ The NCAA enforcement program is tasked with enforcing the NCAA rules, addressing violations when they occur, and imposing appropriate penalties.⁵⁰ The program is committed to fair and timely procedures, and considers the impact to parties uninvolved in the violations, including uninvolved student-athletes, when imposing penalties on a member institution.⁵¹

When the NCAA receives information regarding an institution’s failure to comply with NCAA rules, the enforcement staff determines whether to initiate an investigation.⁵² As a part of an investigation, the enforcement staff may require interviews with student-athletes and other representatives of the member-institution’s athletic department.⁵³ In the event that the enforcement staff conducts an on-campus interview with a student-athlete, the member institution will be permitted to designate an institutional

⁴⁷ *Id.* at 312 (NCAA Division I Bylaw 19.2.3).

⁴⁸ *Id.* at 313 (NCAA Division I Bylaw 19.2.3.2); *id.* at 43 (NCAA Division I Bylaw 10.1(a)).

⁴⁹ *Id.* at 311 (NCAA Division I Bylaw 19.01.2).

⁵⁰ *Id.* (NCAA Division I Bylaw 19.01.1).

⁵¹ *Id.* (NCAA Division I Bylaw 19.01.1).

⁵² *Id.* at 315 (NCAA Division I Bylaw 19.5.1).

⁵³ *Id.* at 316 (NCAA Division I Bylaw 19.5.5–19.5.6).

representative to be present in the meeting.⁵⁴ However, if the investigator wishes to discuss information with a student-athlete that is not related to the member institution and the investigator does not reasonably believe the discussion would affect the student-athlete's eligibility, an institutional representative is not permitted to be present during those portions of the interview.⁵⁵ While recent revisions to the NCAA enforcement program have broadened the previous rule disallowing any institutional representative to be present during these partitions of the interview,⁵⁶ the new rule still allows the determination to have an institutional representative present to be made by the NCAA enforcement staff.⁵⁷ The rule does not permit the student-athlete to be represented by his or her independent legal counsel without ties to the member institution.⁵⁸

The NCAA enforcement staff is required to provide notice of the purpose of these preliminary investigation interviews when requesting information that could be detrimental to the student-athlete being interviewed.⁵⁹ Only at

⁵⁴ *Id.* (NCAA Division I Bylaw 19.5.6.1).

⁵⁵ *Id.* (NCAA Division I Bylaw 19.5.6.1). The 2013–14 revisions to the NCAA Manual expanded on the previous rules that disallowed any institutional representative to be present so long as the investigator did not “reasonably” believe that the discussion would affect a student-athlete’s eligibility. *Id.* The current rule allows “only an institutional representative outside of athletics (e.g., [a] faculty athletics representative or [the] general counsel [of the member institution])” to be present during that portion of the interview. *Id.*

⁵⁶ *Id.* at 316 (NCAA Division I Bylaw 19.5.6.1).

⁵⁷ *Id.* (NCAA Division I Bylaw 19.5.6.1) (allowing an institution representative to be present only if the “subject matter to be discussed in the interview relates directly to the individual’s institution or could affect the individual’s eligibility”).

⁵⁸ *Id.* at 316 (NCAA Division I Bylaw 19.5.6.1) (allowing only an institution representative outside of athletics or the general counsel of the university).

⁵⁹ “When an enforcement staff member requests information that could be detrimental to the interests of the student-athlete or institutional employee being questioned, that individual shall be advised that the purpose of the interview is to determine whether the individual has knowledge of or has been involved directly or indirectly in any violation of the NCAA constitution and bylaws.” *Id.* (NCAA Division I Bylaw 19.5.5.1).

the sole discretion of the enforcement representative, and upon determination that an interview may develop information detrimental to the individual, may the student-athlete be represented by legal counsel throughout the interview.⁶⁰ Additionally, any student-athlete refusing to cooperate with an NCAA enforcement investigation may contribute to the member-institution being found to have committed Severe Breach of Conduct (Level I Violation).⁶¹

Following the preliminary investigation, if the Committee on Infractions determines there is sufficient information to warrant formal allegations, notice of the allegations will be issued to the member institution.⁶² Notice is also provided to all involved individuals,⁶³ including any involved student-athletes. While the Committee on Infractions does not require a formal response to a notice of allegations, the failure to respond within the time permitted⁶⁴ is viewed as admission to the alleged violations.⁶⁵

If resolution in the matter is not achieved following either the preliminary investigation or the responses to the notice of allegations, the Committee on Infractions shall hold a hearing to determine whether the alleged violation occurred⁶⁶ and impose any necessary penalties pursuant to the penalty structure.⁶⁷ Student-athletes who are specifically requested to appear at the

⁶⁰ “Representation by Legal Counsel. When an enforcement staff member conducts an interview that may develop information detrimental to the interests of the individual being questioned, he or she may be represented by personal legal counsel.” *Id.* (NCAA Division I Bylaw 19.5.4).

⁶¹ *Id.* at 311 (NCAA Division I Bylaw 19.1.1). *See id.* at 400 (NCAA Division I Bylaw 19.2.3.2).

⁶² *Id.* at 318 (NCAA Division I Bylaw 19.7.1).

⁶³ *Id.* (NCAA Division I Bylaw 19.7.1.2).

⁶⁴ The deadline for responses to a notice of allegations is 90 days from the date of the notice, unless an extension is granted by the Committee on Infractions. *Id.* at 318 (NCAA Division I Bylaw 19.7.2).

⁶⁵ *Id.* (NCAA Division I Bylaw 19.7.2).

⁶⁶ *Id.* at 319 (NCAA Division I Bylaw 19.7.7).

