

The NCAA's Academic Performance Program: Academic Reform or Academic Racism?

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I. INTRODUCTION

On April 29, 2004, the National Collegiate Athletics Association¹ (“NCAA”) Board of Directors announced that they had overwhelmingly adopted a “landmark” academic reform package.² NCAA President Myles Brand proclaimed these reforms to be “critically necessary” to ensure that student-athletes are academically successful.³ Brand went as far as to declare this reform package as a “sea change” in college athletics.⁴ Robert Hemenway, Chancellor of the University of Kansas and chair of the NCAA Division I Board of Directors, asserted that the event was a “very significant day in the history of the NCAA.”⁵ The academic reform package that both Brand and Hemenway spoke of is called the Academic Performance Program (“APP”).⁶

The APP is an incentive/disincentive based program⁷ comprised of two main components, the Graduation Success Rate (“GSR”) and the Academic Progress Rate (“APR”).⁸ The GSR is a methodology used to measure student-athletes’ graduation-rates.⁹ The NCAA uses GSR

¹ The NCAA is a private association of colleges and universities referred to as “member institutions”. The NCAA governs, regulates, and oversees collegiate athletic competition between its member institutions.

² NCAA News Release, *NCAA Board of Directors Adopts Landmark Academic Reform Package*, <http://www.ncaa.org/releases/divi/2004/2004042901d1.htm>.

³ Audio Recording: Teleconference announcing new academic reform rules for Division 1 institutions, held by the NCAA (Apr. 29, 2004), <http://www.ncaa.org/releases/divi/2004/2004042901d1.htm>.

⁴ *Id.*

⁵ *Id.*

⁶ See NCAA, 2007-08 Division I Manual – Operating Bylaws (hereafter “NCAA Bylaws”), Article 23, available at http://ncaa.org/library/membership/division_i_manual/index.html. (covering the general principles, definitions, application, oversight, penalties, rewards, appeal and APP revision procedures for NCAA member institutions).

⁷ The NCAA called the APP an “incentive/disincentive” based program when it was originally adopted. The only current incentive is a public commendation by the NCAA. The disincentives range from a written warning to loss of NCAA membership.

⁸ See NCAA Bylaws Article 23.02-23.02.2, *supra* note 6 (Definition and Application of Academic Progress Rate and Graduate Success Rate).

⁹ See http://www2.ncaa.org/portal/academics_and_athletes/education_and_research/academic_reform/gsr/index.html. The NCAA developed the GSR to supplement Federal Graduation Data. The GSR accounts for incoming and outgoing transfer students and mid-term enrollees, whereas the federal rate does not. As a result, the GSR methodology better represents student-athletes’ actual graduation rates. The equivalent of the GSR for Division II

data to track student-athletes' "long-term" academic success.¹⁰ The APR, on the other hand, provides a "real-time" assessment of students' and teams' academic progress.¹¹ The NCAA asserts that the APR is the "fulcrum" upon which the APP rests.¹² The APR has this distinction because it is the methodology used to (1) track students' and teams' annual academic progress and (2) assess penalties against member institutions.¹³ As a result, the APR has a more direct impact than the GSR on student-athletes and NCAA member institutions.

This article addresses the direct impact of the APP and APR on student-athletes and member institutions. The APP needs critical scrutiny because it appears that a disproportionate level of punishment is being levied against Historically Black Colleges and Universities ("HBCUs") and African-American males. This potentially discriminatory result leads to inevitable comparisons between this current academic reform package and one of the NCAA's previous reform packages, Proposition 16 ("Prop. 16").¹⁴ Although the two academic reform packages differ in fundamental ways,¹⁵ there is an eerie corollary. Ironically, when President Brand introduced the APP, APR, and GSR he heralded the programs as "well-thought-out."¹⁶ However, it

member institutions is the Academic Success Rate or ASR. It performs the same basic function for Division II Schools except that it accounts for student-athletes that were recruited but did not receive an athletic scholarship. Because the focus of the current problem with the APP is on Division I schools, the ASR will not be discussed in this article.

¹⁰ See *Trend Data Show Graduation Success Rate Improvement*, http://www2.ncaa.org/portal/media_and_events/press_room/2007/october/20071003_grad_rate_1_rls.html. The GSR is used to track graduation rates over six year periods in an effort to represent the long term trends of graduation rates at particular member institutions.

¹¹ *Defining Academic Reform*, http://www2.ncaa.org/portal/academics_and_athletes/education_and_research/academic_reform/defining_academic_reform.html. The details of how the APR works will subsequently be profiled in the main text of this article.

¹² *Id.*

¹³ *Id.*

¹⁴ Proposition 16 established initial academic eligibility standards for student-athletes that wanted to participate in NCAA athletic competition and receive athletic financial aid. The rule required that freshman student-athletes earn a minimum SAT score and a minimum GPA in core high school courses to be eligible to compete and receive athletic financial aid. These minimums were set up on a sliding scale so that a higher GPA would allow for a lower SAT requirement. However, Proposition 16 resulted in a large percentage of African-American student-athletes being declared ineligible for freshman athletics participation and athletic financial aid. Two significant Title VI challenges, *Cureton v. NCAA* and *Pryor v. NCAA* sought to enjoin the NCAA from enforcing Proposition 16 because of its disparate discriminatory impact. *Cureton's* Title VI claim came under a private-cause of action for disparate impact. *Pryor's* Title VI and Section 1981 claim alleged intentional discrimination by the NCAA. Both these cases will be profiled in detail subsequently in this article.

¹⁵ The most obvious difference between Prop. 16 and the APP is that the penalties under Prop. 16 were assessed against the student-athlete, whereas APP penalties are assessed against the member institutions.

¹⁶ Audio Recording, *supra* note 3.

appears the NCAA's current academic reform package was not as "well-thought-out" as President Brand would have liked.

The APP has definite and obvious flaws. Certainly, its apparent discriminatory effect on HBCUs and African-American males should be of great concern. These consequences are embarrassing for the NCAA and may result in a court finding that the APP is unlawful. This article provides a foundation for understanding both past and current NCAA academic reform measures. It also profiles potential legal challenges a student-athlete may bring to enjoin the NCAA's use of the APP. Finally, this article highlights the inherent flaws created by subjecting member schools, with significantly different levels of financial resources, to this dogmatic "carrot and stick" approach to academic reform. This article aims to heighten awareness about the problems with the APP and motivate the NCAA to find solutions that serve all of its member institutions and student-athletes equitably.

Part II of this article surveys the history of NCAA's academic reform efforts and describes why they served as the impetus for APP.¹⁷ Part III outlines 1) the basic structure and function of the APR system, 2) how to calculate an APR score, and 3) how APP penalties are determined and assessed.¹⁸ Part IV identifies potential reasons why the APP levies a disproportionate number of penalties on HBCUs. Part V analyzes potential legal challenges to the NCAA's use of the APP. Part VI explains why an incentive/disincentive system has inherent flaws and provides possible alternatives to ameliorate these intrinsic defects.

Fortunately, the NCAA recognizes the problems with the APP and represents that it is committed to ensuring diversity and inclusion for all persons.¹⁹ Ideally, the NCAA will solve the APP's problems quickly and fairly. If it does not, the NCAA could face expensive and divisive legal challenges from student-athletes, member institutions, and poten-

¹⁷ See *History of Academic Reform*, http://www2.ncaa.org/portal/academics_and_athletes/education_and_research/academic_reform/history.html.

¹⁸ Since, the APR is the "fulcrum" of the APP and the functional tool by which the NCAA identifies and assesses penalties, understanding how the APR works is vital for this article. See *supra* note 11. GSR and Progress Towards Degree calculations are not as pertinent for this article. For a discussion of these issues please see the corresponding articles in the NCAA Bylaws at http://www.ncaa.org/library/membership/division_i_manual/2007-08/2007-08_d1_manual.pdf

¹⁹ See NCAA Constitution, Article 2.6 (The Principle of Nondiscrimination) "The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to refrain from discrimination with respect to its governance policies, educational programs, activities and employment policies including on the basis of age, color, disability, gender, national origin, race, religion, creed or sexual orientation. It is the responsibility of each member institution to determine independently its own policy regarding nondiscrimination."

tially place its tax-exempt status in jeopardy. The NCAA can avoid this potential litigation, public embarrassment, and honor its own constitution by amending the structure of the APP to offset its discriminatory impact. The NCAA can accomplish broad and lasting academic success for its student-athletes by providing tangible incentives²⁰ in addition to punishments.

II. THE HISTORY OF ACADEMIC REFORM IN COLLEGIATE ATHLETICS

Academic fraud, recruiting violations, and clandestine financial compensation of student-athletes have plagued collegiate athletics since its inception.²¹ Before the formation of the NCAA in 1906, colleges and universities engaged in nefarious activities to gain an edge in athletics competition.²² This prompted the NCAA, in its original constitution, to espouse the principles of honor, integrity, amateurism, and good sportsmanship.²³ However, the NCAA exercised no central authority or control over the member institutions.²⁴ Schools immediately took advantage of their “home rule.”²⁵ Member institutions routinely enrolled “tramp” athletes who would transfer from school to school seeking the highest financial reward.²⁶ As a result, the NCAA instituted “progress towards degree” requirements.²⁷

These requirements failed to stem the prevalent recruiting violations, provision of extra benefits, or the manipulation of financial aid awards.²⁸ Therefore, in 1948 the NCAA instituted the “sanity code” to ensure amateurism, academic integrity, and institutional control by limiting recruiting opportunities and financial aid.²⁹ Within the first two

²⁰ Currently the only incentive is an annual public recognition award for the teams whose APR score is in the top ten percent for that sport. The 2006/07 public award winners can be seen at <http://www.ncaa.org/wps/portal/> (Select “Education and Research” hyperlink under the “Academics & Athletes” menu; then follow “Academic Progress Rates (APR)” hyperlink; then select “APR Data Per Institution” hyperlink).

²¹ Joseph Crowley, *In the Arena 3* (Digital ed. 2006), available at http://www.ncaa.org/library/general/in_the_arena/in_the_arena.pdf. Colleges routinely had non-students competing in baseball, football, and even the sport of rowing.

²² *Id.* at 4. (Many players were paid compensation to attend a particular university and were not required to attend classes. Often, schools were in direct competition with each other for the same non-student athletes.)

²³ *Id.* at 15.

²⁴ *Id.* at 15.

²⁵ *Id.* at 15.

²⁶ Jeffrey Waller, *A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA*, 1 DePaul J. Sports L. Contemp. Probs. 189, 191 (2003).

²⁷ *Id.* at 192

²⁸ *Id.* at 192

²⁹ Crowley, *supra* note 21, at 30.

years of the code, member violations related to covert financial aid awards become frequent.³⁰ Pressure from member institutions to loosen the restrictive nature of the “sanity code” led to its elimination in 1951.³¹ However, the “sanity code” established that central NCAA oversight and enforcement of college athletics was here to stay.³²

In 1965, the NCAA instituted its first true academic eligibility standard when it passed the “1.6 rule.”³³ This rule established a predictive methodology to pre-screen student-athletes’ potential for collegiate academic success.³⁴ If the methodology projected that the student-athlete would earn a 1.6 Grade Point Average (“GPA”) as freshman in college, he or she would be eligible to participate in athletics.³⁵ The 1.6 rule was replaced in 1973 with the “2.0 rule”.³⁶ Unlike the 1.6 rule, the 2.0 rule was not a predictive methodology based on copious data and calculations.³⁷ This rule simply required a student-athlete to graduate from his or her high school with at least a 2.0 GPA.³⁸ The 2.0 rule lasted until the mid 1980’s despite the lack of uniformity in the nation’s high schools and abuses by NCAA member institutions.³⁹

In 1986, Proposition 48 (“Prop. 48”) was implemented to heighten academic standards for incoming freshman student-athletes.⁴⁰ This academic reform package required that potential student-athletes earn (1) a score of at least a 700 on the SAT or a 15 on the ACT, (2) complete eleven core academic courses while in high school, and (3) achieve a minimum GPA of 2.0 in those core courses in order to be athletically eligible.⁴¹ Educators and advocates raised concerns when Prop. 48 resulted in denying a disproportionate number of African-American student-athletes athletic eligibility at NCAA member institutions.⁴²

³⁰ *Id.* at 31.

³¹ *Id.* at 31.

³² *Id.* at 31.

³³ *Id.* at 49.

³⁴ Waller, *supra* note 26, at 192.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Crowley, *supra* note 21, at 64.

⁴¹ *Id.* (The core course requirement stipulated that every student-athlete must complete a certain amount of units in social science, natural/physical science, mathematics, and english.)

⁴² Michael Mondello and Amy Abernethy, *A Historical Overview of Student-Athlete Academic Eligibility and the Future Implications of Cureton v. NCAA*, 7 Vill. Sports & Ent. L.J. 127, 132. (2000). (Concerns regarding racial bias of the test and the use of a standardized test for eligibility was questioned because the SAT was not intended to serve that purpose.)

Despite these concerns, Proposition 42 (“Prop. 42”) tightened the restrictions on Prop. 48 in 1989.⁴³ Prop. 42 limited student-athletes who met at least one academic eligibility benchmark⁴⁴ to only “need-based” financial aid and not “athletic-based” financial aid.⁴⁵ It became clear by this point that the NCAA’s effort to combat rules violations with central governance, academic reforms, and initial eligibility standards was well established. Although the NCAA did have some success in the 1970’s and 1980’s enforcing its rules, there were still rampant recruiting, academic, and financial aid abuses.⁴⁶ So many abuses, in fact, the public at large started showing concern that the integrity of college athletics and education were in jeopardy.⁴⁷

In 1991, after a decade of scandal in college athletics⁴⁸ The Knight Commission on Intercollegiate Athletics released a report titled,

⁴³ *Id.* at 135.

⁴⁴ The requirements were (1) Score at least a 700 on the SAT or a 15 on the ACT, (2) achieve a minimum GPA of 2.0, and (3) complete certain core courses while in high school. (These student-athletes are known as “partial-qualifiers.”)

⁴⁵ Mondello, *supra* note 42 at 135. (Prop. 48 allowed athletic aid even though the student-athlete was ineligible under the initial eligibility standards. Essentially, Prop. 42 eliminated athletic financial aid for partial-qualifiers.)

⁴⁶ Crowley, *supra* note 21, at 63-73.

⁴⁷ See Letter from William C. Friday, Co-Chairman, President, William R. Kenan Jr. Fund and Theodore M. Hesburgh, C.S.C., Co-Chairman, President Emeritus, University of Notre Dame, to Mr. Lee Hills, Vice Chairman, Board of Trustees, Knight Foundation (Mar. 1991) (available at http://www.knightcommission.org/about/keeping_faith_letter_of_transmittal).

