

From the Seat of the Chair: An Insider's Perspective on NCAA Student-Athlete Voices

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Student-athletes have been the central focus of the NCAA's core values and mission since it was founded over a century ago in 1906. By now we should have a reasonably informed sense of the role that student-athletes play in influencing outcomes related to their well-being and interests. Yet examining developing trends relative to the legal landscape of college athletics, what emerges is evidence of increasing discourse surrounding a fundamental question of who, if anyone, represents student-athletes' interests.

The issue concerning rights and representation of student-athletes is once again a topic of significant discussion after football student-athletes at Northwestern University filed a petition with the National Labor Relations Board (NLRB) seeking to be recognized as employees and represented by a labor union. They claim, "[t]he number one thing . . . to accomplish is to finally give athletes a true voice . . . at the table when rules and regulations are determined."¹

Here I will not evaluate the legal implications were student-athletes to be recognized as employees or even consider if they have enough supporting legal precedent and factual circumstances to make such a case. Those issues are properly left to the legal process.² Nevertheless, I am particularly keen to discuss the claim that student-athletes lack a voice.

Using the Northwestern NLRB case as a framework, I will explain how student-athletes already have a significantly influential voice. I call upon my personal experience to show that student-athletes are capable of effectuating change by expressing themselves through access to existing and accepted means. As a former Division I student-athlete and Chair of the NCAA Division I National Student-Athlete Advisory Committee (SAAC), I sat in the seat charged with the responsibility to advocate for over 140,000 student-athletes. Thus, my argument is based on personal perspective, not speculation. It is imperative to consider this issue from a standpoint that accounts for a personal perspective because without it one cannot fully appreciate how the student-athlete voice is sought, heard, and acted upon. I am hopeful that my personal perspective might shift the rhetoric to more accurately reflect the influence of the student-athlete voice through SAAC.

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1. Dan Wetzel, *Northwestern Football Team Takes First Step in Forming College Players Union*, YAHOO! (Jan. 28, 2014), <http://sports.yahoo.com/news/northwestern-football-team-takes-first-step-in-forming-college-players-union-163217754.html>.

2. See *Northwestern University and College Athletes Players Association*, No. 13-RC-121359 N.L.R.B. Region 13 (2014) (ordering that an election be conducted for the Northwestern football student-athletes receiving grant-in-aid scholarships). At the time of publication for this work, the National Labor Relations Board is reviewing an appeal of Chicago Regional Director Peter Sung Ohr's March 26, 2014 decision.

I. THE STUDENT-ATHLETE ADVISORY COMMITTEE

To understand how the student-athlete voice is heard, one must consider both the purpose and structure of SAAC. The purpose of SAAC can vary across conferences and institutions, but the primary purpose is to respond to proposed NCAA legislation and to actively participate in dialogues with administrators shaping student-athlete well-being. Generally speaking, this purpose is served by consulting with student-athletes at conferences and institutions to develop a student-athlete position and then advocate for that position in a variety of ways.

Within each of the three NCAA Divisions, the SAAC structure is subdivided into institutional campus SAACs, conference SAACs, and National SAACs. While each NCAA Division has its own SAAC structure, my focus here is on Division I. The Division I Bylaws require all Division I member institutions and conferences to establish a SAAC.³ Each conference SAAC is comprised of members from the campus SAACs. The Division I National SAAC is, in turn, comprised of representatives from the conference SAACs. The Division I National SAAC includes thirty-two student-athletes selected by the current committee members from a pool of nominated student-athletes who participate in SAAC at the institution and conference levels. The role of a Division I National SAAC representative is to be an active participant at all Division I National SAAC meetings and to work as a liaison among the institutional and conference SAAC representatives. The thirty-two student-athletes on the Division I National SAAC also elect a Chair and Vice Chair of the committee. The Chair and Vice Chair manage all committee meetings and respond to inquiries from administrators at the NCAA National Office, the Division I membership, and the media.

There are two primary criticisms of SAAC that I will dispel. The first is that student-athletes on SAAC are not well-versed enough to speak on the issues impacting student-athletes in high profile sports. The second is that SAAC is merely a mouthpiece for the NCAA. Student-athletes who are not on SAAC can—and indeed regularly do—ask for the committee to convey their concerns. The perspectives provided here are examples of the numerous occasions when SAAC has advocated in the best interest of student-athletes rather than merely acquiescing to the views of administrators at the NCAA and its member institutions.