⁶⁷ *Id.* at 321 (NCAA Division I Bylaw 19.9).

hearing or whose eligibility may be affected by the information presented are, for the first time throughout the process, permitted to be represented by independent legal counsel without prior approval from the NCAA enforcement staff.⁶⁸ With penalties for Level III and IV violations including the potential permanent ineligibility of a student-athlete to represent the member institution in competition,⁶⁹ student-athletes should be afforded the right to be represented by legal counsel throughout the entire investigation and not solely at the discretion of the NCAA enforcement staff.

D. Penalties for NCAA Rules Violations

The NCAA enforcement program informs member institutions upon notification that there has been a violation of NCAA rules affecting student-athlete eligibility, with the understanding that the member institution will take appropriate action.⁷⁰ If the member institution fails to take appropriate action by declaring the student-athlete ineligible, it will be cited to show cause why it should not be disciplined for failure to abide by the obligations of membership if it permits the student-athlete to represent the member institution in competition.⁷¹

Student-athletes found to be involved in Level III or Level IV violations may have their eligibility suspended indefinitely, unless and until it is restored by the Committee on Student-Athlete Reinstatement.⁷² An appeal to have a student-athlete reinstated must be made by a designated

⁶⁸ *Id.* at 319. Bylaw 19.7.7.5.1 states that “student-athletes who are specifically requested by the chief hearing officer to appear before the hearing panel at an institutional hearing are expected to appear and may be accompanied by personal legal counsel. *Id.* Failure to attend may result in a violation of this bylaw.” *Id.*

⁶⁹ *Id.* at 325. Bylaw 19.9.12 requires that an institution take appropriate action by declaring the student-athlete ineligible. *Id.*

⁷⁰ *Id.* (NCAA Division I Bylaw 19.9.12).

⁷¹ *Id.* (NCAA Division I Bylaw 19.9.12).

⁷² *Id.* at 324 (NCAA Division I Bylaw 19.9.8(a)).

representative of the member institution to the Committee on Student-Athlete Reinstatement; the request cannot be made by the individual student-athlete.⁷³ While the Committee on Student-Athlete Reinstatement will consider reinstatement under exceptions authorized in a unique circumstance, the student-athlete is held responsible for his or her actions in any violations of the rules, and his or her eligibility shall only be restored when clearly warranted.⁷⁴

The NCAA Manual does not provide additional information regarding the “unique case[s]” that may warrant reinstatement of eligibility.⁷⁵ Further, while the bylaws currently state that “[a]t least one of [the institutional representatives that filed the appeal for reinstatement] must participate in any hearing of the appeal that involves direct participation by the student-athlete or other individuals representing the institution or the student,”⁷⁶ the manual provides no further clarification regarding who the “other individuals” are that may represent the student-athlete.

By continuing to define the role of an “agent” broadly, disallowing student-athletes representation by independent counsel during preliminary investigations, and vaguely defining the types of “other individuals” that may represent a student in the appeals process for reinstatement, the NCAA strips student-athletes of effective support and counsel during proceedings that have huge impacts not only on their collegiate careers, but on any future professional careers as well.

⁷³ *Id.* at 185 (NCAA Division I Bylaw 14.11.1).

⁷⁴ *Id.* (NCAA Division I Bylaw 14.11.3).

⁷⁵ *Id.* (NCAA Division I Bylaw 14.11.3).

⁷⁶ *Id.* (NCAA Division I Bylaw 14.11.2).

II. THE NCAA AS A PRIVATE ACTOR

“Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment’s Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be.”⁷⁷ The NCAA is not currently considered a “state actor” for purposes of analysis under the due process clause.⁷⁸ However, this lack of judicial oversight does not mean the NCAA should be permitted to continue imposing sanctions that may have dramatic effects on a student-athlete’s future career without increased assurances that the student-athlete is afforded representation and fair process.

This section will review the history of the due process clause as it applies to the NCAA and highlight the landmark decision in *NCAA v. Tarkanian*,⁷⁹ in which the court held that a state university did not delegate its authority to the NCAA because its membership in the NCAA is “voluntary.”⁸⁰ Extending the holding to its potential application to student-athletes, this section will then evaluate the repercussions for student-athletes who have no other choice but to be bound by the NCAA enforcement process if they wish to compete in collegiate athletics or pursue a career in professional athletics.

A. History of the Due Process Clause as Applied to the NCAA

In 1975, the Fifth Circuit held that, because education was traditionally a government function, the NCAA was subject to federal judicial review under the due process clause, even as a private organization, because it

⁷⁷ Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 191 (1988) (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

⁷⁸ *Id.* at 199. See generally Sahl, *supra* note 29.

⁷⁹ See generally *Tarkanian*, 488 U.S. 179 (1988).

⁸⁰ *Id.* at 198.

assumed the role of “coordinator and overseer” of collegiate athletics.⁸¹ In *Parish v. NCAA*, five collegiate athletes challenged the NCAA “1.600 rule”⁸² as unconstitutional and sought an injunction that would prevent the NCAA from imposing sanctions that would keep their university from competing in a post-season tournament for failure to enforce the rule.⁸³ The *Parish* court reasoned that if the NCAA were to suddenly cease coordinating intercollegiate athletics, the states would certainly step in to fulfill the function.⁸⁴ Further, the court determined that a holding which did not recognize the NCAA as a state actor would effectively permit states to work together in forming private organizations to oversee similar functions without having to be concerned about the scrutiny of due process analysis.⁸⁵ While *Parish* ultimately held that the “1.600 rule” was constitutional under a minimal due process standard, the case was seminal due to the court’s recognition of the NCAA as a “state actor.”⁸⁶

NCAA v. Tarkanian, however, changed the landscape: for the purposes of a due process analysis, the NCAA is no longer viewed as a “state actor” by the court, and, therefore, student-athletes may not be afforded the same rights to substantive due process when their eligibility to compete in intercollegiate athletics is suspended or revoked.⁸⁷ While *Tarkanian* argued that the member-institution had delegated its public function, the court held

⁸¹ *Parish v. Nat’l Collegiate Athletic Ass’n*, 506 F.2d 1028, 1032 (5th Cir. 1975).