⁴⁸ A multitude of NCAA violations occurred at many educational institutions in the 1980’s. Some of the most serious infractions included academic fraud and provision of improper benefits for student athletes. One example stemmed from the “win at all costs” culture surrounding athletes at the University of Georgia (“UGA”). A former development studies faculty member sued UGA after she claimed she was fired from her position because she spoke out against the preferential treatment student-athletes received at UGA. She accused UGA of exploiting its African-American athletes by keeping them eligible through the school’s remedial program even though their likelihood of graduation from the university was slim. See *Kemp v. Ervin*, 651 F.Supp. 495 (1986). Other problems occurred at Creighton University (Creighton). Kevin Ross, a basketball player sued Creighton for educational malpractice and “negligent admission.” Ross exhausted his athletic eligibility without ever coming close to earning his degree. Ross was only able to read at a third grade level when he left Creighton. See *Ross v. Creighton University*, 957 F.2d 410 (1992). Former All-Pro NFL Lineman Dexter Manley revealed that he had made it through college without being able to read. See Laura Pentimone, *The National Collegiate Athletic Association’s Quest to Educate the Student-Athlete: Are the Academic Eligibility Requirements an Attempt to Foster Academic Integrity or Merely to Promote Racism?*, 14 N.Y.L Sch. J. Hum. Rts. 471, 480. At Southern Methodist University, tens of thousands of dollars were paid to players directly in a scandal that implicated coaches, boosters, the university’s Board of Governors, and even the Governor of Texas, a SMU alumnus. See (http://www.ncaa.org/library/general/in_the_arena/in_the_arena.pdf at page 70). This list is by no mean exhaustive but only indicative of a rampant problem that plagued college athletics in the 1980’s. These kinds of problems continued to occur well into the 1990’s and into the new millennium. In 2003, former UGA men’s basketball coach Jim Harrick and his son, Jim Jr. (who served as an assistant coach) were both associated with academic fraud issues relating to their teams stu-

“Keeping the Faith with the Student Athlete: A New Model for Intercollegiate Athletics.”⁴⁹ This independent report called for greater presidential control of intercollegiate athletics and a commitment to ensure academic and fiscal integrity through a certification process.⁵⁰ This report and the public image problem from which it grew led the NCAA to institute a stronger NCAA academic reform package in 1992.⁵¹ This academic reform package was Prop. 16 and it was fully implemented by the 1996-97 academic year.⁵²

Prop. 16 heightened initial eligibility requirements by requiring two additional core courses and a 2.5 high school GPA.⁵³ However, a “sliding scale” was implemented to make the initial eligibility index more malleable.⁵⁴ A student-athlete could remain eligible if his or her GPA dropped below the 2.5 if he or she had a considerably higher SAT/ACT score.⁵⁵ Despite this sliding scale, a study by The National Center for Education Statistics indicated that Prop. 16 significantly reduced opportunities for all student-athletes, particularly African-Americans.⁵⁶ The study also indicated that student-athletes from lower socio-economic classes suffered disproportionately.⁵⁷ As was expected by many concerned parties, Prop. 16’s initial academic eligibility standards disparately limited athletic opportunities for many economically dis-

dent-athletes. Jim Sr. resigned and Jim Jr. was fired in March of 2003 after it was revealed Jim Jr. provided passing grades to his players for classes they never attended. It was also later revealed that Jim Sr. had tampered with his student-athlete’s grades at his previous employer, the University of Rhode Island. While at UGA, Jim Sr. was also shown to have provided his credit card to one of his student-athletes for the purchase of a television. See http://sportsillustrated.cnn.com/basketball/college/news/2003/03/27/harrick_resigns_ap/. The problems with academic fraud continue to this day. Even as this article is being written, Florida State University had 36 student-athletes suspended for academic fraud. See, Andrew Carter, *36 FSU Players Sidelined*, Orlando Sentinel, Dec. 22, 2007, at <http://www.topix.net/content/trb/2007/12/36-fsu-players-sidelined>; See, Andrew Carter, *FSU Puts Its Sports Teams on Probation*, Orlando Sentinel, Feb. 15, 2008, at <http://www.orlandosentinel.com/sports/college/orl-fsu1508feb15,0,6363901.story>

⁴⁹ Commission Reports, http://www.knightcommission.org/about/knight_commission_reports/.

⁵⁰ *Id.*

⁵¹ Crowley, *supra* note 21, at 77.

⁵² Mondello, *supra* note 42 at 135.

⁵³ *Id.* at 136-37.

⁵⁴ Mondello, *supra* note 42 at 136. (The sliding scale would allow a student-athlete to have a GPA below the minimum if the student-athlete’s SAT/ACT score were higher than the minimum 820. A student-athlete with a 2.0 GPA needed a SAT score of 1010 to be athletically eligible.)

⁵⁵ *Id.*

⁵⁶ *Id.* at 137. (Approximately half of the college bound African-American students met Prop. 16 compared to two-thirds of Caucasians and Asians. Overall, 20% fewer students met Prop. 16 requirements compared to Prop. 48.)

⁵⁷ *Id.* at 138.

advanced African-American student-athletes.⁵⁸ Two significant legal challenges resulted from Prop. 16's disparate discriminatory impact.⁵⁹ Both cases were adjudicated in the Eastern District of Pennsylvania and eventually the Third Circuit.⁶⁰ The case of *Cureton v. NCAA* was heard in 1999, followed by *Pryor v. NCAA* in 2000.⁶¹

Tai Kwan Cureton and three other plaintiffs alleged that Prop. 16 had a disparate discriminatory impact on African-American student-athletes.⁶² The defendants brought an implied cause of action for disparate discriminatory impact under Title VI of the Civil Rights Act of 1964 against the NCAA.⁶³ The District Court found for the plaintiffs in what is now referred to as *Cureton I*.⁶⁴ The Third Circuit overturned this holding in *Cureton II*.⁶⁵ The pertinent details of these cases will be analyzed subsequently in this article. What is important to realize is that the *Cureton* plaintiffs were not alleging intentional discrimination by the NCAA, only that its policies had a disparate discriminatory impact.⁶⁶

In 2001, the Supreme Court eliminated an implied cause of action for disparate discriminatory impact under Title VI in the case of *Alexander v. Sandoval*.⁶⁷ As a result, a case under Title VI now requires

⁵⁸ *Id.*

⁵⁹ Waller, *supra* note 26, at 194-95.

⁶⁰ *Id.*

⁶¹ *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999); *Pryor v. NCAA*, 153 F. Supp. 2d. 710 (E.D. Pa. 2000).

⁶² *Cureton*, 37 F. Supp. 2d at 689.

⁶³ *Id.*

⁶⁴ *Id.* at 715.

⁶⁵ *Cureton v. NCAA*, 198 F.3d 107, 118 (3rd Cir. 1999)

⁶⁶ *Cureton*, 37 F. Supp. 2d at 689.

⁶⁷ *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001). In 1990, after Alabama made English the official language of the state by amending its constitution, James Alexander (Director of the Alabama Department of Public Safety) created an English only driver's license test. Martha Sandoval sued Alexander and others under §602 of Title VI, the regulations that are promulgated to enforce §601 or the rights granting clause of Title VI. Sandoval hoped to enjoin the use of the English-only test and argued that it created a discriminatory "disparate impact" on non-English speaking persons. The Supreme Court, in a 5-4 decision, used *Cannon v. University of Chicago*, 441 U.S. 677 (1979) as a basis to hold that Title IX and Title VI only protect a private cause of action for intentional discrimination. The court stated that because §602 did not contain the same rights creating language of §601 and that §602 regulations provide for an expressed method to enforce §601, Congress must have intended to exclude other methods such as a private cause of action for disparate impact. Prior to this decision, there were many cases decided before the Supreme Court and other lower courts that upheld the validity of Title VI disparate impact claims. *See Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Vil-lanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Gomez v. Illinois State Bd. Of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403

proof of intentional discrimination.⁶⁸ Therefore, when Kelly Pryor and Warren Spivey, Jr. brought their Title VI and Section 1981 claims against the NCAA for Prop. 16's discriminatory impact, they alleged intentional racial discrimination by the NCAA.⁶⁹ The District Court denied the plaintiffs' claim in *Pryor I* and the Third Circuit reversed in *Pryor II*.⁷⁰ Again, the details of these cases will be profiled subsequently in this article. After *Pryor II*, the NCAA lowered the stringent academic requirements of Prop. 16 and amended the sliding scale initial eligibility index to be less restrictive and less discriminatory.⁷¹ However, the social pressure on the NCAA to uphold its founding principles of amateurism and academic integrity were still being felt.

In 2001, the Knight Commission revisited the issue of academic integrity in college athletics.⁷² Its follow-up to the 1991 report revealed a need for a greater commitment to academic standards.⁷³ This second report titled, "A Call to Action: Reconnecting College Sports and Higher Education" found that "rampant commercialism" corrupted the concepts of amateurism and academic integrity in college athletics.⁷⁴ This report implored the NCAA to work with member institutions and athletic conferences to implement its recommendations.⁷⁵ One such recommendation was to increase graduation rates among student athletes by the year 2007.⁷⁶ The NCAA is attempting to institute many of these recommendations through its use of core course requirements⁷⁷,

(11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984). In fact, by memorandum dated July 14, 1994, the Attorney General directed the heads of governmental departments and agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs." See The United States Department of Justice - Civil Rights Division, *Title VI Legal Manual* (January 11, 2001). (The last time this manual was revised and just before *Alexander v. Sandoval* was decided by the Supreme Court). See <http://www.usdoj.gov/crt/cor/coord/vimanual.htm>

#B.%20Disparate%20Impact/Effects.

⁶⁸ *Pryor v. NCAA*, 288 F.3d 548, 562 (3rd Cir. 2002).

⁶⁹ *Pryor v. NCAA*, 153 F. Supp. 2d. 710, 716 (E.D. Pa. 2001).

⁷⁰ *Pryor*, F.3d at 570.

⁷¹ See *Division I Academics/Eligibility/Compliance Cabinet Subcommittee on Initial- Eligibility Issues, Agenda*, June 20, 2002, available at http://www.ncaa.org/governance/pdfs/200206_aec_agenda_supp10.pdf.

⁷² See *Knight Commission Report*, *supra* note 49.

⁷³ *Id.*

⁷⁴ A Call to Action, <http://www.knightcommission.org/about/>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See NCAA Bylaws Article 14.3 (Freshman Academic Requirements – The NCAA has increased the number of "core" high school courses required to be eligible as a freshman for participation and financial aid. The number of core courses required in the Fall of 2008 will increase to sixteen).

the APP, the APR, the GSR and Progress Towards Degree requirements.⁷⁸

Member institutions are also heeding this call. Several schools appear to be using self-help measures to make academic integrity an integral part of their programs.⁷⁹ However, many of these measures are only accessible to the wealthiest schools. Outstanding academic facilities and superior administrative staffs are expensive to develop and maintain. According to the NCAA, a lack of financial resources hinders academic success at all levels of education.⁸⁰ Many at-risk student-ath-

⁷⁸ See *History of Academic Reform*, *supra* note 17 This profiles the steps the NCAA has taken to carryout the mission of academic reform and ensuring the goal of academic integrity as one of paramount importance. An interesting point of note is that the NCAA uses the Knight Commission's language to define the goals of its academic reform programs.

⁷⁹ Ironically, the same "rampant commercialism" that drove institutions to ignore problems in the past may be why schools are now making efforts to keep student-athletes eligible. The repercussions from having a poor public perception about the integrity of a school's athletic program (e.g. fewer new student applicants & alumni donations) coupled with the threat of severe penalties (e.g. lost scholarships, being banned from post-season play or televised broadcasts) directly results in lost revenue for the university. The prospect of lost revenue seems to motivate schools to keep their athletes eligible. This could be why the NCAA currently relies so heavily on a disincentive-based system and not an incentive based system to enforce the APP. The counter argument to this is that financial subsidies may be an equal if not greater motivational factor than financial losses. It is difficult to know what motivates the decision making process of the NCAA or any member institution. Whatever the reason, there are definitive self-help measures being taken by member institutions to ensure academic success. At the University of Georgia, Athletic Director Damon Evans has begun to fine his student athletes and suspend them from athletics participation if they miss class or scheduled tutoring time. Other schools have also stressed class attendance, as well as implement other strategies for academic success. These commitments to academic support require time, money and a dedication by the administration to run their programs with integrity. A good example of this comprehensive approach is Oklahoma State University (OSU). OSU has impressive academic support services, facilities, and programs. I immediately recognized the quality of the OSU program and the commitment of its administrators when I served as an intern in the athletic department's NCAA rules compliance office during the summer of 2007. The school provides individual and group tutoring, faculty mentors, contracted study sessions, and significant academic facilities to assist in learning. These facilities include a language lab, science and mathematics resource center, literary resource center with writing labs and an assistive technology center to help students with learning disabilities. Access to these state-of-the-art facilities is easy for student-athletes because the academic support building connects directly to the gymnasium. However, these technological and fiscal benefits are only as good as the staff that administers the program. The integrity and commitment of the academic support staff is vital to ensuring a student-athlete's academic success. This point cannot be stressed enough. At OSU, many of its student-athletes refer to the Associate Athletic Director for Academic Affairs as "Mom." This fondness is indicative of the athletes trust in her and her genuine concern for the student-athletes' total welfare. Administrators, coaches, and staff build academic integrity into an athletic program through diligence and a commitment to their student-athlete's well-being. Budget allocations alone will not ensure that academic integrity becomes, much less remains, a core element of college athletics.

⁸⁰ *HBCU, Katrina-area Schools Struggle in APR Report*, May 2, 2007, <http://sports.espn.go.com/ncaa/news/story?id=2857999>

letes enroll in college lacking the formal educational resources and opportunities that many affluent children take for granted.⁸¹ Unfortunately, the financial resources needed to ensure academic success in college are simply unavailable to many schools.⁸²

The APP grew from this myriad of issues. Member schools have attempted to dodge NCAA rules for over one hundred years. Previous attempts by the NCAA at academic reform have had limited success and some have led to extensive legal battles. The financial stakes for member schools and the NCAA are higher than ever because of the enormous commercial value of college athletics. Wealthy schools⁸³ can act to protect their own academic development programs with financial expenditures. However, smaller schools like HBCUs struggle to provide adequate, much less comprehensive, academic support for their student-athletes. These issues coupled with the prevalent social pressure for academic integrity in athletics, compelled the NCAA to act. The NCAA responded by passing the APP.

III. THE STRUCTURE AND FUNCTION OF THE ACADEMIC PROGRESS RATE

The APR assesses both a team's and an institution's academic success in "real-time."⁸⁴ During each academic term, every student-athlete on an athletic scholarship can earn two points by remaining at the institution and maintaining academic eligibility.⁸⁵ These points are called a "retention point" and an "eligibility point."⁸⁶ A team's APR score is the total points earned, divided by the total points possible, and multiplied by one thousand.⁸⁷ The minimum cutoff or "cut" score to avoid "contemporaneous" penalties is 925; to avoid "historical penalties" the

⁸¹ Lisa Trei, *Getting in is not the Hardest Part: Students Ill-prepared for College, Study*, STANFORD REPORT, Mar. 12, 2003, <http://news-service.stanford.edu/news/2003/march12/bridge-312.html> (Access to a diverse and challenging academic curriculum, current textbooks, well-furnished science labs, and safe schools are the kinds of resources and opportunities being discussed here. The Institute for Educational Leadership, The National Center for Public Policy and Higher Education, The Stanford Institute for Higher Education Research are all good sources for research in this area).

⁸² *Id.*

⁸³ "Wealthy" schools generally refers to universities and colleges from the BCS conferences. Other schools like Notre Dame are also included in this category. Some schools, commonly referred to as "Mid-Majors" also have more resources than the smallest Division I schools like HBCUs. HBCUs have limited resources compared to BCS schools for both athletics and academic support.