II. ADEQUATE REPRESENTATION

If student-athletes like those at Northwestern would utilize SAAC as their preferred means to pass along their concerns, they would surely find their voices considerably more effective than unionization. Kain Colter, the former quarterback for the Northwestern University football team, provided testimony at the February 2014 NLRB hearing. Colter described his perceived injustice of the current NCAA system as a product of the NCAA governance structure functioning as a

3. Nat'l Collegiate Athletic Ass'n, 2014-2015 NCAA Division I Manual §§ 3.3.4.6, 6.1.4 at 13, 41 (2014), *available at* <http://www.ncaapublications.com/productdownloads/D115AUG.pdf>.

“dictatorship” because student-athletes “don’t have a seat at the table.”⁴ Actually, student-athletes do have a seat at the table. The NCAA governance structure already provides SAAC with regular opportunities to express their ideas and concerns. The Chair and Vice Chair, for example, have had longstanding representation at the highest levels of NCAA governance, including active participation at meetings of the Leadership and Legislative Councils.⁵ These Councils consist of administrators who regularly inquire about the student-athlete opinion on the gamut of issues impacting student-athlete well-being.

SAAC also has representation on twenty-two other NCAA cabinets and committees. One such committee is the Competitive Safeguards and Medical Aspects of Sport Committee (CSMAS). The Northwestern student-athletes have expressed their desire for more influence on health and safety issues. What is important to understand is that the concerns for student-athlete health and safety are listened to. The role of the SAAC member on CSMAS as an advocate for health and safety is just one example that should give solace to concerns that student-athletes lack influence on health and safety issues.

III. FINANCIAL ASSISTANCE

Student-athletes have an unquestionable influence on decisions concerning financial aid. The Northwestern student-athletes have placed themselves in the center of this issue, suggesting that the full scholarships covering the cost of tuition, fees, books, and room and board are insufficient. They propose that multi-year grants-in-aid and stipends covering the full cost of attending institutions are necessary. Courts and the NCAA membership have already examined this issue, and SAAC’s opinion was chief in influencing the outcomes.

On the heels of a failed antitrust challenge to the NCAA financial aid bylaws brought by a former student-athlete in *Agnew v. NCAA*,⁶ the Division I membership considered modifying Bylaw 15.02.7 with proposal 2011-97, which would have allowed institutions to award multi-year grants-in-aid. SAAC initially opposed the proposal based on member feedback primarily from men’s basketball and football student-athletes. We commented on the potential complacency for some student-athletes to not put forth a deserving effort of a scholarship. Proposal 2011-97 was reconsidered as a result. After subsequent vetting, SAAC supported the proposal and the Division I membership adopted it.

Around this same time, the Division I membership also considered proposal 2011-96 that would have permitted institutions to award a two thousand dollar

4. Chris Isidore, *College Football Players Want to Join Union*, CNN (Jan. 28, 2014), <http://money.cnn.com/2014/01/28/news/economy/college-football-union/index.html>.

5. In August 2014, the Division I Board of Directors voted to adopt a redesigned Division I governance structure that created a new body known as the Council, which replaced the former Legislative and Leadership Councils. The Council will be responsible for day-to-day operations of Division I and include two student-athletes with a voting capacity. See *Division I Governance*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/governance?division=d1>.

6. 683 F.3d 328 (9th Cir. 2012).

miscellaneous expense allowance to accommodate the full cost of attending institutions. The likely genesis for proposal 2011-96 was a settlement agreement in the class action lawsuit *White v. NCAA*, which ordered the NCAA to establish a ten million dollar fund for former student-athletes to receive assistance for educational expenses such as degree completion.⁷ SAAC had a meaningful opportunity to discuss proposal 2011-96 in a meeting with the Division I Board of Directors at the 2012 NCAA Convention. After this meeting, the Division I Board of Directors suspended the proposal, especially in light of feedback sought from SAAC. The Chair of the NCAA Executive Committee at the time, Oregon State University President Ed Ray, described the impact of SAAC's input: "[i]n my opinion, student input was critical to leading us to the right decisions."⁸ This was a profound act by the Division I Board of Directors that demonstrates the value and impact that the student-athlete voice through SAAC can have at the highest levels of the NCAA governance structure.