⁸² The “1.600 rule” required that member-institutions grant eligibility, scholarships, and other benefits only to prospective student-athletes who demonstrated academic performance sufficient enough to insure that the student-athlete would maintain athletics as a part of the education program. *Id.* at 1030.

⁸³ *Id.* at 1030–33 (1975).

⁸⁴ *Id.*

⁸⁵ *Id.* at 133.

⁸⁶ *Id.* at 133–34.

⁸⁷ *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179 (1988). *See generally* Sahl, *supra* note 29.

the NCAA possessed the authority to sanction only the member-institution and not the individual himself.⁸⁸

Four years after becoming the head basketball coach at University of Nevada, Las Vegas (UNLV), Jerry Tarkanian had turned the UNLV men's basketball team around and was described as the "winningest" active basketball coach.⁸⁹ In September 1977, UNLV suspended Tarkanian after a report issued to the university by the NCAA enforcement program detailed 38 violations of NCAA rules, ten of which involved Tarkanian directly.⁹⁰ UNLV was further required to "show cause" why the NCAA should not impose further penalties if the university did not sever ties with Tarkanian.⁹¹

In response to the NCAA's demand the university sever ties with Tarkanian or risk heavier sanctions, UNLV chose to "[r]ecognize the University's delegation to the NCAA of the power to act as ultimate arbiter of these matters . . . even while believing that the NCAA was wrong."⁹² UNLV reassigned Tarkanian from the position of head basketball coach without providing him adequate notice.⁹³ While the majority in *Tarkanian* did not agree that UNLV was delegating power to the NCAA because the NCAA did not have the power to directly discipline Tarkanian,⁹⁴ the dissent argues that UNLV had "embraced" the rules of the NCAA and was contractually bound to accept the sanctions.⁹⁵ The *Tarkanian* court relied heavily on the NCAA's voluntary membership as sufficient to hold that the

⁸⁸ *Id.*

⁸⁹ *Tarkanian*, 488 U.S. at 180.

⁹⁰ *Id.* at 180–81.

⁹¹ *Id.* at 181.

⁹² *Id.* at 187.

⁹³ *Id.*

⁹⁴ *Id.* at 190. See Sahl, *supra* note 29, at 652.

⁹⁵ *Tarkanian*, 488 U.S. at 190. See Sahl, *supra* note 29, at 652.

organization was not “acting under color of state law” and, therefore, was not subject to constitutional scrutiny of state actors.⁹⁶

The implications of the *Tarkanian* decision included a student-athlete’s inability to challenge the loss of property interests in their eligibility as a collegiate athlete under due process claims.⁹⁷ While the *Tarkanian* decision involved allegations of NCAA rules violations as a coach, the NCAA enforcement process applies similarly to student-athletes.⁹⁸

B. NCAA as the Only Option for Student-Athletes

While the NCAA presented UNLV the option of “pull[ing] out of the NCAA completely on the grounds that [the university] will not execute what [it considers] unjust judgments,”⁹⁹ this option is not a realistic possibility for member-institutions wishing to compete in intercollegiate competition. The “voluntary membership” of the NCAA that *Tarkanian* heavily relied on is hardly voluntary for member institutions¹⁰⁰ and only voluntary to student-athletes if they chose not to compete at all.

If student-athletes wish to compete in intercollegiate athletics, they are left with little choice but to comply with the NCAA rules structure. This also binds the student-athletes to an enforcement process that affords them little representation or support throughout their career as an NCAA-eligible athlete.

⁹⁶ *Tarkanian*, 488 U.S. at 195–99.

⁹⁷ Sahl, *supra* note 29, at 655–61. *See generally Tarkanian*, 488 U.S. 179 (1988).

⁹⁸ The enforcement process outlined in the NCAA manual applies similarly to both coaches and student-athletes, as it leverages the voluntary membership of the member institutions to impose penalties. *Div. I Manual*, *supra* note 5, at 311–33 (NCAA Division I Article 19).

⁹⁹ *Tarkanian*, 488 U.S. at 187.

¹⁰⁰ *See Sahl*, *supra* note 29, at 653.

III. THE PROBLEM: A LACK OF COMPREHENSIVE SUPPORT FOR STUDENT-ATHLETES UNDER THE CURRENT NCAA REGULATIONS

Under the “no-agency” rule, the NCAA does not permit student-athletes to be represented by an agent or to accept benefits from a person wishing to represent them prior to the expiration of their eligibility, including the time prior to their enrollment in an NCAA member-institution.¹⁰¹ In January 2012, the NCAA expanded the definition of an agent to include individuals “not limited to, a certified contract advisor, financial advisor, marketing representative, brand manager or anyone who is employed or associated with such persons.”¹⁰² Furthermore, prospective student-athletes are prohibited from paying an individual or organization to represent them for purposes of securing institutional financial aid on the basis of their athletic ability or reputation.¹⁰³ While the “no-agency” rule does allow student-athletes to consult with a lawyer for the purpose of reviewing a proposed professional contract, the attorney may not contact the professional organization on behalf of the student-athlete or be present during any discussions of the contract offer.¹⁰⁴ Currently, the NCAA only permits a student-athlete, his or her parents, or the university’s Professional Sports Counseling Panel to negotiate with professional sports organizations without the loss of the student-athlete’s amateur status.¹⁰⁵

¹⁰¹ An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. *Div. I Manual, supra* note 5, at 66 (NCAA Division I Bylaw 12.3.1). Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport. *See Div. I Manual, supra* note 5, at 57 (NCAA Division I Bylaw 12.0.2).

¹⁰² *Id.* at 59 (NCAA Division I Bylaw 12.0.1).

¹⁰³ *Id.* at 68 (NCAA Division I Bylaw 12.3.3).

¹⁰⁴ *Id.* at 68 (NCAA Division I Bylaw 12.3.2).