⁸⁴ *Defining Academic Reform*, *supra* note 11 The APR scores are recorded for each semester or quarter, but are calculated on an annual basis.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

cutoff is 900.⁸⁸ These penalties will be detailed below but first, a quick look at a hypothetical men's basketball team will provide an example of how points are earned and a team's APR is calculated. An institution can award thirteen total full grant-in-aid scholarships for men's basketball.⁸⁹ Since each player can earn one point each for remaining at the university (retention point) and maintaining academic eligibility (eligibility point), 26 total points are possible for the team each semester.⁹⁰ Because the APR is calculated on an annual basis, there are 52 total points possible in an academic year. If every other player on the team earns all the points possible but two players lose eligibility and leave school as a result,⁹¹ the team will score 48 out of 52 possible points. This results in a .923 raw score. This score is multiplied by one thousand to get the APR score, in this case a 923.

The NCAA asserts that a score of 925 on the APR equates to a GSR of 60% and a 900 equates to a GSR of 45%.⁹² Because of the NCAA goals for overall graduation rates, these cut scores have become the benchmark for APR penalties. Our hypothetical basketball team's APR score would result in a contemporaneous penalty.⁹³

⁸⁸ *Id.*

⁸⁹ NCAA Bylaws Article 15.5.4.1 (Scholarship Limits for Men's Basketball).

⁹⁰ Thirteen total players that can earn two points each equals twenty-six total points. A team's APR score is calculated over the entire academic year, which results in 52 total points under a semester system.

⁹¹ *Defining Academic Reform*, *supra* note 11. In NCAA lingo, this would be a "0 for 2" for each semester.)

⁹² *Id.* Although the NCAA asserts that the data it collects supports these numbers, its formula for these calculations is not publicly accessible. Even if one "adjusts" the APR calculation for athletes turning professional, the numbers still seem incongruous. It seems logical that more than 60% of the student-athletes would graduate if 92.5% of them remain academically eligible and stay in school until their athletic eligibility is exhausted. Certainly, the school would lose student-athletes to professional sports leagues in the United States, Europe, and elsewhere. Other student-athletes leave school for personal reasons that warrant an APR adjustments. However, the numbers of student-athletes turning professional and leaving for personal reasons would seem to be less than 32.5% of all the student athletes in Division I athletics. Despite my repeated requests for an explanation of its methodology, the NCAA simply asserts on its website that it tracks the graduation data and has a formula to equate APR to GSR.

⁹³ NCAA Bylaws Article 15.5.7.1.1.1 and 15.5.7.1.1.2 (Description of Head Count and Equivalency Sports). A team's APR is calculated in the same manner whether it is a "head-count" sport or an "equivalency" sport. Head-Count sports count every scholarship as one scholarship regardless of how much athletic financial aid is received. If a student-athlete receives only \$400 and is a head count sport participant, he or she still counts as one scholarship. Football, as an example of a head-count sport, has eighty-five total scholarships available annually. Equivalency sports will partition out scholarships based on the total percentage of athletic financial aid granted to each student-athlete. Therefore, if a student-athlete is awarded half of all his/her costs of attendance (books, tuition, fees, room, and board) he or she will count as a half of a scholarship. Baseball, as an example of an equivalency sport, has 11.7 total scholarships available annually. Problems also creep into the system because of the

The APR penalty system is two tiered. Contemporaneous penalties serve to rehabilitate while historical penalties act to punish schools.⁹⁴ A contemporaneous “loss of scholarship” penalty is assessed if a student-athlete fails to earn both APR points in the same academic term than his or her team scores below the 925 cut score.⁹⁵ The institution cannot re-award that “lost” athletic scholarship to any student-athlete the following academic year.⁹⁶ There are some exceptions for student-athletes who have exhausted their eligibility and an annual ten percent cap on contemporaneous penalties.⁹⁷ The cap is in place because the contemporaneous penalties serve a rehabilitative function.⁹⁸

The historical penalties, on the other hand, punish “chronic underperformers” by assessing significant sanctions against them.⁹⁹ Historical penalties increase in severity with each subsequent offense.¹⁰⁰ The institution or team receives a public warning on the first occasion that an institution or team falls below the 900 “cut-line.”¹⁰¹ After the initial public warning, the institution or team is subject to three years of APP analysis and more severe penalties.¹⁰² The institution or team suffers limitations on practice/playing seasons, recruiting and financial aid after

size of particular teams. The fact that a football team has 85 players on scholarship and a men’s basketball team only has 13 players makes no difference when APR calculations are made to determine penalties. Therefore, a football team that has an APR score below 925 can have six students go “0 for 2” and still not suffer a contemporaneous penalty. However, a men’s basketball team is subject to a contemporaneous penalty if two student-athletes goes 0 for 2 and the team scores below a 925 on the APR. This is because one student-athlete’s presence on a team represents a significantly different percentage of teams overall roster.

⁹⁴ *Defining Academic Reform, supra* note 11.

⁹⁵ If a student-athlete fails to maintain his/her eligibility and withdraws from the school (thus going 0 for 2 for that semester) and his/her team falls below 925, a full scholarship is eliminated for the following academic year. However, the 10% cap for each sport limits these contemporaneous penalties. Therefore, the maximum penalty for baseball (an equivalency sport) is 1.7 or 10% of 11.7 total available scholarships. Whereas, in men’s basketball (a head count sport), the maximum penalty is 2 scholarships because there are 13 scholarships available. The head count sport calculations are rounded up for APR penalty considerations. *See supra* note 93 and NCAA Bylaws Article 15.5.7.1.1.1 and 15.5.7.1.1.2 explaining the difference between head count and equivalency sports.

⁹⁶ NCAA Bylaw 15.5.7 (Limitations on Re-Awarding of Financial Aid). An institution can take APP penalties at its next available opportunity. This is done because APP penalties are assessed in May at the end of the academic year and member institutions have already enrolled students for the fall semester of the upcoming academic year. Therefore, the NCAA allows the member institution to take the penalty the following academic year.

⁹⁷ *Defining Academic Reform, supra* note 11.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ NCAA Bylaws Article 23.2.1.2.1 (Public Warning).

¹⁰² NCAA Bylaws Article 23.2.1.2.1.2 (Monitoring Period).

its second offense.¹⁰³ The institution becomes ineligible for pre and post-season competition the third time the institution or team misses the 900 cut-score.¹⁰⁴ This includes pre-season tournaments, NCAA Championships and bowl games.¹⁰⁵ However, if a penalty prevents a team from participating in pre and post season competition there is an exception for a student-athlete in individual sports to compete if he or she is academically eligible.¹⁰⁶ The NCAA reclassifies an institution's entire program to restricted membership status for one year on the fourth occasion that a *team*¹⁰⁷ fails to meet the APR 900 cut-score.¹⁰⁸ Finally, the NCAA reclassifies an institution as a corresponding member if the penalized team continually fails to meet the benchmarks set under the historical penalty structure.¹⁰⁹ The institution's ability to use the NCAA's name, logo, or insignia in any manner is limited under this membership classification.¹¹⁰ The APP subjects teams to continued analysis and potentially stiffer historic penalties if they repeatedly score below 900.¹¹¹

In May 2007, the NCAA assessed the first historical penalties by distributing "public warning letters" to the Division I member institutions in violation of the APR.¹¹² The more severe historical penalties have yet to occur. By the time this article is published, some member institutions will likely be subject to the second level of historical penalties. The 2006-07 academic year data revealed certain potential issues with APR penalties even though there were some positive results.¹¹³

¹⁰³ NCAA Bylaws Article 23.2.1.2.2 (Financial Aid, Playing and Practice Seasons and Recruiting Limitations). No member institution has suffered this level of penalty because the 2007-08 school year was the first time historical penalties were assessed. The substance and scope of these penalties will be revealed if and when the NCAA punishes a team at this level.)

¹⁰⁴ NCAA Bylaws Article 23.2.1.2.3 (Preseason and Postseason Competition).

¹⁰⁵ *Id.*

¹⁰⁶ NCAA Bylaws Article 23.2.1.2.3.1 (Individual Sports).

¹⁰⁷ NCAA Bylaws Article 23.2 (Penalties and Rewards). Only this level of penalty excludes "institution." The Bylaws stipulate that a penalty will be assessed if a "team" is in violation. The practical difference appears to be that an institution can have four consecutive years of historical penalties by at least two different teams without losing "active membership" status. However, when one team falls below the 900 cut score on four occasions will membership status be in jeopardy.

¹⁰⁸ NCAA Bylaws Article 23.2.1.2.4 (Membership Status).

¹⁰⁹ *Id.*

¹¹⁰ NCAA Bylaws Article 3.5.2 (Corresponding Membership Privileges).

¹¹¹ *Defining Academic Reform*, *supra* note 11.

¹¹² *Most Recent Division I APR Data Encouraging Overall But Highlight Challenges as Well*, May 2, 2007, http://www2.ncaa.org/portal/media_and_events/press_room/2007/may/20070502_apr_data_rls.html.

¹¹³ *Id.* (reporting that of the 6,110 teams subjected to the APR only 112 received public warning letters).

Because the APR intends to represent an accumulation of four years of rolling data, there has been a squad-size adjustment used to act as a margin of error correction tool until four years of data is collected.¹¹⁴ The squad-size adjustments will be eliminated in the 07/08 academic year.¹¹⁵ The problem that was exposed in the 2006-07 data is that 44% of men's basketball teams, 40% of football teams, and 35% of baseball teams would have posted APR scores below 925 if the squad-size adjustments had not been in place.¹¹⁶ This could be a serious problem for the NCAA, member schools, and fans because many athletic scholarships in revenue generating sports could be lost.¹¹⁷ The effect of removing the current squad-size adjustments will become more apparent in the 2007-08 data. Fortunately, schools do have an avenue by which they can offset some of these potential penalties.

Institutions may appeal any contemporaneous or historical penalty.¹¹⁸ There are two tiers of appeals available to the institution for its third and fourth historical offenses.¹¹⁹ Institutions may also apply for "waivers" for any APR penalty.¹²⁰ In addition to appeals and waivers, the NCAA also provides "adjustments" for academically eligible student-athletes who leave early to participate in a professional sport.¹²¹ This adjustment occurs by eliminating the retention point from the total points possible in the denominator of the teams APR calculation.¹²² If however, the student-athlete turns professional while academically ineligible, there is no adjustment. If this occurs, the student-athlete would

¹¹⁴ *NCAA Backgrounder on Squad-Size Adjustments*, http://www2.ncaa.org/portal/academics_and_athletes/education_and_research/academic_reform/backgrounder_squad_size.html.

¹¹⁵ *Id.*

¹¹⁶ *Most Recent Division I APR Data Encouraging Overall But Highlight Challenges as Well*, *supra* note 112.

¹¹⁷ *Knight Commission Reaction to NCAA Academic Data Released Today*, May 2, 2007, http://www.knightcommission.org/students/item/knight_commission_reaction_to_ncaa_academic_data_released_today/

¹¹⁸ NCAA Bylaws Article 15.5.7, 23.2.1.2.1.1, 23.2.1.2.2.1, 23.2.1.2.3.2, 23.2.1.2.4.1, 23.3, 23.3.1, and 23.3.2 (Appeal Provisions and Opportunities).

¹¹⁹ NCAA Bylaws Article 23.2.1.2.3.3 and 23.2.1.2.4.2 (Appeal of Committee on Academic Performance Decision).

¹²⁰ NCAA Bylaw 15.5.7.3 (Waiver Provision – One important waiver is based on the education mission of the school. "Mission Waivers" have been granted to HBCUs because APP penalties may not be appropriate in all cases. If the schools educational mission is frustrated by an APP penalty then a waiver may be granted). See also *Most Recent Division I APR Data Encouraging Overall But Highlight Challenges as Well*, *supra* note 112.

¹²¹ *NCAA Division I Academic Progress Rate Adjustment Directive*, http://www1.ncaa.org/membership/governance/division_1/academic_performance/2007-08APRAAdjustmentDirective.pdf

¹²² *Id.* If a student-athlete leaves school early for a professional career and is academically eligible when he or she left, the student's APR score in that semester would be a 1 for 1 and not a 1 for 2. The retention point is adjusted for by eliminating it from the denominator.

fail to earn either the retention or the eligibility point.¹²³ This results in the dreaded “0 for 2.”¹²⁴

Institutions also may seek adjustments for both retention and eligibility points on behalf of their student-athletes for extreme family financial difficulty, natural disasters, life-threatening injury or illness, harassment, Olympic competition, or other unforeseen circumstances beyond the student-athletes or institution’s control.¹²⁵ As of January 2008, adjustments for transfers are also allowed under certain circumstances.¹²⁶ Unfortunately, adjustments and waivers cannot hide the most significant problem with the APP. HBCUs have suffered a disparate number of penalties because of the APP and APR.

IV. WHY DOES THE APR HAVE A DISPARATE DISCRIMINATORY IMPACT ON HBCUs?

Although significant historical penalties are looming once the squad-size adjustments are lifted, the more troubling issue apparent in the APR data is that HBCUs are disproportionately punished compared to other schools.¹²⁷ About 13% of the penalties were assessed against HBCUs even though they make up only about 6% of Division I institutions.¹²⁸ The disparity apparently results mainly from a HBCU’s relative lack of financial resources.¹²⁹ Myles Brand addressed these concerns during a teleconference with reporters when the 2006-07 APR

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See January 2008 Report at http://www1.ncaa.org/membership/governance/division_I/academic_performance/Committee_Reports. The main criteria for the transfer adjustment are that the student-athlete be (1) enrolled for at least one year prior to transfer, (2) transfer to another four year institution, (3) have a cumulative GPA over 2.600, and (4) earn his/her APR eligibility point in the last term or enrollment prior to transferring.

¹²⁷ *HBCU, Katrina-area Schools Struggle in APR Report*, May 2, 2007, <http://sports.espn.go.com/ncaa/news/story?id=2857999>. This is particularly true compared to the member institutions in the Big 12, Big Ten, ACC, PAC Ten, Big East, and Southeastern Conferences that make up the Bowl Championship Series.

¹²⁸ *Id.*; See also Stan Diel, *NCAA May Pass Out Aid to Needy Schools*, THE BIRMINGHAM NEWS, November 4, 2006, available at http://blog.al.com/bn/2007/03/ncaa_may_pass_out_aid_to_needy.html. This fails to take into account the significant number of “mission waivers” awarded to HBCUs. It also ignores that HBCUs have, on average, fewer teams than large Division I schools. Thus, an even greater percentage of penalties are being assessed against HBCUs because their teams make up less than 6% of the total number of Division I teams.

¹²⁹ *Most Recent Division I APR Data Encouraging Overall But Highlight Challenges as Well*, *supra* note 112; See also Stewart Mandel, *NCAA Releases Three-year APR Data*, SPORTS ILLUSTRATED, <http://sportsillustrated.cnn.com/2007/football/ncaa/05/02/apr.report/index.html>.

data was released.¹³⁰ Brand stated that it was not an issue of race but one of financial resources.¹³¹ Although this may be true, the unfortunate reality is that many HBCUs are low-resource institutions.¹³²

Many scholars assert that low socio-economic status can act as proxy for race in many situations, such as access to education, housing, and medical care.¹³³ U.S. Census data from 2006 indicates that the median African-American household annual income was over twenty thousand dollars less than the median for white households.¹³⁴ The U.S. Census data also shows that in 2006 over 24% of African-Americans lived under the poverty line.¹³⁵ Therefore, when Brand and the NCAA assert that the problem is about money, they are only telling part of the truth. The more difficult consideration is that a lack of financial resources is often a proxy for race in the context of higher education and college athletics. This lack of financial resources seems to have contributed to the discriminatory impact of the APP.