In addition to NCAA legislative measures, there are other existing means for student-athletes to obtain financial assistance outside of scholarships. One example is a multimillion dollar Student Assistance Fund to provide direct benefits to student-athletes to cover personal and educational expenses. This fund was established as part of the NCAA's broadcast-rights agreement with CBS Sports and ESPN.

Considering the failed legal challenges to the current structure and the existing means to provide student-athletes with financial assistance, increasing the financial aid available to student-athletes would prove quite a challenge for a union. Financial aid is one of the more dynamic areas of the NCAA bylaws, and it will surely be revisited by the NCAA membership as discussions evolve. The foregoing demonstrates that SAAC has the experience to effectively speak for student-athletes when that time comes.

IV. EXPLOITATION

The Northwestern student-athletes allege that they are exploited by having no voice in how their names, images, and likenesses are used. This is misguided. During my tenure as Chair, one of the more significant matters handled by the SAAC concerned amateurism and commercialism. Both are at issue in ongoing litigation in the multidistrict class action lawsuit *In re Student-Athlete Name & Likeness Licensing Litigation*.⁹ In 2009, the plaintiffs alleged that the NCAA violated antitrust law by conspiring with Electronic Arts and the Collegiate

7. No. CV 06-0999-RGK, 2006 WL 8066802 (C.D. Cal. Sept. 20, 2006) Plaintiffs alleged that the NCAA and its member institutions violated the federal antitrust laws by entering into a horizontal agreement to limit the athletic-based aid awarded to student-athletes to an amount capped at the grant-in-aid. *Id.* at *1.

8. Michelle Brutlag Hosick, *Student-Athletes Have a Voice at Convention and Beyond*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 27, 2012), <http://fs.ncaa.org/Docs/NCAANewsArchive/2012/january/student-athletes%2Bhave%2Ba%2Bvoice%2Bat%2Bconvention%2Band%2Bbeyonddf30.html>.

9. 2012 WL 1745593, at *1 (N.D. Cal. May 16, 2012).

Licensing Company to restrain competition in the commercial use of their names, images, and likenesses.

After the litigation commenced, the Division I membership considered proposal 2010-26, which would have modified Bylaw 12.5.1.1 to expand the ability for commercial entities to use student-athletes' names, images, and likenesses in promotional activities. From an outsider's perspective, it is easy to be critical of the intent of a proposal like 2010-26 and agree with the plaintiffs that the NCAA was attempting to exploit student-athletes. What many fail to recognize, however, is that student-athletes standing to benefit the most from commercial promotion were not concerned about their own financial exploitation. It is quite the opposite, in fact: SAAC members and men's basketball and football student-athletes from many of the most high profile programs supported prioritizing revenue generation for member institutions themselves so that the institutions could equitably distribute the new revenue among all athletic programs.

It is important to know that SAAC speaks from an informed perspective. While we were debating the merits of proposal 2010-26, we met with executives from EA Sports to discuss our opinions and see in detail what the proposed use of names, images, and likenesses in video games would look like. This opportunity added considerable knowledge to our dialogue when we later voted on the proposal. SAAC ultimately opposed proposal 2010-26, but not because of its merits. Rather, we were uncomfortable with the procedures to obtain student-athlete consent for the promotional activities. The proposal was suspended after SAAC expressed this position.

V. SOLUTION

If I was to offer a solution—and I am not at all certain a problem exists for which a solution is warranted—I would suggest that the better alternative to unionization is to strengthen the student-athlete voice in NCAA governance. This will happen when voting privileges are obtained for those student-athletes representing SAAC at NCAA meetings. At the 2014 NCAA Convention, a primary concern was what role SAAC could play in a restructured Division I governance model. At its August 2014 meeting, the Division I Board of Directors voted to adopt a new Division I structure that will have additional student-athlete representation, including voting privileges for SAAC members. Although voting will not dramatically alter SAAC's current role, it will likely quiet some concerns that student-athletes do not have a true impact through SAAC. What is more important, however, is that the student-athletes on SAAC continue to be engaged with their student-athlete peers and voice their opinions and concerns to administrators.

CONCLUSION

SAAC already effectively achieves what some student-athletes seek to accomplish through legal challenges and union representation. Apropos of the Northwestern student-athletes' call for more representation involving NCAA decisions, my own testimonial evidence here shines light on a perspective that is

often overshadowed. If we fully appreciate the voice that student-athletes already have, we see that there is no need for a union to represent student-athlete interests.