¹⁰⁵ *Remaining Eligible: Professional Draft Inquiries*, NCAA, <http://www.ncaa.org/remaining-eligible-professional-draft-inquiries> (last visited Apr. 14, 2014).

A. Professional Sports Counseling Panel

In the absence of representation, the NCAA permits colleges and universities to appoint a Professional Sports Counseling Panel (PSCP) that may advise student-athletes as they transition from their collegiate to professional careers.¹⁰⁶ PSCP must be comprised of at least three people, a majority of whom shall be full-time employees working outside of the institution's athletic department; no more than one panel member may work in the athletic department; and the panel may not contain a sports agent or any person employed by a sports agency.¹⁰⁷ The PSCP may advise student-athletes in a number of areas, such as assisting the student-athlete in selecting an agent, reviewing proposed professional sports contracts, assisting in securing try-outs, and assisting in determining the student-athlete's market value.¹⁰⁸ However, the panels still fall well short of comprehensive representation during a time when student-athletes need far more support because, while it is "permissible" for the panel to serve in these capacities, there is no indication that the panel is required to provide student-athletes with this support.¹⁰⁹

Though many member-institutions provide their student-athletes with consultation and resources available through the PSCP, these panels do not achieve the level of independent, objective, and comprehensive representation that a student-athlete needs to successfully navigate his or her career. First, these panels are not mandated by the NCAA and are only implemented at approximately 100 of the member institutions.¹¹⁰ Second,

¹⁰⁶ *Div. I Manual, supra* note 5, at 67 (NCAA Division I Bylaws 12.3.4).

¹⁰⁷ *Id.* (NCAA Division I Bylaws 12.3.4.1-2).

¹⁰⁸ *Id.* (NCAA Division I Bylaws 12.3.4(a) – (g)).

¹⁰⁹ *See id.* (NCAA Division I Bylaws 12.3.4).

¹¹⁰ Libby Sander, *NCAA Considers a National Pro-Sports Counseling Panel*, THE CHRON. OF HIGHER EDUC. (Oct. 19, 2010), <http://chronicle.com/blogs/players/ncaa-mulls-idea-of-a-national-pro-sports-counseling-panel/27598>.

the PSCPs are appointed by the President or a delegate of the member institution and are comprised of staff, faculty, and in some cases, alumni athletes of the institution,¹¹¹ with such a strong loyalty to the institution, it is unlikely the panel would be able to objectively counsel student-athletes and advocate effectively in the best interest of a student-athlete. Finally, because these panels are aimed at providing consultation to students as they transition to a “professional” career, they effectively exclude a large number of other students who may need assistance in other areas of their collegiate career but do not plan to, or are unable to, become professional athletes.

With 350 member schools active in Division I of the NCAA,¹¹² the availability of PSCPs at approximately only 100 member schools translates to a minimum of two-thirds of the Division I member institutions without a PSCP. The failure of the NCAA to require PSCPs to be implemented at all member institutions leaves a majority of student-athletes without any form of representation when transitioning from collegiate athletics to a professional career in sports.¹¹³

Additionally, the appointment of PSCP members with strong ties to the institution undermines the ability of student-athletes to receive objective representation. In any agency relationship,¹¹⁴ it is a fundamentally accepted

¹¹¹ The University of Colorado has a former student-athlete on its PSCP at the university. *Professional Sports Counseling Panel – Panel Members*, COLORADO UNIV. ATHLETICS, http://www.cubuffs.com/ViewArticle.dbml?&DB_OEM_ID=600&ATCLID=1513208 (last visited Apr. 14, 2014).

¹¹² *Division I, About*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Feb. 25, 2014).

¹¹³ With 350 universities in Division I, 300 in Division II, and 444 in Division III, the NCAA has over 1,000 member schools across all three divisions; this leaves approximately 90 percent of the member schools without even the minimal resources available through the PSCP. *See id.*; *Division II, About*, NCAA, <http://www.ncaa.org/about?division=d2> (last visited Feb. 25, 2014); *Division III, About*, NCAA, <http://www.ncaa.org/about?division=d3> (last visited Feb. 25, 2014).

¹¹⁴ Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s

practice that a representative providing legal counsel and assisting in negotiations be an agent of the principal and act only on behalf of the principle.¹¹⁵ When a PSCP member is permitted to speak with professional leagues on the student-athlete's behalf, the PSCP is effectively acting in an agent capacity.¹¹⁶ When the PSCP member is also appointed by the president of the member-institution, the PSCP member has an interest that may substantially affect the negotiation, and, thus, he or she cannot effectively represent the student-athlete.

The ramifications of this arrangement are highlighted when we consider the circumstances of a high-profile collegiate football player looking to examine his professional prospects following his junior year season at a NCAA member institution. Not eligible for the National Football League (NFL) combine until three years following graduation from high school,¹¹⁷ a talented football star will likely play three seasons for an NCAA member institution prior to considering his potential in the NFL draft. Assuming he survives three seasons without injury, he is not eligible for the NFL draft unless he denounces his amateur status, secures an agent, and forfeits his

behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

¹¹⁵ An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

¹¹⁶ In line with the definition of "agency," the PSCP is acting on the student-athlete's behalf and subject to the student-athlete's control because the student-athlete is likely to be contacting the PSCP about which teams and/or agents they wish to speak with. Citation needed. Additionally, the PSCP manifests assent or otherwise consents so to act when they agree to contact teams or agents on behalf of the student-athlete. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

¹¹⁷ The National Football League (NFL) effectively requires that draft-eligible players attend college for a minimum of three seasons following graduation from high school before requesting special eligibility from the NFL commissioner. *See* NAT'L FOOTBALL LEAGUE, *supra* note 38.