There may be other reasons why HBCUs are shouldering a disproportionate level of punishment. HBCUs traditionally have been more willing to accept academically at-risk student-athletes in hopes of providing them a positive and structured formal educational experience.¹³⁶ Others claim the problem lies in the school administrators' lack of understanding about how the APR works.¹³⁷ A full and developed understanding of the APR could be sacrificed if there is a limited staff to oversee the athletic department.¹³⁸ Finally, the effects of Hurricane Katrina could have contributed to the disproportionate impact.¹³⁹ Thir-

¹³⁰ HBCUs, *Katrina Area Schools Struggle in APR Report*, *supra* note 127.

¹³¹ *Id.*

¹³² *See Id.*

¹³³ Carman DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2006* at 7, U.S. CENSUS BUREAU, Aug. 2007, <http://www.census.gov/hhes/www/poverty/poverty06.html>; *See also* PAUL JARGOWSKY, *POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY* (1997) available at <http://www.poverty.smartlibrary.org/NewInterface/segment.cfm?segment=1630>, CORNELL WEST, *RACE MATTERS* 93-95 (Vintage 1994); *See also* *Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

¹³⁴ DeNavas-Walt, *supra* note 133, at 7.

¹³⁵ DeNavas-Walt, *supra* note 133, at 11.

¹³⁶ *See HBCUs, Katrina Area Schools Struggle in APR Report*, *supra* note 127; *See NCAA May Pass Out Aid to Needy Schools*, *supra* note 128; http://www.black-collegian.com/news/bcwire/archives/hbcu_future1_1006.htm; http://findarticles.com/p/articles/mi_m0DXX/is_14_20/ai_108265877. HBCU's have traditionally been concerned with the advancement of African-Americans. To that end, open admissions policies have been used at many HBCUs for many years.

¹³⁷ HBCU, *Katrina-area Schools Struggle in APR Report*, May 2, 2007, <http://sports.espn.go.com/ncaa/news/story?id=2857999id> (Some HBCU administrators and athletic directors have taken the blame for failing to follow APP rules).

¹³⁸ *Id.*

¹³⁹ *Id.*

teen HBCUs from Louisiana received public warnings this past academic year.¹⁴⁰ Unfortunately, there is no accurate measure available to gauge how many student-athletes may have left school in response to Hurricane Katrina.¹⁴¹ HBCUs did receive over 50 waivers in the '06-'07 academic year but the NCAA did not reveal how many schools received waivers because of Katrina.¹⁴²

All of these factors appear to have played a role. Nonetheless, the HBCUs' relative lack of resources and limited ability to provide adequate academic support appears to be the major problem. The NCAA has acted to provide funding on behalf of HBCUs but merely on a cursory level.¹⁴³ Only time will reveal if these measures solve the problem. However, the NCAA could be subject to multiple legal challenges if the APP continues to assess a disproportionately number of penalties against HBCUs.

V. POTENTIAL LEGAL CHALLENGES AND ENJOINING THE NCAA'S USE OF THE APP & APR

There are two main claims¹⁴⁴ a student-athlete could bring against the NCAA to challenge its use of the APP and APR. A student-athlete could bring claims under Title VI of the Civil Rights Act of 1964 and U.S. Code Section 1981. Both are plausible claims that could be and have been brought against the NCAA. However, a plaintiff would have a difficult time winning either of these claims because each requires proof of intentional racial discrimination.¹⁴⁵ Therefore, for either claim to succeed,¹⁴⁶ a student-athlete must prove the NCAA intentionally

¹⁴⁰ *HBCUs, Katrina Area Schools Struggle in APR Report*, *supra* note 127.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.* The NCAA would likely contend that the 1.6 million dollars it has pledged to support HBCUs is not a cursory attempt at solving the problem. However, when one considers that many of the wealthiest Division I institutions will spend that on academic support facilities and administration of its own academic support program, spreading that amount over every HBCU is inadequate.

¹⁴⁴ Other claims could be brought to challenge the APP in addition to the two profiled in this article. One example would be a Section 1985 claim. However, the two types of claims analyzed subsequently in this article, Title VI and Section 1981, have successfully challenged NCAA academic regulations in the past. Therefore, they are the most logical options for a student-athlete challenging the APP.

¹⁴⁵ *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002). Both Title VI and Section 1981 require the plaintiff to be a racial minority as well. This element is self-evident and will not be discussed in this article.

¹⁴⁶ Success here means that a judge or jury would uphold the claim and find for the plaintiff. However, the NCAA has been pressured to change its policies and programs in the past after a plaintiff has withstood a FRCP 12(b)(6) motion. Therefore, the term "success" has a broad meaning when one considers the scope and overall purpose of a claim brought against the NCAA. If a suit withstands pre-trial motions and forces the NCAA to settle and amend

discriminated based on race when it 1) created the APP or 2) through its use of the APR.

In addition to the discriminatory intent element, other unique elements must also be met for both claims to be upheld. Title VI prohibits intentional racial discrimination by federally funded programs or organizations.¹⁴⁷ Section 1981 provides all persons an equal right to make, enforce, and enjoy contractual relationships.¹⁴⁸ Section 1981 requires the plaintiff to prove that the defendant impaired the plaintiff's ability to make or enjoy the benefits of a contract.¹⁴⁹ Section 1981 does not require that the plaintiff receive federal funding, like Title VI, but it does prohibit intentional racial discrimination by private parties. This is different from Title VI, which only applies to federally funded programs or organizations and not private parties.¹⁵⁰

This article first examines a student-athlete's potential Title VI claim, then analyzes a potential Section 1981 claim. Both claims require that the student-athlete meet a difficult burden to gain relief against the NCAA. Therefore, this article also outlines two ways the Federal Rules of Civil Procedure (FRCP) could be used to provide a student-athlete with a means to challenge the NCAA's use of the APP. Both of these procedural methods require the student-athlete to bring his or her initial suit¹⁵¹ against the member institution and not the NCAA.¹⁵² This legal posture may provide the student-athlete a better opportunity to enjoin the use of the APP. These procedural methods include FRCP Rule 14(a) – “Third Party Practice” and FRCP 65(d) – “Injunction Upon Those In Active Concert or Participation”. These procedural methods have difficulties of their own and may not succeed to enjoin the use of the APP. Consequently, a student-athlete may have to rely on public policy grounds and not a direct cause of action to question the NCAA's use of the APP and its discriminatory impact. This public policy rationale will be profiled at the end of this section.

the APP, this would be considered a success even if the claim would ultimately fail before a judge or jury.

¹⁴⁷ Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d – 2000d-7 (1964).

¹⁴⁸ 42 U.S.C. Section 1981 (2004).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; Title VI *supra* note 147.

¹⁵¹ The claim would likely be either a Title VI or Section 1981 claim.

¹⁵² The details of how these procedural claims will work will be covered subsequently in the text of this article.

A. *Protection for Student-Athletes Under Title VI of the Civil Rights Act of 1964*

Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (FFA).”¹⁵³ Title VI ensures student-athletes protection from racially discriminatory actions and policies by member institutions and possibly the NCAA.¹⁵⁴ If a student-athlete challenges the NCAA for its use of the APP, he or she must prove (1) the NCAA receives FFA and (2) the NCAA intentionally discriminates against minority athletes.

1. Receipt of Federal Financial Assistance

The Supreme Court defined the scope of FFA in the Title IX case of *NCAA v. Smith*.¹⁵⁵ Title IX cases are instructive for Title VI actions because the statutes use identical language with the lone exception being that the word “sex” is substituted for “race” in Title IX.¹⁵⁶ In *Smith*, the student-athlete argued that because the NCAA governed federally funded member institutions’ athletic programs, the NCAA benefited economically from its members’ FFA. The Third Circuit agreed and interpreted “recipient” to mean any educational organization or program that receives or benefits from federal funds.¹⁵⁷ The Supreme Court overturned the Third Circuit and held that only entities that receive FFA, whether directly or through an intermediary, are recipients.¹⁵⁸ Programs or organizations that merely “benefit” economically from FFA were not considered recipients.¹⁵⁹

Although member institutions clearly receive FFA,¹⁶⁰ the NCAA appears to be sheltered from this Title VI element. Most likely, the NCAA does not currently receive FFA directly or through an interme-

¹⁵³ Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d – 2000d-7 (1964).

¹⁵⁴ *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002).

¹⁵⁵ *See NCAA v. Smith*, 525 U.S. 459, 467 (1999).

¹⁵⁶ *Id.* at 466 n.3.

¹⁵⁷ *Id.* at 468.

¹⁵⁸ *Id.* at 468.

¹⁵⁹ *Id.*

¹⁶⁰ *See Grove City College v. Bell*, 465 U.S. 555, 563-570 (1984); Civil Rights Restoration Act of 1987, 102 Stat. 28, 20 U.S.C. §1687(2)(A). (Any educational institution that directly or indirectly receives any form of FFA is subject to Title VI). Virtually all NCAA member institutions receive FFA because they accept federal grants directly or through the use of federal student loan programs.

diary.¹⁶¹ Whether the NCAA receives FFA has been an issue for many years. The Third Circuit reached opposite conclusions regarding this matter in *Cureton II* and *Pryor II*.¹⁶² The more recent case of *Pryor II* found that the NCAA does receive FFA.¹⁶³ However, the hook that the *Pryor II* court used to make this conclusion, may no longer exist.¹⁶⁴ Given this, the likelihood that a court would find that the NCAA receives FFA is slim. Even so, a potential plaintiff could succeed by showing the NCAA receives FFA through one viable manner.¹⁶⁵ These potential options include 1) the NCAA is an indirect recipient of FFA, 2) the NCAA has controlling authority over programs that receive FFA, 3) the financial benefit of the NCAA's tax-exempt status equates to FFA, and 4) the NCAA meets one definition of what the Department of Education (DOE) considers FFA.

i. The NCAA is an Indirect Recipient of Federal Financial Assistance

In *Pryor I*, *II*, and *Cureton I*, the NCAA was found to have been an indirect recipient of FFA.¹⁶⁶ The Third Circuit in *Cureton II* overturned the district court's holding but has since been shown to have erred in its decision.¹⁶⁷ The courts in *Pryor I* and *Cureton I* decided that

¹⁶¹ See NCAA 2006–07 OPERATING BUDGET (2006), http://www1.ncaa.org/finance/2006-07_budget.pdf. There is no indication in the NCAA's budget that it receives any federal grants.

¹⁶² *Cureton v. NCAA*, 198 F. 3d 107 (3d Cir. 1999); *Pryor v. NCAA*, 288 F.3d 548 (3d Cir. 2002).

¹⁶³ *Pryor v. NCAA*, 288 F.3d 548 (3d Cir. 2002).

¹⁶⁴ See *Pryor v. NCAA*, 153 F. Supp. 2d. 710, 715 (E.D. Pa. 2001). The details of this change will be profiled subsequently in the text of this article.

¹⁶⁵ *Id.*

¹⁶⁶ *Cureton v. NCAA*, 37 F. Supp. 2d 687, 696 (E.D. Pa. 2001); *Pryor v. NCAA*, 153 F. Supp. 2d. 710, 716 (E.D. Pa. 2001).

¹⁶⁷ In *Cureton II*, the Third Circuit overturned the holding that the NCAA received FFA. However, subsequent events demonstrate that the Third Circuit's holding was erroneous and does not reflect current law. The holding was based on a technicality related to the plaintiff's implied cause of action for disparate impact under Title VI. Not only does this implied cause of action no longer exist, the court found that Title VI regulations for disparate impact were "program-specific" and not "institution-wide." As a result, the court reasoned Title VI would only apply to the activities of the NYSP and not to the NCAA. The court noted, however, that Congress passed the Civil Rights Restoration Act of 1987 to eliminate "program-specific" protection in favor of an "institution-wide" approach to enforcing Title IX and VI. The court ignored Congress's clear directive and held that because the Title VI regulations had not been amended to effectuate the "institution-wide" approach, the court must apply the "program-specific" language. In 2003, the Title VI regulations were amended in direct response to the Third Circuit's holding in *Cureton II*. The Office of Civil Rights' ("OCR") reaffirmed the "institution-wide" approach to FFA determinations and asserted the Third Circuit's opinion in *Cureton* thwarted expressed congressional intent. The OCR, Congress, *Pryor I*, and *Pryor II* have shown that the Third Circuit made an error in *Cureton*

because the NCAA exercised “effective control” over federal grants the National Youth Sports Program (NYSP) received, it was an “indirect recipient” of FFA.¹⁶⁸ The NYSP provides economically disadvantaged youth with sports instruction. The NCAA created the program with a grant from the federal government in 1968.¹⁶⁹ Until 2006, when Congress made no fiscal allocation for the NYSP, the NYSP received both Department of Health and Human Services (DHHS) community service grants and Department of Agriculture (DOA) summer food service grants.¹⁷⁰ Congress has not funded the NYSP since 2005. As a result, the NYSP will cease operations at the end of 2008.¹⁷¹ However, during the time of the *Cureton* and *Pryor* cases the NYSP was still receiving FFA. The courts found the NYSP was “merely a conduit” through which the NCAA decided how the federal grants were to be used.¹⁷² Substantial amounts of evidence supported this conclusion.¹⁷³ For example, the NCAA performed the NYSP’s administrative duties for one dollar annually and the two organizations shared a bank account.¹⁷⁴

Although the indirect recipient approach worked previously, the likelihood of success is now in question. The NCAA has distanced itself from the NYSP since 2006¹⁷⁵ and the NYSP is ceasing operations at the

II. Even though the “program-specific” technicality has been eliminated from Title VI enforcement regulations, the point is now moot because the “institution-wide” approach has always been applicable for intentional discrimination and disparate discriminatory impact is no longer a private cause of action.

¹⁶⁸ *Cureton*, 37 F. Supp. 2d at 694; *Pryor*, 153 F. Supp. 2d at 715.

¹⁶⁹ National Youth Sports Program, <http://www.nyscorp.org/nysp/home.html> (last visited Apr. 6, 2008).

¹⁷⁰ *Id.*

¹⁷¹ Telephone interview with Rochelle Taylor, Director, National Youth Sports Corporation (NYSC), in Indianapolis, Ind. (Jan. 22, 2008). The NYSC is the nonprofit organization that runs the NYSP. Ms. Taylor indicated that the NCAA and federal support ended completely in 2006. The organization has operated on private donations since that time. After failing to obtain federal funding in 2007, the organization decided to cease operations at the end of 2008.

¹⁷² *Cureton v. NCAA*, 37 F. Supp. 2d 687, 694 (E.D. Pa. 2001).

¹⁷³ See *Cureton v. NCAA*, 198 F. 3d 107, 125-26. The NYSP was run by former NCAA officials. Furthermore, all decisions about how the NYSP’s grants are used are determined by the NCAA’s NYSP committee; the NCAA’s NYSP committee had final approval over which colleges and universities may participate in the NYSP as sub-grantees; the administrative services include distribution of NYSP grants. Upon dissolution the NYSP’s assets are to be transferred to the NCAA; the NYSP does not observe standard corporate formalities. Even the Supreme Court noted in *NCAA v. Smith* that the DHHS issued two letter determinations that the NCAA was a recipient of FFA by virtue of the its grant to the NYSP. See *NCAA v. Smith*, 525 U.S. 459, 470 n.7.

¹⁷⁴ *Id.*

¹⁷⁵ The NCAA stopped providing funding and services to the NYSP in 2006. See Telephone Interview with Rochelle, *supra* note 176.

end of 2008.¹⁷⁶ However, if the NYSP transfers its assets to the NCAA upon dissolution, the NCAA may be considered a recipient of FFA for that year.¹⁷⁷ Additionally, if the NCAA exercises the same control over other programs that receive FFA, it may be subject to a similar FFA attack. However, the NCAA appears to be cognizant of this possibility and has isolated itself specifically to protect against a Title VI or Title IX suit.¹⁷⁸ Therefore, a potential plaintiff would likely have to find another way to prove the NCAA receives FFA.

ii. The NCAA as a Controlling Authority

The “controlling authority” argument contends that the NCAA exercises effective control over its member institutions and their use of FFA.¹⁷⁹ In *Cureton I*, the district court stated that the NCAA’s creation was necessary to promote intercollegiate athletics and supervise member institution’s athletics programs.¹⁸⁰ The court also held that the NCAA’s constitution and bylaws limit its member institutions’ control of their own athletic programs.¹⁸¹ Additionally, the court highlighted that member institutions grant authority to the NCAA to promulgate rules that the member institutions must follow.¹⁸² The court found that the juxtaposition of these facts creates “controlling authority” by the NCAA over its member institutions.¹⁸³ Accordingly, the district court held that the NCAA fell within the scope of Title VI because it acts as the enforcement entity for the legislation adopted by its member institutions.¹⁸⁴

On appeal, the Third Circuit reversed the district court’s holding.¹⁸⁵ The court held that the member institutions are free to follow NCAA rules or not.¹⁸⁶ However, the court recognized that failing to follow NCAA rules jeopardizes a school’s membership status.¹⁸⁷ Nevertheless, the Third Circuit concluded that this only meant that member institution were “cognizant” of the NCAA rules and not that the

¹⁷⁶ *Id.*

¹⁷⁷ This assumes that the NYSP has assets remaining from DHHS and DOA grants prior to 2006.

¹⁷⁸ I realize this is a cynical assessment but it is not an unreasonable conclusion to make.

¹⁷⁹ See *Cureton v. NCAA*, 37 F. Supp. 2d 687 (Mar. 8, 1999) 689, at 694-696.

¹⁸⁰ *Id.* at 695.

¹⁸¹ *Id.*

¹⁸² *Id.* at 696.

¹⁸³ *Id.* at 695-96.

¹⁸⁴ *Id.* at 696.

¹⁸⁵ *Cureton v. NCAA*, 198 F. 3d 107, 118 (3rd Cir. 1999).

¹⁸⁶ *Id.* at 117.

¹⁸⁷ *Id.*

NCAA controls them.¹⁸⁸ The court held that the ultimate decision to follow NCAA rules rests squarely in the hands of the member institution.¹⁸⁹ The court concluded that the decision of how to use federal funds is solely at the discretion of the member institution and not the NCAA.¹⁹⁰ This reversal by the Third Circuit prevented the plaintiffs in *Pryor* from asserting a “controlling authority” argument.

Currently, the likelihood of success for the “controlling authority” argument appears slim.¹⁹¹ The NCAA would likely rely on the Third Circuit’s opinion in *Cureton II*. The NCAA would claim its members’ compliance with the association rules are not enough to establish that the NCAA controls its members or receives FFA. A plaintiff could respond by highlighting the APP’s most severe penalty is the loss of NCAA membership status. The plaintiff would argue that by having this as the harshest penalty under the APP, the NCAA recognizes that ignoring the association rules is an unfeasible option for any member.¹⁹² This in turn may establish that the NCAA is attempting to exercise control of its member institutions. This attempted control in conjunction with the financial expenditures that a member institution must make to meet APP rules may be enough to find the NCAA does effectively control its members’ FFA.

The plaintiff would argue that the NCAA forces member schools to allocate their federal funds in a manner that ensures they implement and monitor the rules set forth by the APP. A plaintiff would claim the “institution-wide”¹⁹³ perspective of FFA is well-established.¹⁹⁴ The plaintiff would argue that part of the member institution’s FFA must be used to execute and follow APP regulations based on this “institution-wide” view of FFA. The plaintiff’s conclusion would be that the NCAA

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 118

¹⁹⁰ *Id.*

¹⁹¹ See e.g. *Johnny’s Icehouse v. Amateur Hockey Association of Illinois*, 134 F. Supp. 2d 965, 968-969 (N.D. Ill. E. Div. 2001). (rejecting the “controlling authority” line of cases. Defendants were not recipients of federal funds, although high schools had ceded controlling authority over their hockey programs to defendants.)

¹⁹² The Supreme Court in *Tarkanian v. NCAA* held that compliance with NCAA rules is voluntary and although the option of losing NCAA membership is unpalatable, it is still an option. However, in *NCAA v. Board of Regents of the Univ. of Oklahoma & Univ. of Georgia Athletic Ass’n* the Supreme Court held that member schools had no real choice but to comply with NCAA rules. These seemingly contradictory holdings by the Supreme Court occurred just four years apart. The *Tarkanian* case was the most recent and may well be the current view of the court. However, given the ever increasing commercial value of NCAA college athletics, an argument could be made that supports the Court’s view in *Board of Regents*.

¹⁹³ See *supra* note 167

¹⁹⁴ See Civil Rights Restoration Act of 1987, 102 Stat. 28, 20 U.S.C. §1687(2)(A).

is controlling the use of its member institutions' FFA by forcing them to allocate funds specifically to meet APP rules. Therefore, the NCAA should be considered a recipient of the FFA. However, given the uncertainty of the controlling authority argument, a potential plaintiff challenging the APP would likely look to other alternatives to prove the NCAA receives FFA.

iii. Tax Exempt Status as a Form of Federal Financial Assistance

A plaintiff could argue the NCAA's tax-exempt status equates to a receipt of FFA.¹⁹⁵ Title VI regulations define FFA as direct grants or loans of federal funds, donated federal property, use of federal personnel, use of federal Property,¹⁹⁶ and any agreement which is purported to provide assistance.¹⁹⁷ Title VI regulations fail to provide guidance as to whether federal tax benefits equate to FFA.¹⁹⁸ Without clear guidance, one must turn to case law to help define the parameters of FFA as it relates to tax-exempt status.

The Supreme Court stated in *Regan v. Taxation with Representation*, "Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as cash grants to the organization of the amount of tax it would have to pay on its income."¹⁹⁹ The court also stated that cash grants and tax subsidies are not equivalent in all respects, implying that they are equivalent in others.²⁰⁰ Two relevant non-sports cases have analyzed whether tax-exempt status would qualify as FFA in the context of civil rights statutes.²⁰¹ In *McGlotten v. Connally*, the court found that tax exempt status can equate to FFA; whereas in *Bachman v. American Society of Clinical Pathologists*, the court found that tax benefits are never FFA.²⁰²

¹⁹⁵ Clearly, if the tax-exempt status equates to FFA, there would be significant ramifications for many tax-exempt organizations, not the least of which are entanglement issues related to religious organizations. The scope of these concerns is beyond this article and will not be discussed.

¹⁹⁶ Without consideration or for nominal consideration.

¹⁹⁷ *Johnny's Ice House*, 134 F. Supp. 2d at 971 citing 34 C.F.R. 106.2.

¹⁹⁸ David Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope Civil Rights Laws to Apply to Tax-Exempt Charities*, B.Y.U. L. Rev 167, 173 (2001).

¹⁹⁹ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1997).

²⁰⁰ *Id.*

²⁰¹ Brennen, *supra* note 198 at 200; *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972); *Bachman v. American Society of Clinical Pathologists*, 577 F. Supp. 1257 (D.N.J. 1983).

²⁰² *Id.* at 201-205; *see id.*; *see id.*

The *McGlotten* court created a two-tiered analysis to determine whether a particular tax benefit should be considered FFA.²⁰³ If the benefit excludes an amount that would be taxable income and serves a government-specified purposes, then the court should treat the benefit as FFA.²⁰⁴ The plaintiff would argue that the second factor is met by granting tax-exempt status because Congress implicitly sanctions that particular organization's purpose simply by granting it tax-exempt status. Therefore, under the *McGlotten* test, Congress provides implied consent to an organization's use of FFA by providing tax-exempt status.

If a court accepts and applies this "implied consent" theory to a Title VI challenge to the NCAA, the plaintiff may have a valid claim. The NCAA's tax-exempt status does exempt income that would otherwise be considered taxable.²⁰⁵ Congress, by definition, sanctioned the NCAA's purpose by granting it tax-exempt status. Therefore, a court applying the *McGlotten* test would likely equate the NCAA's tax-exempt status to FFA. However, most other courts have determined tax-exempt status is not FFA.

In *Bachman*, the court found that congressional intent established that tax benefits should never be considered FFA.²⁰⁶ The court stated that "assistance" of FFA meant direct grants by subsidy, not subsidy by exemption.²⁰⁷ The court also found that tax-exemption is excluded from the definition of what can be considered FFA.²⁰⁸ Finally, the court held that FFA must not include tax exemption because Title IX cases rely on a school's receipt of federal grants as the hook to satisfy the FFA element.²⁰⁹ Therefore, only direct grants qualify as FFA.

One recent sports related case has considered whether tax-exempt status should be considered FFA. In *Johnny's Ice House, Inc. v. Amateur Hockey Association of Illinois* ("AHAI"), female plaintiffs brought a Title IX suit alleging sex discrimination by the AHAI.²¹⁰ The plaintiffs claimed that the AHAI's tax-exempt status constituted FFA for Title IX purposes.²¹¹ The court rejected this argument, relying mainly on the DOE definition of FFA.²¹² The court found that tax-exempt sta-

²⁰³ *McGlotten*, 338 F. Supp 448 at 462; See Brennen, *supra* note 198 at 203-204.

²⁰⁴ *Id.*

²⁰⁵ See NCAA Operating Budget, *supra* note 161. The NCAA sells broadcast rights for its championship events, like the NCAA Men's Basketball tournament.

²⁰⁶ *Bachman*, 577 F. Supp, 1257 at 1264.

²⁰⁷ *Id.* at 1264-65.

²⁰⁸ *Id.* at 1264.

²⁰⁹ *Id.*

²¹⁰ *Johnny's Ice House, Inc. v. Amateur Hockey Ass'n*, 134 F. Supp. 2d 965, 966 (*N.D. Ill. E. Div. 2001*).

²¹¹ *Id.* at 971.

²¹² *Id.* at 972

tus only provides the possessor of such status receipt of a higher net income, not federal grants.²¹³ Therefore, the court concluded tax exemption is an indirect subsidy and not a direct federal grant of money or services.²¹⁴ Although equating tax-exempt status to FFA appears to be a losing argument, both the *Bachman* and *Johnny's Ice House* courts reveal an important consideration. The court's give significant consideration to the definition of what constitutes FFA to make a determination of whether a program is subject to Title VI or IX.

iv. Meeting the Department of Education's Definition of FFA

Both the *Bachman* and *Johnny's Ice House* courts relied heavily on the definition of FFA to find that tax-exempt status was not FFA.²¹⁵ If falling within the DOE definition of FFA is definitive grounds for determining who is a recipient, the NCAA may be one after all. The NCAA would fall under the DOE definition of FFA recipient²¹⁶ by accepting the services of federal personnel. If the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, and Firearms (ATF), the Department of Homeland Security (DHS), or any other federal agency provides security or services for NCAA events, such as the Final Four in men's basketball, the NCAA may be considered a recipient of FFA. However, the NCAA appears to put the burden of providing security for such events upon the member schools and the

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *See id.* at 971; Brennen, *supra* note 198 at 206.

²¹⁶ 34 C.F.R. § 106.2(g). Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:

- (1) A grant or loan of Federal financial assistance, including funds made available for:
 - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility of any portion thereof; and
 - (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
- (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
- (3) Provision of the services of Federal personnel.
- (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
- (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

host venues.²¹⁷ The organization that receives these federal services is important to determine which organization benefits from the federal services. If the NCAA is the beneficiary of these federal services, the NCAA would likely meet the DOE definition of FFA.

If the NCAA receives these types of federal provisions, it may be enough to conclude the NCAA accepts FFA for Title VI and Title IX purposes. Discovery tools would reveal if federal agencies provide such services to the NCAA and whether the NCAA pays for such services. Nevertheless, even if a court finds that the NCAA is subject to FFA, another key element is required before a plaintiff can gain relief under Title VI. A plaintiff must prove the NCAA intentionally discriminated based on race when it 1) created the APP or 2) through its use of the APR.

2. Proving Intentional Discrimination

A plaintiff must prove intentional racial discrimination by the defendant to recover under Title VI or Section 1981.²¹⁸ Therefore, the discriminatory intent analysis here is applicable to both claims and will only be profiled here. A plaintiff can show intentional racial discrimination by proving the NCAA adopted the APP “because of” and not “in spite of” the adverse effect it would have on African-American student-athletes.²¹⁹ The NCAA’s awareness that negative consequences may occur from the facially neutral policy, e.g., the APP, will not suffice to subject the NCAA to a claim.²²⁰ The plaintiff must prove that a racially based discriminatory purpose motivated the NCAA’s establishment or use of the APP. If a plaintiff can prove this, the NCAA may still justify its use of the APP under a strict scrutiny analysis.²²¹

²¹⁷ See http://www1.ncaa.org/membership/emergency_planning/security_options (This is a memorandum from the NCAA to member institutions about how best to obtain and provide security for its events. One can only assume the NCAA follows its own suggestions when it stages its own championships, like the Final Four.)

²¹⁸ *Pryor v. NCAA*, 288 F. 3d 548, 562 (3rd Cir. 2002).

²¹⁹ *Pryor*, 288 F. 3d at 562. (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

²²⁰ *Adm’r of Mass. v. Feeney*, 442 U.S. at 277-78.

²²¹ *Pryor*, 288 F. 3d at 562 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). (According to these cases, it appears that strict scrutiny principles apply to “racially neutral” statutes if racial justifications were made to implement the policy.) This analysis is beyond the scope of this article because it is unlikely that any challenge to a NCAA academic reform package will ever reach this stage. The NCAA has either won its case or settled the case if the plaintiff’s challenge shows promise of success. If a court did consider this question, it would likely find that raising graduation rates is a compelling government interest, but the APP may not be the least restrictive means of achieving this goal.

A plaintiff would show discriminatory intent through a “sensitive inquiry” into whether a discriminatory purpose motivated the NCAA’s adoption of the APP.²²² A program’s discriminatory impact is relevant to this inquiry. More than once, the Supreme Court has held that finding discriminatory purpose starts with an assessment of the action’s impact.²²³ The key factor in this analysis is the extent of the adverse effects on one race more than any other.²²⁴ The Court has concluded that often a policy’s purpose could be ascertained or explained by the resulting impact.²²⁵ Other factors considered in determining discriminatory intent include 1) historical background, 2) specific events leading up to the formation of the challenged policy, 3) departures from normal procedures in adopting the policy, 4) administrative history, and 5) contemporary statements or internal memorandum by the decision making body.²²⁶

i. Proving Intentional Discrimination in the Context of the APP

A plaintiff hoping to challenge the APP must prove the NCAA intentionally discriminated based on race when it 1) created the APP or 2) through its use of the APR. To accomplish this, a student-athlete’s strategy would likely mimic that of the plaintiff in *Pryor I* and *II*.²²⁷ As the plaintiffs in *Pryor* did, a plaintiff challenging the APP must show that *race was a consideration* for the NCAA when it implemented the APP.²²⁸ In *Pryor I* and *II*, the NCAA stated it believed the adoption of Proposition 16 would increase graduation rates among African-American student-athletes.²²⁹ The NCAA knew Prop. 16 would reduce the number of African-American student-athletes eligible for participation

²²² *Arlington Heights v. Metro. Housing Dev. Corp.* 429 U.S. 252, 266 (1977).