NCAA eligibility.¹¹⁸ Prior to forgoing his fourth year and entering the draft however, the PSCP may assist the student-athlete in assessing his draft status to determine if he might be better served by playing a fourth season at the member institution. As the only representatives available to him, the members of the PSCP may talk with NFL league officials and assist the student-athlete in reviewing contracts and determining marketing value.¹¹⁹ Unlike an independent agent however, because the members of the PSCP are appointed by the president of the university and may be directly involved in the university's athletic department, they arguably have an interest in the success of the university's football team in the coming year. Thus, they cannot be expected to objectively and adequately represent the interests of the student-athlete.

Finally, PSCP members are only available to student-athletes pursuing a career in professional sports.¹²⁰ While most member institutions provide their student-athletes with resources to support them in maintaining academic and general NCAA eligibility, academic support and compliance personnel are employed by the member institution.¹²¹ As employees, they

¹¹⁸ While the NFL eligibility rules do not require potential players to be represented by an agent, it is generally expected that players will secure an agent prior to entering into negotiations with a team. Securing an agent is a violation of the "no-agency" rule and forfeits the student-athlete's eligibility. *Div. I Manual, supra* note 5, at 59 (NCAA Division I Bylaws 12.1.2).

¹¹⁹ *Id.* at 67 (NCAA Division I Bylaws 12.3.4(a) – (g)).

¹²⁰ Because the PSCP resources are specifically tailored to activities involving communications with professional teams and age, student-athletes not intending to participate in professional sports are effectively not supported by the PSCP. *Id.* (NCAA Division I Bylaws 12.3.4(a) – (g)).

¹²¹ While not required, most NCAA member institutions provide their student-athletes with academic support in line with the recommendations provided by the NCAA. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ACADEMIC SUPPORT SERVICES EVALUATION GUIDE (2009) available at, <http://fs.ncaa.org/Docs/AMA/Athletics%20Cert/N4A-NCAA%20Academic%20Support%20Services%20Eval%20Template%20JP-6-09.pdf>.

are bound by the duty to report rules violations to the NCAA without providing process or comprehensive representation to the student-athlete.¹²²

Unless the student-athlete is the subject of an NCAA investigation and the NCAA enforcement staff reasonably believes the investigation may affect his or her eligibility, the student-athlete is bound by the “no-agency” rule.¹²³ Thus, any formal and independent representation sought by the student-athlete to represent his or her interests at any time throughout his or her career as a collegiate athlete places him or her at risk of losing eligibility under the NCAA’s broad definition of an “agent.”

IV. A SOLUTION: NATIONAL COLLEGIATE SPORTS COUNSELING CENTER

The NCAA plays a large regulatory role in the administration of intercollegiate athletics and, thus, governs most of the major decisions impacting prospective student-athletes as they transition into and proceed through their collegiate athletics career. Prospective student-athletes begin to evaluate the opportunity to compete in intercollegiate athletics as early as the ninth grade and may declare eligibility before the age of maturity.¹²⁴

¹²² “Each institution shall . . . monitor its programs to assure compliance and to identify and report to the Association instances in which compliance has not been achieved. . . . Members of an institution’s staff, student-athletes, and other individuals and groups representing the institution’s athletics interests shall comply with the applicable Association rules.” *Div. I Manual, supra* note 5, at 4 (NCAA Division I Bylaws 2.8.1).

¹²³ Student-athletes may be accompanied by personal legal counsel when appearing at investigative hearings at the request of the Committee on Infractions. *Id.* at 319 (Bylaw 19.7.7.5.1). *See id.* at 59 (NCAA Division I Bylaws 12.1.2).

¹²⁴ Generally, many high school athletes do not turn 18 years of age until their senior year of high school, and it is feasible that they may sign their National Letter of Intent while they are still 17 years of age. *See generally* Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L.J. 265 (2011); Marc Isenberg, *The National Letter of (Bad) Intent*, GEORGE RAVELING: COACHING FOR SUCCESS (Feb. 8, 2013), <http://coachgeorgeraveling.com/the-national-letter-of-bad-intent/>.

Thus, there is a need for increased independent resources for these young men and women as they travel an unknown landscape of policies and regulations that may have a large, and possibly detrimental, effect on their future careers in the event of a single misstep.

In October 2001, the Division I Amateurism Cabinet of the NCAA discussed the implementation of a National Professional Sports Panel as a way of providing students wishing to pursue a professional career with objective advisors to assist them in the transition to professional sports.¹²⁵ While it does not appear that this particular initiative has been further discussed within the legislative bodies of the NCAA, it is not known why such a panel has not been further pursued or if the NCAA plans to pursue it at a later time.

This section will outline the expansion of the PSCP to include a national presence available to all student-athletes throughout their collegiate athletic career. Such a program would include support during the student-athlete's transition into the athletic department of a member institution, administrative support and guidance in navigating the unforgiving rules of NCAA eligibility, increased representation throughout the NCAA enforcement process, and assisting in a transition to professional athletics.

A. An Independent Body to Support Student-Athletes

Imperative to the comprehensive support of student-athletes is the ability to provide them with representation and resources independent of the interests of either the NCAA or the member institutions. As an independent body, a National Collegiate Sports Counseling Center (NCSCC) should be established separately from the NCAA, though funded collectively by the member institutions. While member institutions may not agree with the

¹²⁵ *Supra* Sander, note 109.

increased fees required to establish such a funding model, the cost is likely to be shared enough to reduce the overhead member-institutions already spend on providing student-athletes with far less comprehensive resources at the campus level.

B. Economic Equality for Independent Representation

The common funding model is important to achieve equality across a population of student-athletes that come from a wide variety of socio-economic backgrounds.¹²⁶ Without providing identical NCSCC services to each student-athlete at no cost, the question of representation will be reduced to a function of resources: those student-athletes with access to additional financial support will be able to secure more adequate representation. Under the current model, students may secure independent “advisors” so long as the advisor does not represent the student formally in contract negotiations,¹²⁷ however, there may still be a portion of student-athletes unable to secure representation at the market rate in order to compete with their peers.