²²³ *Id.*; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997).

²²⁴ *Id.* at 487.

²²⁵ *Arlington Heights*, 429 U.S. at 266; *Bossier Parish Sch. Bd.*, 520 U.S. at 489. (The Supreme Court in *Bossier Parish School Bd.* stated that “people usually intend the natural consequences of their actions”).

²²⁶ *Arlington Heights*, 429 U.S. at 267-68.

²²⁷ *Pryor v. NCAA*, 288 F.3d 548 (3rd Cir. 2002). An important consideration is that the court in *Pryor II* found that the plaintiffs survived a FRCP 12(b)(6) motion by the NCAA by showing enough dispute regarding the issue of purposeful discrimination. Even though a much higher evidentiary showing of discriminatory intent would have been required to withstand a summary judgment motion, the NCAA took action to amend its use of Prop. 16 after the Third Circuit’s holding. It seems reasonable to assume that the NCAA would also amend the APP to lessen the discriminatory impact if a claim of discriminatory intent survives a 12(b)(6) motion.

²²⁸ *Pryor*, 288 F.3d at 564.

²²⁹ *See id.*

and athletic scholarships.²³⁰ The court found that the NCAA was not only aware of Prop. 16's consequences but also used it to limit the number of African-American athletes that would be eligible for NCAA competition.²³¹ The court concluded that the NCAA's used Prop. 16 as a pretext to screen out the least academically prepared African-American student-athletes.²³² The court, however, did express doubt about insidious motives by the NCAA.²³³ Regardless of this acknowledgement, the court denied the NCAA's motion to dismiss because a fact finder could ultimately determine that Prop. 16 was used *because of its* adverse affect on African-Americans.²³⁴

The court established that a jury must determine if racial discrimination motivated the NCAA's passage of Prop. 16.²³⁵ Therefore, a plaintiff's using *Pryor II* as precedent needs to show the NCAA considered race when it developed and implemented the APP and APR. In *Pryor II*, much of the evidence indicating the NCAA considered race was revealed during discovery.²³⁶ It is difficult to assess what similar requests regarding the APP would expose. Regardless of what may be revealed in discovery, a plaintiff would rely on the factors described by the Supreme Court in *Arlington Heights* as cited in *Pryor II*²³⁷ to show discriminatory racial intent. These factors applied to the APP would require a review of previous NCAA academic reforms, an understanding of how Prop. 16 led to the APP, and an analysis of NCAA committee reports, among other considerations.

Interestingly, the NCAA website reveals some evidence that the NCAA may have considered race when it designed the APP. The NCAA directly references its concern with low graduation rates for African-American male basketball players on its web page titled, "History of Academic Reform."²³⁸ The statements on this web page are analogous to similar statements made by NCAA personnel when Prop. 16 was passed. The NCAA also created the Men's Basketball Academic Enhancement Group to help raise male basketball players' graduation

²³⁰ *Pryor*, 288 F.3d at 566. (stating that Prop. 16 would "effectively screen-out" African-American student-athletes).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 566.

²³⁵ *Id.*

²³⁶ E.g., depositions, interrogatories, and document requests.

²³⁷ *Arlington Heights v. Metro. Housing Dev. Corp.* 429 U.S. 252, 267-68 (1977). 1) Historical background, 2) specific events leading up to the formation of the challenged policy, 3) departures from normal procedures in adopting the policy, 4) administrative history, and 5) contemporary statements or internal memorandum by the decision making body.

²³⁸ *History of Academic Reform*, *supra* note 17.

rates.²³⁹ This group is charged with the duty to help identify academic problems in the sport and how best to raise graduation rates among men's basketball players.²⁴⁰ NCAA President Brand stated during a teleconference announcing the creation of the APP that the APP responds to the concerns raised in *Pryor*.²⁴¹ This is a direct statement by the NCAA's president admitting the ramifications of academic reform on racial minorities were considered when the NCAA implemented the APP. All of this evidence in conjunction with further evidence that discovery tools might produce, could indicate that the NCAA considered race when it created the APP. A plaintiff could almost certainly show the NCAA considered the APP's negative ramifications on African-American when it was created.

Proving the NCAA uses the APP and APR as a pretext to screen out African-American student-athletes would be a much more difficult case to make. The NCAA asserts that the APP's goal is to ensure student-athletes receive every opportunity to gain a college education.²⁴² However, eliminating scholarships through APR penalties may indicate the NCAA's genuine concern is not to ensure academic opportunities. The NCAA cannot ensure a student-athlete's educational opportunity if it eliminates the only practical means many student-athletes have to attend college.²⁴³ The athletic scholarship has been and should continue to be an avenue for many at-risk student-athletes to attend college.

When asked how member institutions could change their behavior to ensure compliance with the APP, President Brand stated that schools should look at recruiting more academically qualified student-athletes.²⁴⁴ Thus, Brand is suggesting that member institutions forego opportunities to recruit and educate the most academically at-risk students. Brand knows, but chooses to ignore, that many of the students that would be passed up by his reasoning are economically disadvantaged urban student-athletes of color.

Brand's response would be that member institutions need to recruit better academically prepared student-athletes in every sport.²⁴⁵

²³⁹ *NCAA News Release* Aug. 20, 1999, REPORT OF THE NCAA DIVISION I WORKING GROUP TO STUDY BASKETBALL ISSUES, <http://www.ncaa.org/releases/basketballissues/1999082001bi.htm>.

²⁴⁰ *Id.*

²⁴¹ Audio Recording: Teleconference Announcing APP, *supra* note 3.

²⁴² Audio Recording: Mondays with Myles, http://doubleazone.com/audio/20060306_Myles_Brand_apr22m16.mp3.

²⁴³ See *Phillip v. NCAA*, 960 F. Supp. 552, 558 (D. Conn. 1996). (stating that it would be financially impossible for the plaintiff to attend his university without an athletic scholarship.)

²⁴⁴ Audio Recording: Mondays with Myles *supra* note 242.

²⁴⁵ *Id.*

This defense, however, does not resonate given that most student-athletes do fine academically.²⁴⁶ Brand's suggestion that coaches should sacrifice the recruitment of academically challenged student-athletes, coupled with the NCAAs concern over raising African-American graduation rates could lead to a cynical but plausible conclusion. The conclusion being that, the NCAA may be using the APP to prevent the least academically qualified African-American student-athletes from enrolling at member institutions in an effort to bolster overall student-athlete graduation rates.

The NCAA would likely claim, as it did in *Pryor*, that it is trying to help African-American student-athletes with the APP and APR. The NCAA would cite the Knight Foundation Report and its own statistics as justification for its attempt to bolster the academic performance of its student-athletes. However, the NCAA's laudable goals would not provide it protection²⁴⁷ if two facts can be shown. First, a plaintiff must prove the NCAA openly considered race when it created the APP.²⁴⁸ Second, a plaintiff must show the NCAA implemented the APP because it would have a disproportionately harmful effect on African-American student-athletes.²⁴⁹ If a plaintiff establishes these two factual propositions, a court would have to conclude that the NCAA intentionally discriminated and that it uses the APP and APR to screen-out African-American student-athletes.

ii. Other Methods of Proving Intentional Discrimination

A plaintiff can prove discriminatory intent in other ways besides showing the NCAA considered race when it created the APP. Two recent Title IX cases provide these other means. These methods may be difficult to prove in the case of the APP, but are worth noting. Paternalistic and stereotypical notions of ability, failing to fix potential violations after notice that the violation exists, and retaliation against claims of discrimination have all been found to equate to intentional discrimination.

²⁴⁶ See NCAA, Trend Data Show Graduation Success Rate Improvement, http://www2.ncaa.org/portal/media_and_events/press_room/2007/october/20071003_grad_rate_1_rls.html (The GSR statistics show that 77 percent of student-athletes graduate within six years and graduation rates for student-athletes are increasing among all sports.)

²⁴⁷ See *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002).

A benevolent purpose does not protect the NCAA. The Supreme Court held that a claim for purposeful discrimination may still be present even if the decision maker (NCAA) adopted the allegedly discriminatory policy at issue for a "beneficial" or "laudable" purpose.

²⁴⁸ See *id.*

²⁴⁹ See *id.*

In *Pederson v. Louisiana State Univ.*, a number of female student-athletes alleged that LSU intentionally discriminated against them in the provision of facilities, opportunities, and lack of effective accommodations.²⁵⁰ The Fifth Circuit found that a decision by the university to deny equal opportunities for its female student-athletes based on paternalistic and stereotypical assumptions about their abilities was intentional discrimination.²⁵¹ It would not be that unreasonable to claim the NCAA is making paternalistic and stereotypical assumptions about African-American males' academic ability to compete in college. The assertion would be that the NCAA is using the APP and APR to exclude the most at-risk African-American males because paternalistic and stereotypical assumptions led it to conclude these students are ill-prepared for college. This would clearly have to be a factual determination and would be difficult to prove.

Also in *Pederson*, the court found that LSU was put on notice that Title IX violations were occurring and did nothing to fix them.²⁵² This failure to act can also be considered intentional discrimination, at least in the Fifth Circuit where many HBCUs are located.²⁵³ The NCAA is on clear notice that a potential Title VI violation is occurring because of the APP. Previous academic reform packages, like Prop. 16, were challenged under Title VI.²⁵⁴ Additionally, The NCAA's own data indicates that HBCU's and African-American males are suffering disproportionate harm because of the APP. The pertinent question for analysis then becomes, is the NCAA doing enough to fix the problem? It has granted waivers and money to help offset the effects of the APP.²⁵⁵ However, the NCAA has not changed the structure or function of APP or APR to yield a less discriminatory impact. Again, a fact-finder must determine if these actions are sufficient to prove the NCAA did or did not intentionally discriminate.

Finally, in *Jackson v. Birmingham Bd. of Educ.*, a high school girl's basketball coach brought a Title IX claim as a "whistle-blower" after

²⁵⁰ *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 864 (5th Cir. 2000).

²⁵¹ *Id.* at 881. E.g., A high-level LSU administrator referred to a female soccer player as cutie, sweetie, and honey. The same administrator said that soccer would be a good varsity sport for women because the players would look cute running around in soccer shorts. LSU also appointed a low-level administrator to the position of Senior Women's Athletic Administrator. The NCAA defines that position as one that would be occupied by the most senior woman in the athletic department. LSU also routinely approved larger budgets for men's teams compared to women's teams.

²⁵² *Id.* at 880.

²⁵³ *Id.*

²⁵⁴ *Cureton v. NCAA*, 37 F. Supp. 2d 687, 715 (E.D. Pa. 2001); *Pryor v. NCAA*, 288 F.3d 548, 570 (3rd Cir. 2002).

²⁵⁵ See *HBCUs, Katrina Area Schools Struggle in APR Report*, *supra* note 127.

the team he coached did not receive equal access to athletic equipment or facilities.²⁵⁶ The plaintiff complained about the discriminatory treatment that his team received and was soon fired from his position.²⁵⁷ The plaintiff alleged that the defendant retaliated against him because he voiced concern about the discrimination in the school's athletic program.²⁵⁸ The Supreme Court agreed with the plaintiff, finding that "retaliation is, by definition, an intentional act."²⁵⁹ The Court concluded that retaliation against a person who complains of discrimination constitutes intentional discrimination.²⁶⁰

A plaintiff hoping to use the *Jackson* holding to attack the APP would need to prove the NCAA retaliated against African-Americans because they complained about having to meet unfair academic standards as a pre-requisite to participation in college athletics. Student-athletes, educators, and coaches have made these very complaints about Prop. 48, Prop. 16, and the APP.²⁶¹ If the plaintiff can show that the NCAA retaliated in response to these complaints by passing the APP, it may be enough to find the NCAA intentionally discriminated. However, this is an unlikely conclusion because of the difficulty a plaintiff would have in supporting a retaliation argument. Whether the NCAA's passage of the APP constitutes retaliation is a question that must be determined by a fact-finder.

The likelihood of a court finding that the NCAA intentionally discriminated through any means is slim. The holding in *Pryor II* resulted in the NCAA settling the case and amending Prop. 16's initial eligibility standards. There was no direct finding by the Third Circuit that the NCAA intentionally discriminated based on race,²⁶² instead the court determined it was an issue appropriately determined by a fact finder.²⁶³ Because proving intentional discrimination is so difficult, the NCAA would likely be able to defeat a Title VI claim that challenged the structure and function of the APP. The NCAA's public image might suffer from an extended legal battle over the APP, particularly if its discriminatory impact becomes more prevalent in the coming years.²⁶⁴ However, the NCAA could likely protect the APP and its use of the APP.

²⁵⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

²⁵⁷ *Id.* at 172.

²⁵⁸ *Id.* at 171.

²⁵⁹ *Id.* at 173-74.

²⁶⁰ *Id.* at 174.

²⁶¹ See Mondello, *supra* note 42 at, 132-38.

²⁶² *Pryor*, 288 F.3d 548, 570 (3rd Cir. 2002).

²⁶³ *Id.*

²⁶⁴ The NCAA public image may be bolstered in some academic circles if it fights to protect the APP, even if the APP's impact is clearly discriminatory.

A plaintiff would then be forced to rely on another cause of action to challenge the NCAA.

B. § 1981 – *Equal Rights Under the Law and the APP*

U.S. Code Section 1981 asserts that all persons have the same right to make and enforce contracts as white citizens.²⁶⁵ Section 1981 requires three basic elements to sustain a cause of action. First, the plaintiff must be a racial minority.²⁶⁶ Second, the defendant must have intentionally discriminated against the plaintiff based on race.²⁶⁷ Third, the defendant's discrimination must have interfered with the plaintiff's ability to enjoy, enforce, or make a contract.²⁶⁸ These elements applied in the context of the APP would be relatively clear-cut. The student-athlete must be a member of a racial minority. The NCAA must have intended to discriminate against the plaintiff through its creation or subsequent use of the APP. Finally, the student-athlete must prove the APP interferes with his or her ability to enjoy, make, or enforce his or her contract with a NCAA member institution. The student-athlete's signed National Letter of Intent (NLI) and athletic scholarship with his or her member institution satisfy the contract element²⁶⁹ of Section 1981.²⁷⁰

²⁶⁵ 42 U.S.C. Section 1981 (2004). The statute is more extensive than this, but this is the relevant language for a student-athlete who wishes to challenge the NCAA's use of the APP. The text of Section 1981 is as follows:

(A) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(B) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(C) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Section 1981, in its truest sense, provides the plaintiff protection for any activity listed under Section 1981. In this case it is a student-athlete's existing contract with a member institution or his/her ability to make a contract with a member institution. This is why this article refers to it as the "contract" element.