While the NCAA does allow student-athletes and their parents to consult with legal advisors,¹²⁸ the student-athlete may be required to pay market-rate for the services to ensure the consultation is not construed as a

¹²⁶ In 2009 and 2010, the NCAA’s Student-Athlete Ethnicity report stated that while the highest percentages of student-athletes across all divisions and all sports were white (70.4 percent of male and 77.2 percent of female student-athletes) the percentage of student-athletes reporting themselves as “black” has risen to 18.7 percent of male student-athletes and 11.6 percent of female student athletes, up from 16.3 percent and 9.4 percent, respectively, in 1999-2000. NAT’L COLLEGIATE ATHLETICASS’N, 2009-2010 STUDENT-ATHLETE RACE / ETHNICITY REPORT 55 (2010), available at <http://www.ncaapublications.com/productdownloads/SAERP11.pdf>.

¹²⁷ *Div. I Manual*, *supra* note 5, at 66 (NCAA Division I Bylaws 12.3.2-12.3.2.1).

¹²⁸ *Id.* (NCAA Division I Bylaws 12.3.2).

prohibited benefit or service.¹²⁹ The option to pay market-rate for legal services is limited to only those student-athletes who can afford the fee, causing an immediate disparate impact to those who do not have the financial resources. While the advisor may be willing to offer his or her services at a lower rate to accommodate the student-athlete's financial circumstances, the NCAA may view this unequal treatment as a "benefit."¹³⁰ Furthermore, under the expanded definition of agents,¹³¹ it is unclear how the NCAA will view the role of an attorney or a similar advisor, and whether or not the student-athlete risks forfeiture of eligibility by soliciting private advice when navigating these regulations. With a prospective student-athlete's collegiate eligibility and potential professional career at stake, many young athletes and their families may opt to navigate these regulations on their own, rather than risk violating the NCAA's "no-agency" rule.

C. Support for All Student-Athletes

Expanding the PSCP model to incorporate all collegiate student-athletes, rather than only those planning a career in professional sports, is congruent with the fundamental purposes of the NCAA. The NCAA's purpose is integrating the athletic experience into the educational program and ensuring that the athlete remains an integral part of the student body.¹³² To that end, the NCAA requires as a part of its institutional control model that each member institution ensure the student-athlete's activities are conducted

¹²⁹ Bylaw 12.1.2.1.6 prohibits "preferential treatment, benefits or services because of the individual's athletics reputation or skill . . . unless such treatment, benefits or services are specifically permitted under NCAA legislation." *Id.*

¹³⁰ *Id.* (NCAA Division I Bylaws 12.3.2).

¹³¹ *Id.* at 57 (NCAA Division I Bylaw 12.02.1.1).

¹³² *Id.* at 1 (NCAA Fundamental Policy 1.3).

as an integral part of his or her educational experience.¹³³ The availability of adequate support to student-athletes is consistent with the integration of the athletic experience as a part of the academic environment by facilitating the education of student-athletes about the regulatory structure of the NCAA and allows student-athletes to advocate for themselves appropriately, with guidance from professionals in the field. The expansion to a national level would also provide consultation and resources to student-athletes attending the many member institutions that do not currently have a PSCP in place.

While the additional cost of providing these resources on a national level may be seen as prohibitive, with nearly \$71 million in surplus¹³⁴ generated from the efforts of student-athletes across the nation, providing these same athletes with the resources needed to adequately navigate the regulatory structure is more than justified. Additionally, by taking a pro-active approach to regulation through education and support, the NCAA is likely to reduce the overhead currently dedicated exclusively to enforcement. Where the investigative and adversarial enforcement approach undercuts the purpose of the NCAA to promote and develop educational leadership,¹³⁵ an expanded educational and supportive approach falls squarely within these ideals.

Additionally, the expansion to providing support to all student-athletes would provide comprehensive information and support as student-athletes transition into their career in collegiate athletics from high school.

D. Increased Support for Prospective Student-Athletes

In serving all student-athletes throughout their collegiate career, it is important that prospective student-athletes receive adequate and

¹³³ *Id.* (NCAA Bylaw 2.2.1).

¹³⁴ Berkowitz, *supra* note 25.

¹³⁵ *Div. I Manual*, *supra* note 5, at 1 (NCAA Constitution 1.2).

independent counsel as they make the difficult decision of which university to attend. The media is quick to highlight the National Signing Day¹³⁶ as a celebratory moment in the lives of these young student-athletes, marking the culmination of years of hard work and success that has delivered them to the front door of their chosen institution. However, the signing of the National Letter of Intent¹³⁷ is merely the formal beginning of a student-athlete's governance by a large, regulatory authority and economic powerhouse; behind the row of pristine hats is but a young man or woman hoping they have made the right decision.

Upon registration with the NCAA eligibility center, the NCSCC could be charged with assigning to a student-athlete a counselor to support them in preparing for their own National Signing Day, ensuring the athlete is properly completing all eligibility information. While the prospective student-athlete would still ultimately be responsible for the information provided, the additional guidance and support provided by the NCSCC will ensure that the student fully understands the process and the consequences of completing the information incorrectly. More importantly, this initial contact at the point of registration with the eligibility center will provide the prospective student-athlete with a resource at the NCSCC. The opportunity exists for these NCSCC contacts to be available to the student-athlete

¹³⁶“National Signing Day is an annual event wherein high school football prospects around the country sign their letters of intent, officially announcing which college they will be attending. . . . It's the closest thing college football has to a draft, except players get to pick their destinations from among all the schools who've offered them scholarships.” Pete Volk, *What is College Football's National Signing Day?: An FAQ for the Casual Fan*, SB NATION (Feb. 3, 2014, 9:01 AM), <http://www.sbnation.com/college-football-recruiting/2014/2/3/5364380/national-signing-day-2014-college-football-recruiting>.