²⁷⁰ NLI Overview, <http://www.national-letter.org/overview>. The National Letter of Intent is a program under which a high school student-athlete declares his/her intent to attend a particular college or university. Upon signing the NLI, recruitment of that athlete is prohibited by other member institutions. The member institution, to which the recruit is signed,

1. The NLI and Athletic Scholarship as a Contract

The student-athlete's contract with his or her university is well-established.²⁷¹ The student-athlete's signed NLI and athletic scholarship are considered contracts.²⁷² The plaintiffs in *Pryor* used a Section 1981 claim in addition to a Title VI claim to challenge Prop. 16.²⁷³ However, a plaintiff's Section 1981 challenge to the APP would require a different approach than the one taken in *Pryor*. In *Pryor*, the plaintiffs already had a contract with the member school, which was established by their signed NLI.²⁷⁴ In contrast, the APP is structured so that no penalties are levied against student-athletes with a signed NLI or athletic scholarship.²⁷⁵ Therefore, a student-athlete would have to argue that the APP penalties harm his or her ability to *make a contract* with the NCAA member institution. This alone distinguishes the plaintiffs in *Pryor*, who argued that Prop. 16 impaired their ability to *enjoy their existing contract*.²⁷⁶

also agrees to provide financial aid to the student-athlete as long as he or she is admitted to the school and is eligible under NCAA rules. The NLI is a binding agreement as long as these conditions are met. If the student-athlete "backs-out" of his/her NLI, and barring a release or waiver, he or she is banned from NCAA participation for a year and will lose a year of athletic eligibility.

²⁷¹ Taylor v. Wake Forest University, 16 N.C. App. 117, 121 (1972); Derek Quinn Johnson, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 Colum. L. Rev. 96, 114-119 (1985).

²⁷² *Id.*; *Pryor v. NCAA*, 288 F.3d, 548, 557 (3rd Cir., 2002); Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 Wayne L. Rev. 1275, 1290 (1989).

²⁷³ *Pryor*, F.3d at 552.

²⁷⁴ *Id.* at 557.

²⁷⁵ NCAA Report, http://www.ncaa.org/wps/wcm/connect/NCAA/Legislation+and+Governance/Committees/Division+I/Management+Council/2006/October/12C_REPORT_CAP.htm. The NCAA allows the penalized school to assess APR scholarship penalties at the member institutions "next available opportunity." If the penalized member institution has already admitted a student-athlete that has signed his/her NLI, the school can honor that contract. However, the member institution must take the APP scholarship penalty the following academic year. This ensures that the school will not take away a scholarship from a student-athlete that has already signed a NLI. This results because the APR penalties are assessed at the end of the academic year. Most student-athletes have already signed NLI's by that time and have been admitted to the member institution.

²⁷⁶ *Pryor*, 288 F. 3d. at 562. The plaintiffs in *Pryor* argued that Prop. 16 impaired their ability to enjoy the benefits of their contract with the member institutions. It seems reasonable to assume a plaintiff would make a similar argument to challenge the APP. The difference would be that the plaintiff is unable to make a contract with the member school. Because the member institutions are allowed to take APP penalties at their earliest convenience, the school will always be able to honor a student-athlete's NLI and athletic scholarship. If the school does not honor the contract, they subject themselves to a potential lawsuit. However, both *Pryor* and a potential APP challenge involve academic regulations promulgated by the NCAA that function to limit a student-athlete's ability to participate in college athletics. This analogy appears to be enough to allow a student-athlete challenging the APP

The APP penalizes member institutions and teams, whereas Prop. 16 penalized specific student-athletes.²⁷⁷ This difference is significant because under Prop. 16 it was clear which student-athlete's contract/scholarship was being impaired. The APP penalty structure makes it difficult to determine which, if any, particular student-athlete is suffering a scholarship impairment.

By penalizing the team and member institution, the NCAA limits the overall number of scholarships a team may award any given academic year. This forces member institutions to make difficult decisions about whether it should even admit academically at-risk student-athletes to the school. If the school admits an at-risk student-athlete and he or she fails to graduate, the school could potentially lose a scholarship. This penalty structure allows the NCAA to exclude at-risk student-athletes as it did in Prop. 16 but without having to identify a specific student-athlete. Under Prop. 16 many of these students were allowed to attend classes, just not receive athletic financial aid or participate in athletics. Because the APP penalizes a school if a student-athlete does not meet APP regulations, the school is more likely to deny admission to student-athletes who may be an academic risk. A student-athlete wishing to challenge the APP will have a difficult time proving a "lost scholarship" was intended for him or her when the NCAA takes the scholarship from the school and not the student.

The APP does allow member-institutions to honor any current NLI or athletic scholarship already in place when an APP scholarship penalty is assessed. This creates a scenario in which the potential student-athlete must prove the member-institution "would have" given him or her an athletic scholarship but for an APP scholarship penalty. This was not the case in *Pryor*, where the plaintiffs already had contracts with their member institutions. However, as explained below, the intentional discrimination element of the plaintiff's Section 1981 served to satisfy both elements.

to rely on *Pryor* for positive authority. Section 1981 provides protection for a person's ability to make and enjoy the benefits of a contract.

²⁷⁷ *Defining Academic Reform*, *supra* note 11. If a specific student-athlete did not meet Prop. 16 requirements, he or she would suffer the penalty. Under the APP, if a team does not meet APR cut scores, the team or institution will suffer the penalty, not any particular student athlete.

2. Intentional Discrimination and its Relation to the Contract Element

In *Pryor II*, the Third Circuit denied the NCAA's motion to dismiss the student-athlete's Section 1981 claim.²⁷⁸ The Third Circuit found that the NCAA may have intentionally discriminated when it created Prop. 16.²⁷⁹ The court reasoned that, if discriminatory intent is shown, any contract or contract term resulting from that intentional discrimination is void as against public policy.²⁸⁰ As a result, the court surmised that a student-athlete could not comply, consent, or be bound by a contract (e.g. athletic scholarship) that incorporated the provisions of Prop. 16 if the proposition was a product of intentional racial discrimination.²⁸¹ The student-athlete was not subjected to Prop. 16 requirements despite a term in the NLI that stipulated that he or she must comply with its academic regulations.²⁸² The court held that a factual inquiry was necessary to determine whether the NCAA intentionally discriminated when it passed Prop. 16.²⁸³ Thus, the discriminatory intent element essentially invalidated the terms of the NLI until a jury or court decided if the NCAA actually discriminated.²⁸⁴

As a result of this holding, the NCAA settled this case and amended its initial eligibility requirements to lessen Prop. 16's alleged discriminatory impact.²⁸⁵ Given this history, a student-athlete's Section 1981 challenge to the APP could look to *Pryor II* for guidance notwithstanding one significant difference. Because a potential plaintiff challenging the APP likely has no contract with the member institution, the alleged harm is much more difficult to prove. A plaintiff's best hope would be that a court follows the Third Circuit's reasoning in *Pryor II*. The court would have to determine that the NCAA considered race when it formed the APP and therefore may have intentionally discrimi-

²⁷⁸ *Pryor*, 288 F.3d at 561.

²⁷⁹ *Pryor*, 288 F.3d at 570.

²⁸⁰ *Id.* at 569.

²⁸¹ *Id.*

²⁸² *Id.* The NLI stipulated that the student-athlete must meet NCAA academic eligibility requires, e.g. Prop. 16. The court found that this clause was meaningless if the entire contract was the result of intentional discrimination. Therefore, the intentional discrimination element served to invalidate the terms of the contract.

²⁸³ *Id.* at 570.

²⁸⁴ *Id.* at 569. A fact finder never determined whether the NCAA actually committed intentional discrimination or not. However, if a showing of intentional discrimination is ultimately made, a Section 1981 claim would likely succeed because any contract or contract terms that are a product of intentional discrimination are void against public policy. However, if the fact finder determines that no intentional discrimination occurred, then a Section 1981 claim would fail because both the contract and intent element are necessary.

²⁸⁵ See NCAA, Division I Academics/Eligibility/Compliance Cabinet Subcommittee on Initial-Eligibility Issues, Agenda, *supra* note 71.

nated against African-Americans. If a court does so, any scholarship penalties under the APP would likely be void until a fact finder could determine if the NCAA intentionally discriminated.

A potential plaintiff would still have to show his or her ability to contract with a member institution was impaired. However, a holding that the NCAA may have intentionally discriminated would likely pressure the NCAA to change the APP as it did with Prop. 16. This is not a foregone conclusion however, because the APP penalty structure could be distinguished from Prop. 16. Therefore, the student-athlete must show contract impairment in a different manner than the plaintiffs did in *Pryor*.

3. Protecting a Student-Athlete's Ability to Make a Contract

An APP penalty may impair a potential student-athlete's ability to make a contract with a member institution. A potential student-athlete must prove that an APP penalty directly denied him or her the ability to sign a NLI or to receive an athletic scholarship from a member institution. The potential student-athlete must show that he or she *would have* received an athletic scholarship but for the APP penalty.²⁸⁶

In the case of *in re: NCAA I-A Walk-On Football Players Litig.*, the plaintiffs' antitrust claim alleged that walk-on football players would have been granted athletic scholarships but for the NCAA rules that limit the total number of football scholarships that a member school can award annually.²⁸⁷ The NCAA's motion to dismiss this claim was denied by the district court.²⁸⁸ Thus, this district court found merit in the notion that a NCAA rule could interfere with a student-athlete's ability to obtain an athletic scholarship.

A potential student-athlete who shows the APP causes a similar contractual impairment to the *Walk-On* plaintiffs may be able to use this same strategy to satisfy the contract element of a Section 1981

²⁸⁶ See *Runyon v. McCrary*, 427 U. S. 160, 172 (1976) (holding that defendants are liable for Section 1981 violations when, for racially-motivated reasons, they prevented individuals who "sought to enter into contractual relationships" from doing so); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). (holding that a plaintiff can enjoy Section 1981 protection to make or enforce a contract so long as "the plaintiff has or would have rights under the existing or proposed contractual relationship"). Because a student-athlete would enjoy rights under the NLI or an athletic scholarship, it appears he or she would enjoy Section 1981 protection to enter into a contract with a member institution. The difficulty lies in proving he or she would have been the student-athlete that would have received the athletic scholarship that an APP penalty removed from the member institution.

²⁸⁷ *In re: NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1146-47 (W.D.Wash. 2005). Walk-on student-athletes are allowed to participate in athletics but do not receive an athletic scholarship.

²⁸⁸ *Id.* at 1152.

claim. However, the likelihood of success in this scenario is unpredictable because the plaintiffs in *re NCAA I-A Walk-On Football Players Litigation* were already athletics participants at a member institution.²⁸⁹ A student-athlete's ability to bring a cause of action by alleging that he or she *would have* received an athletic scholarship but for an NCAA rule appears to be a defensible argument. The larger problem for a potential student-athlete is proving the school would have granted an athletic scholarship specifically to him or her.

4. Proving That a Scholarship was Intended for a Particular Student-Athlete

A potential student-athlete must first show a member institution intended to grant him or her an athletic scholarship and admission. The potential student-athlete would likely have to rely on a showing that the coach made a verbal scholarship offer to him or her. In addition, the recruited student-athlete would also likely have to prove the member institution would have granted him or her admission. These factual findings would be very difficult to prove, particularly because NCAA member schools often deny athletic scholarship offers to some recruits. Further complications arise because the member school would almost certainly recruit more than one student-athlete for any particular scholarship. Therefore, it would be difficult for any recruit to prove that one specific scholarship was intended for him or her.

5. Additional Section 1981 Arguments and Discriminatory Intent

The NCAA would likely invoke other arguments in denying it interfered with a student-athlete's ability to contract with a member institution. The NCAA could argue that the recruited student-athlete could sign an NLI to attend a different institution and that the policy therefore would not interfere with the student-athlete's ability to contract. Student-athletes could respond, however, by claiming that the APP impairs their ability to make a contract with the member institution of their choice. This may be a viable argument because the opportunity to attend one college is not always equal in kind to attending another college. Additionally, the student-athlete may have only been offered one athletic scholarship. HBCU's do not traditionally recruit the most sought after and talented athletes. Some HBCU's student-athletes may have only received one athletic scholarship offer. Therefore, the argument that he or she could attend another college is disputable. Ulti-

²⁸⁹ *Id.* at 1146-47.

mately, the strength of these arguments would likely turn on the factual circumstances of each case.

Given the difficulty of proving the contract element for potential student-athletes, proving intentional discrimination is of paramount importance. As in *Pryor II*, if a court finds the NCAA intentionally discriminated through its use of the APP, then scholarship penalties resulting from the APP would be void as contravening public policy.²⁹⁰ Therefore, the APP scholarship penalties would be unenforceable and every team suffering current APP penalties would likely have their available scholarships restored to pre-penalty levels. This in turn, would ensure that many potential student-athletes would be able to receive athletic scholarships. However, proving intentional discrimination is an extremely difficult burden. Therefore, a student-athlete may have to rely on procedural methods to enjoin the NCAA's use of the APP and APR.

C. *Using Rules of Civil Procedure to Enjoin the NCAA's Use of the APP and APR*

Given the difficulty of winning a Title VI and Section 1981 against the NCAA directly, a student-athlete might explore other legal options to challenge the APP. For example, a student-athlete could make use of the Federal Rules of Civil Procedure to enjoin the NCAA's use of the APP and APR. Two main FRCP rules provide the greatest opportunity for success. These procedural methods include FRCP Rule 14(a) – “Third Party Practice” and FRCP 65(d) – “Injunction Upon Those In Active Concert or Participation.” Each method requires the student-athlete to first bring a Title VI and/or Section 1981 claim against the member institution and not against the NCAA. This legal posture provides the potential plaintiff a means of challenging the APP and APR without having to prove the Title VI and Section 1981 elements against the NCAA.²⁹¹

²⁹⁰ See *Pryor v. NCAA*, 288 F.3d 548, 561 (3rd Cir. 2002).

²⁹¹ Fed. R. Civ. P. 19 – “Joinder for Just Adjudication” is another procedural option available to a potential plaintiff but the likelihood of success of FRCP 19 is slim. However, the option of using Rule 19 is worth noting. Rule 19 may allow the NCAA to be joined to a student-athlete's Title VI and/or Section 1981 claim against a *member institution*. A court may force the NCAA to join the suit if it concludes the NCAA's promulgation and enforcement of the APP undeservedly subjects the university to a student-athlete's Title VI and Section 1981 claim. The difficulty arises because Rule 19 requires a student-athlete to prove the same Title VI and Section 1981 legal elements (intentional discrimination / receipt of FFA / contract element) against both the member institution and the NCAA. Nevertheless, Rule 19 requires the court to first consider why joining the NCAA as a defendant is necessary. This analysis may result in the court having a sympathetic view of the member institution's plight. The court would likely recognize the awkward position a member institution

i. FRCP Rule 14(a) – “Third-Party Practice”

FRCP Rule 14(a) – “Third Party Practice” allows a member institution to implead the NCAA after a student-athlete first brings a suit against the member institution. The student-athlete would likely sue the school for a Title VI or a Section 1981 violation in an effort to challenge its enforcement of the APP. The student-athlete’s complaint would likely allege that the member institution’s enforcement of APP rules and APR penalties violated his or her civil rights under Title VI and his or her ability to contract under Section 1981. After the student-athlete brought these claims, the member institution in turn would bring its own cause of action against the NCAA via a FRCP Rule 14(a) “Third Party Practice”. The member school would likely assert that the NCAA rules (APP/APR) require it to discriminate against certain student-athletes in contravention of its duty to comply with federal law and therefore its ability to make contracts with potential student-athletes is impaired.