¹³⁷“By signing a National Letter of Intent, a prospective student-athlete agrees to attend the designated college or university for one academic year.” *About the National Letter of Intent (NLI)*, NAT'L LETTER OF INTENT, <http://www.nationalletter.org/aboutTheNli/index.html> (last visited Feb. 25, 2014).

throughout his or her collegiate career, and to establish a rapport that will ultimately provide the student-athlete with increased support if he or she chooses to pursue a professional career.

As the student-athlete transitions into his or her collegiate career, his or her NCSCC representative may provide assistance and consultation throughout the recruiting processes and as he or she declares his or her intent to participate in athletics at a particular member institution. Specifically, as the recruiting regulations are extensive and detailed, it is important that the prospective student-athlete have an independent and objective advocate who is well-versed in the rules and policies surrounding NCAA recruiting. This additional support through the recruiting process will ensure the student does not inadvertently violate the regulations and mistakenly forfeit their eligibility. Furthermore, as the time nears for the student to sign a National Letter of Intent and commit to a particular institution, it is imperative that the student have adequate guidance when making a decision that will drastically affect their collegiate education and intercollegiate athletic career, and that ultimately may have a drastic effect on a potential career as a professional athlete.

E. Increased Support Through NCAA Enforcement Procedures

With the NCAA managing the operations and overseeing the direction of intercollegiate athletics, these student-athletes have little choice but to agree to the terms and conditions required by the members institutions in compliance with NCAA bylaws and regulations. Student-athletes are subject to serious sanctions, including the suspension or revocation of eligibility, if they do not comply with NCAA rules. Under NCAA guidelines, student-athletes are only permitted to have legal counsel present during interviews regarding potential infractions if the NCAA investigator

feels that the interview is detrimental to the interests of the student-athlete.¹³⁸ Under the NCSCC, a student-athlete could have access to adequate representation throughout any investigation. Under the current procedures, the student-athlete is only informed of violations that may affect his or her eligibility once the NCAA has notified the member institution and determined that the student-athlete's interests may be compromised. Without recourse to be found in the courts, these student-athletes are at the mercy of an organization that is not required to provide substantive due process. The NCAA owes these student-athletes a show of restraint in exercising unbridled regulatory authority and the opportunity to seek adequate and comprehensive advice from qualified advocates who are familiar with NCAA regulations.

F. Support During Transition to Professional Career

Once a student-athlete begins to look forward toward a future in professional sports, the NCSCC representative may transition into the role of a limited agent through the timeframe when a student-athlete is not permitted to secure proper representation through a traditional agent. Under the current PSCP, a student-athlete may consult with the panel to evaluate marketability and potential draft position.¹³⁹ However, it is not possible for a student-athlete to properly evaluate his or her potential in the professional arena without a representative that is independent of the member institution, particularly when the student-athlete may be evaluating the possibility of leaving the institution to enter the draft prior to the expiration of his or her eligibility. Understanding that it may be a conflict of interest for a single

¹³⁸ Sahl, *supra* note 29. See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

¹³⁹ *Div. I Manual*, *supra* note 5, at 67 (NCAA Division I Bylaws 12.3.4(a) – (g)).

representative to be simultaneously evaluating the draft potential of more than one student-athlete in the same sport, this may be the point at which the NCSCC should hand-off the student-athlete to an agent that is registered with the NCAA to provide individual and independent agency services as outlined by the NCAA. Nevertheless, support from the NCSCC will prove invaluable while the student-athlete begins to evaluate the possibility of transitioning to a professional team or selecting an agent.

While such representation may be inconsistent with the NCAA's current "no-agency" rule, the availability of support and representation by the NCSCC should not be interpreted as an agency, in the same way that the guidance of the PSCP does not violate the "no agency" rule. Providing structured and independent representation may reinforce the "clear line of demarcation" between amateur and professional athletics by requiring that prospective agents and teams work through the NCSCC when recruiting. By providing student-athletes with a single contact thorough which agents, teams, and others may contact them, the NCAA is in a position to monitor the interaction of student-athletes with the world of professional sports and, thus, preserve the "clear line of demarcation." More importantly, by acting as a buffer between student-athletes and agents or teams, the student-athletes will be able to better focus on their education, knowing that their interests are being protected by an independent and adequate representative.

Furthermore, under the guidance of NCSCC representatives, student-athletes are in a better position to really "learn the ropes" of negotiating in the professional arena and how to best protect their own interests. While NCAA sanctions can affect member institutions and student-athletes, agents can only be sanctioned if they violate federal or state statutes, which prohibit agents from coercing or bribing students into signing an agency

contract prior to their eligibility expiration.¹⁴⁰ Because these statutes go largely unenforced,¹⁴¹ it may be time for the NCAA to begin to evaluate providing more protection to student-athletes by way of establishing its own modified and limited agency organization.

G. Additional Support to the Student-Athlete

Finally, and perhaps most importantly, within the vast structure of the NCAA and under the institutional control of the member institution for which the student-athlete participates, there are few independent resources to which the student-athlete may turn with concerns or grievances regarding his or her experience as a student-athlete without fear or worry of repercussions from the coach, athletic director, or institution. In the “win-at-all-cost” culture that is so pervasive in collegiate athletics, as highlighted in the 2012 Penn State scandal,¹⁴² those charged with protecting and

¹⁴⁰ Michael L. Martin, *It's Not a Foul Unless the Ref Blows the Whistle: How to Step up Enforcement of the UAAA and SPARTA*, 19 SPORTS LAW. J. 209, 211–12 (2012).

In 1997, the NCAA and several universities reached out to the National Conference of Commissioners on Uniform State Laws (NCCUSL) to draft a model state law regulating athlete agents across the country. . . . The NCCUSL presented the [Uniform Athlete Agents Act] in 2000. Since then, this model Act has been adopted in some capacity by forty states, the District of Columbia, and the United States Virgin Islands.

Id. at 212.

¹⁴¹ *Id.* at 215–18.

¹⁴² In 2012, former defensive coordinator for Penn State Jerry Sandusky was found guilty of 45 counts of sexual abuse occurring over a 15-year period. In the wake of the news, the university fired football coach Joe Paterno and president Graham Spanier, and school officials were accused of failing to report suspected child abuse. Bill Chappell, *Penn State Abuse Scandal: A Guide and Timeline*, NPR (June 21, 2012, 6:01 PM), <http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline>. While the NCAA initially issued unprecedented sanctions against the university, it later reduced the penalty by increasing the number of football scholarships the university may award through the 2016 season. *Penn State Sanctions: \$60M, Bowl Ban*, ESPN COLLEGE FOOTBALL (July 24, 2012, 10:54 AM), http://espn.go.com/college-football/story/_/id/8191027/penn-state-nittany-lions-hit-60-million-fine-4-year-bowl-ban.

controlling the institution and student-athletes often have substantial motivation to refrain from reporting violations of NCAA rules, or worse, hide criminal activity. Behind the guise of “protecting the program,” minor NCAA infractions go unreported. In hopes of preserving alumni donations and support, athletic departments and member institutions may remain willfully ignorant of improper recruiting practices. In the most egregious circumstances, an entire university may be complicit in covering up a scandal that could unravel the athletic department from the inside out. At times like these, when student-athletes may feel most powerless to do the right thing or simply need an independent advocate to speak with, a forum like a NCSCC may prove most beneficial.

V. CONCLUSION: COMPREHENSIVE SUPPORT FOR STUDENT-ATHLETES IS LONG OVERDUE

More than five years after Andrew Oliver was forced to sit out more than half of a season, Oregon State University pitcher Ben Wetzler received news that he would miss 20 percent of his senior season for violating the “no-agency” rule.¹⁴³ Arising from circumstances similar to Oliver’s, Wetzler was sanctioned for “his use of a financial adviser while negotiating a contract with the Philadelphia Phillies, who selected him in the fifth round of [the June 2013 Major League Baseball (MLB)] draft.”¹⁴⁴ Eligible for the

wins-dating-1998; Josh Moyer, *Penn State to Regain Scholarships*, ESPN COLLEGE FOOTBALL (Sep. 25, 2013, 10:25 AM), http://espn.go.com/college-football/story/_id/9716482/ncaa-reduce-penalties-penn-state-regarding-jerry-sandusky-child-sexual-abuse-matter.

¹⁴³ Connor Letourneau, *Oregon State Baseball: NCAA Ruling on Ben Wetzler Feeds National Debate on ‘No Agent’ Rule*, THE OREGONIAN (last updated Feb. 21, 2014, 9:17 PM), http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon_state_baseball_wetzler.html.

¹⁴⁴ *Id.*

draft once during his collegiate career,¹⁴⁵ Wetzler instead walked away from the contract offer with the Phillies to return to Oregon State, with the hopes of taking the team to the national championship.¹⁴⁶ While it appears Wetzler had “no intent . . . to circumvent the rules,” the suspension may have cost him his dream of playing in the college world series.

Prospective student-athletes will continue to dream of playing for their favorite university and aspire to be one of the lucky few who are awarded athletic financial aid and become a professional athlete in their sport. Though founded with the intention of providing support to student-athlete’s education and protection of their best interests, the NCAA has become a regulatory framework that provides policies by which member institutions and student-athletes must comply or risk losing their collegiate eligibility and possibly the potential for a valuable education provided by an athletic scholarship. So much rides on a student-athlete’s understanding and navigation of detailed NCAA rules and regulations, without much recourse to be found in the courts. The NCAA itself is in the best position to not only provide the student-athletes it purports to serve with the education and support necessary to achieve continued eligibility, but also to prepare these student-athletes for the realities they may face in the world of professional athletics.

One of the greatest assets available to anyone is adequate representation, particularly when navigating a large regulatory agency that has a vast

¹⁴⁵ “An enrolled student-athlete in a sport . . . may enter a professional league’s draft one time during [his] collegiate career without jeopardizing his or her eligibility in the applicable sport, provided . . . [he] declares his or her intention to resume participation in intercollegiate athletics.” *Div. I Manual, supra* note 5, at 66 (NCAA Division I Bylaws 12.2.4.2.4).

¹⁴⁶ Connor Letourneau, *Oregon State Baseball: Ben Wetzler Enters Senior Season Eager to Join the Dog Pile*, THE OREGONIAN (last updated Feb. 14, 2014 at 8:09 AM) http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon_state_baseball_ben_wetz.html.

amount of control over an individual's property rights and access to due process. The expansion of the current Professional Sports Counseling Panel to a National Collegiate Sports Counseling Center would provide student-athletes with comprehensive representation throughout the lifecycle of their collegiate career, beginning as prospective student-athletes in high school and continuing through their transition to a career in professional sports. Additionally, the NCSCC ensures adequate resources and support to all student-athletes competing under the framework of the NCAA regulations, and not limited to only those student-athletes competing for a member institution that provides a PSCP. Finally, a national model provides student-athletes with independent representation when evaluating contracts, draft eligibility, market rate, and interviewing future agents. The NCSCC does not limit the student-athletes by requiring them to seek guidance through resources that may have loyalties to the member institution or by requiring they work with their families to secure funding to pay a private "advisor" who may not pass the "no-agency" rule under NCAA amateurism guidelines.

The jurisdiction of the NCAA umbrella and the details of the regulations are changing each year and affect the very nature of a student-athletes ability to pursue their education while participating in a sport that they love. Implementation of a national model provides student-athletes with the resources to navigate these continuous changes, and supports the mission and purpose of the NCAA by ensuring that athletic pursuits be an integrated component of the overall educational experience of student-athletes.