FRCP Rule 14(a) “Third-Party Practice” would enable the member institution to serve a summons upon the NCAA for the student-athlete’s Title VI and Section 1981 claim against the school.²⁹² It is important to understand, however, that the NCAA must not already be a party to the student-athlete’s original claim against the member institution.²⁹³ There must also be a defensible relationship to the pending claim against the member institution in order to implead the NCAA as a third-party defendant.²⁹⁴ A Title VI or Section 1981 claim against a member institution concerning the enforcement of NCAA rules would likely meet the defensible relationship element of FRCP Rule 14(a). Third Party Practice may be an effective tool for a student-athlete and

experiences by having to follow NCAA rules that may force it to violate civil rights laws. Therefore, Rule 19 may result in the court hearing the “big-picture” issues associated with the NCAA’s relationship to its member institutions before the details of the Title VI and Section 1981 legal elements are considered. The court then may be amenable to review the plaintiff’s allegations with sympathy after hearing these “meta” issues initially. Ultimately, the court may be more willing to find the NCAA receives FFA and intentionally discriminated against African-Americans if it views the entire case in context. However, a plaintiff would not solely rely on this argument. This Rule 19 argument is grounded in legal realism. The plaintiff would hope that the court would “stretch” the limit of what conditions would meet the legal elements required of Title VI and Section 1981 to find for the plaintiff. This strategy may work but it would put the case in a very risky procedural posture.

²⁹² See Fed. R. Civ. P. 14(a)(1).

²⁹³ See *id.*; See also, *Mauney v. Imperial Delivery System, Inc.* 865 F. Supp. 142, 153 (S.D.N.Y. 1994).

²⁹⁴ See *U.S. v. Olavarrieta*, 812 F.2d 640, 643 (11th Cir. 1987). Rule 14(a) requires that the outcome of the impleader be partly dependent on the outcome of the original suit. It does not allow the third-party plaintiff to assert an independent and separate claim even though it may rise out of the same general set of facts as the main claim.

the member institution. In fact, this scenario occurred in the Title IX case of *Pavey v. The University of Alaska v. NCAA*.²⁹⁵

In *Pavey*, the plaintiffs brought a Title IX suit against the University of Alaska (“UA”) which in turn brought a Section 1983 claim²⁹⁶ against the NCAA and the Association for Intercollegiate Athletics for Women (“AIAW”). UA alleged the combined effect of the NCAA and AIAW rules would “require and promote discrimination by the University in contravention of its duty to comply with the requirements of federal law.”²⁹⁷ UA also sought to enjoin the NCAA from enforcing its rules and from sanctioning UA for failing to abide by the rules.²⁹⁸ The third party defendants, the NCAA and AIAW, moved to dismiss on the grounds that UA had no Section 1983 protected right, any injury would have been speculative, no controversy existed between UA and the associations, and the relief sought was beyond the remedial powers of the federal courts.²⁹⁹

The court held in favor of UA, finding that UA had a constitutionally protected right to be free from interference while performing and executing its obligations under federal law.³⁰⁰ In addition, the court found that UA acted reasonably in trying to avoid a confrontation with the association’s rules, instead of relinquishing its membership in the NCAA.³⁰¹ The problem with relying on *Pavey* is that a Section 1983 claim requires the conduct in question to be carried out under color of state law.³⁰² After *Pavey* was decided, the Supreme Court found that the NCAA is not a state actor in most situations.³⁰³ In addition, since

²⁹⁵ See *Pavey v. Univ. of Alaska v. NCAA*, 490 F. Supp. 1011, 1013 (D. Alaska 1980).

²⁹⁶ 42 U.S.C. Section 1983 (2004). Two elements are needed to satisfy a §1983 claim: 1) The conduct complained of was engaged in under color of state law; and 2) the conduct subjected the plaintiff to the deprivation of rights, privileges, and immunities secured by the constitution of the United States.)

²⁹⁷ *Pavey*, 490 F. Supp. at 1013.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 1014.

³⁰¹ *Id.* at 1015. (The court stated that UA was acting reasonably, when it was trying to ensure its student-athletes ability to participate by avoiding confrontation with the NCAA.)

³⁰² 42 U.S.C. Section 1983 (2004).

³⁰³ See *NCAA v. Tarkanian*, 488 U.S. 179, 196-197 (1988). The Supreme Court held that the NCAA should be viewed as a private actor when it represents the interests of its entire membership in an investigation of one public university. This has been expanded by other courts to mean that the NCAA is not a state actor in most situations. These cases include *Bloom v. NCAA*, 93 P. 3d 621 (Ct. App. Colo. 2004) and *Matthews v. NCAA*, 79 F. Supp. 2d 1199, 1207 (E.D. Wash 1999). However, in *Cohane v. NCAA*, 215 Fed. Appx. 13, 15 (2nd Cir. 2007) the Second Circuit found that the NCAA could be a state actor in some situations. It appears the Second Circuit found that if collusive behavior between the member institution and the NCAA deprives a student-athlete of his/her liberty the NCAA may be a state actor.)

Pavey the Supreme Court has held that a member institution could simply relinquish its NCAA membership if it chooses not to follow the NCAA's rules.³⁰⁴

The NCAA would have a difficult time asserting that a member institution should choose between its NCAA membership or follow a potentially discriminatory rule. A NCAA claim that a school can simply relinquish its membership if it does not want to follow the APP rules that potentially violate student-athletes' civil rights seems difficult to support both legally and morally. Regardless, the NCAA would likely not be considered a state actor in this situation.³⁰⁵ This consideration alone makes the use of a Section 1983 claim by a school against the NCAA problematic. Therefore, a member institution would likely bring a different claim against the NCAA to enable it to use FRCP Rule 14(a).

The member institution would need to bring its own cause of action against the NCAA in the third-party complaint, such as a Section 1981 claim. This may seem ironic or even unnecessary at first glance because the student-athlete may have his or her own Section 1981 claim against the NCAA. However, a member institution's Section 1981 claim may be easier to sustain against the NCAA than that of a student-athlete. The APP scholarship penalties are assessed directly against the member institution. Therefore, a member school can point to an NCAA action (e.g., APP scholarship penalty) that clearly impairs the school's ability to make a contract with a potential student-athlete of its choice. The member institution's Section 1981 claim also provides greater protection for recruited student-athletes than a student-athlete's Section 1981 claim would. Potential student-athletes benefit more from a member institution's Section 1981 claim because of the member institution's ability to contract with *any student* is being impaired by the APP scholarship penalty. The school does not have to show which specific student-athlete it would contract with or offer an athletic scholarship to. Conversely, under a student-athlete's Section 1981 claim, the

³⁰⁴ See *Tarkanian*, 488 U.S. 179 at 198. (This view has not always been the prevailing view of the Supreme Court. In fact, the Court directly contradicted itself in *Tarkanian* in regard to whether NCAA membership is necessary in *NCAA v. Board of Regents of the Univ. of Oklahoma & Univ. of Georgia Athletic Ass'n*. See *supra* note, 192 for an explanation of these divergent approaches.

³⁰⁵ The current Supreme Court would likely follow the *Tarkanian* approach and hold that the NCAA is not a state actor. However, the Second Circuit and others may apply the *Cohane* view that the NCAA can be a state actor if it and the member institution collude to deprive a student-athlete's rights. The plaintiffs would likely have to show the NCAA and member institutions colluded through the use of the APP to intentionally discriminate against African-Americans.

student-athlete would need to show he or she would have made a contract with a member school. This burden could be very difficult to meet. The member institution needs to show the APP penalty impaired its ability to make and enforce contracts with potential student-athletes, not one particular student-athlete. If the member institution meets this burden, it would still need to show the NCAA intentionally discriminated against African-Americans when it created the APP.

A member institution, as a third party plaintiff, would have as much difficulty proving the NCAA intentionally discriminated as a student-athlete would. However, if a court found that the NCAA did discriminate based on race, the member institution's Section 1981 third party complaint would likely be upheld. Additionally, if the third party complaint were sustained, the NCAA would likely be enjoined from using the APP in its current form. Once again, a plaintiff's relief under a Section 1981 or Title VI hinges on proving the discriminatory intent element. Given this difficulty, there are other procedural options available to a member institution subject to a student-athlete's Title VI or Section 1981 suit.

ii. FRCP 65 – “Injunction Upon Those In Active Concert or Participation”

A student-athlete may make further use of the FRCP by bringing a Title VI and Section 1981 claim against his or her member institution and in turn, use FRCP Rule 65 to seek a preliminary injunction against both the member institution and NCAA. The goal of the preliminary injunction would be to prevent the school and NCAA from enforcing APP rules.³⁰⁶ If a plaintiff could show that the preliminary injunction was necessary³⁰⁷ and that the member school and NCAA acted in con-

³⁰⁶ This in turn could lead to a permanent injunction. Initially, the purpose of the injunction is to pressure the NCAA to amend the APP in such a way to eliminate the discriminatory impact. When this article refers to injunction, it is referring to a preliminary injunction.

³⁰⁷ The plaintiff(s) must show they would suffer irreparable injury unless the injunction is granted. The plaintiff must also show either (1) a substantial likelihood of prevailing on the merits or (2) sufficient questions regarding the merits warrant litigation. If the plaintiff can show one of these two, a balancing of the harms analysis will occur. This analysis weighs the plaintiff's harm if the injunction is not granted against the harm caused to the defendant if the injunction is granted. Four factors are considered by the court in deciding whether to grant the injunction. (1) The threat of irreparable harm to the plaintiff, (2) the potential harm on each party, (3) the probability of success on the merits, and (4) ensuring the injunction would not be adverse to the public interest.

cert to create the APP, Rule 64(d) may suspend the enforcement of the APP rules until the completion of the student-athlete's case.³⁰⁸

Rule 65(d) may allow the student-athlete to gain injunctive relief against the NCAA without naming it as a defendant. Rule 65(d) states that every order granting an injunction is binding against the parties to the action, their officers, agents, servants, employees, attorneys and upon *those persons in active concert or participation with them* who receive actual notice.³⁰⁹ Therefore, if the plaintiff is granted injunctive relief against the member institution and proves the NCAA acted in concert with the school to promulgate and enforce the APP rules, a plaintiff may be able to use FRCP 65(d) in forcing the NCAA to suspend its use of the APP and APR. Such a use of FRCP 65 is more than theoretically possible.

In *Phillip v. NCAA*, a student-athlete won a preliminary injunction against his member institution and the NCAA.³¹⁰ The NCAA prevented the plaintiff's participation in collegiate athletics after determining his core high school courses did not meet NCAA initial eligibility standards.³¹¹ As a result, the university that recruited the plaintiff could not award him an athletic scholarship even though it disagreed with the NCAA's eligibility determination.³¹² In determining whether to grant the injunction, the court held that denying a person's right to obtain a scholarship constituted irreparable injury.³¹³ Next, the court found that denying the student-athlete the financial benefit of the athletic-scholarship inflicted irreparable harm because it could significantly delay his education.³¹⁴ The court then turned to a balance of harms analysis.³¹⁵ The court found it was "plain beyond doubt" that denying the injunction harmed the student-athlete to a greater extent than granting the injunction harmed the member institution or the NCAA.³¹⁶ The court granted the injunction, reasoning that the plaintiff would lose his only chance at paying for college if he lost his scholarship.³¹⁷

³⁰⁸ *Tri-State Generation & Transportation Ass'n Inc., v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986). (Once the preliminary injunction is granted, the status quo is preserved until a determination in the case is made.)

³⁰⁹ Fed. R. Civ. P. 65(d).

³¹⁰ *Phillip v. NCAA*, 960 F. Supp. 552, 558 (D. Conn. 1996).

³¹¹ *Id.* at 553.

³¹² *Id.*

³¹³ *Manuel v. Oklahoma City University*, 833 P.2d 288, 293 (Ct. App. Okla. 1992).

³¹⁴ *Phillip v. NCAA*, 960 F. Supp. 552, 558 (D. Conn. 1996).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* The court expressed its admiration for this student-athlete in its opinion. The court stated that the plaintiff's testimony was credible because he was mature, poised, and genuinely frustrated by his predicament. The court felt that the student-athlete had earned a shot

The court also stated it was “equally plain” that sufficiently serious questions going to the merits of the claim made them fair grounds for litigation.³¹⁸ The court took issue with the procedure used by the NCAA in re-evaluating the plaintiff’s core course classifications.³¹⁹ The court found that the NCAA failed to adhere to its own rules by disregarding the course classifications made by the plaintiff’s high school principal.³²⁰ By granting the injunction, the court ensured that the plaintiff could participate in athletics and receive financial aid until the merits of the case were decided.³²¹

The *Phillip* court’s rationale for granting the injunction would also support granting an injunction in the context of the APP. The key distinction would be that the student-athlete would sue only his or her member institution and not both the NCAA and the member institution like the plaintiff in *Phillip*. The potential plaintiff would seek an injunction against the school and then seek to enjoin the NCAA through FRCP Rule 65(d). The court would consider whether to grant an injunction against the school first and then decide if the NCAA and member institution acted in concert to promulgate and administer the APP.

iii. Granting a Preliminary Injunction to Enjoin the Use of the APP

A student-athlete who loses a scholarship because of an APP penalty could claim he or she experiences the same irreparable harm as the plaintiff in *Phillip*. The student-athlete would claim that a denial of the scholarship’s benefits harm him or her enough to warrant a preliminary injunction. For example, a court would be more likely to grant a preliminary injunction if the student-athlete, like the plaintiff in *Phillip* has no other financial means to acquire a college education. Therefore, the balancing of harms analysis may reveal the student-athlete lost an educational opportunity similar to that of the plaintiff in *Phillip*.

The merits of a Title VI and Section 1981 claim against a member institution must also warrant litigation for the preliminary injunction to be granted. The *Pryor II* holding seems to establish that a factual determination regarding the merits of a student-athlete’s Title VI and Sec-

at enjoying his scholarship. The court also found that the school suffered no harm except that it lost a highly recruited player and that the NCAA suffers nothing from the court granting the injunction.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

tion 1981 challenge to NCAA academic eligibility rules must be made.³²² A plaintiff's challenge to a member institution's use of the APP may also meet this standard. *Pryor II* also established that a factual determination regarding the intentional discrimination element of a Title VI and Section 1981 claims may be required.³²³ A plaintiff challenging the APP would make similar, if not identical, claims and arguments.

In contrast to the *Pryor II* decision, courts have traditionally been hesitant to intervene in the internal affairs of voluntary associations like the NCAA.³²⁴ However, when a violation of a civil right has occurred the court may be more likely to intervene.³²⁵ Therefore, the court would likely grant a preliminary injunction if it found that the APP may violate a student-athlete's civil rights. If the court granted such a preliminary injunction against the member institution, the student-athlete would then seek to enjoin the NCAA through FRCP Rule 65(d).

iv. Proving the Member Institution and the NCAA Acted in Concert

The student-athlete could attempt to enjoin the NCAA under the same preliminary injunction by using Rule 65(d). If the plaintiff gains injunctive relief against the school for its use of the APP, then the student-athlete would claim the NCAA acted in concert with the member institution in developing and enforcing the APP penalties. If the student-athlete was able to show the NCAA's acted in concert under FRCP Rule 65(d) then he or she may be able to prevent the NCAA and the member institution from enforcing the APP rules and penalties. A student-athlete could show the NCAA acted in concert through various factors.

A court would likely enjoin a non-party under Rule 65(d) if it finds that 1) the defendant and the non-party have similar interests, 2) a commonality of incentives exists between the two parties or 3) the non-party aides and abets the defendant subject to the injunction.³²⁶ These factors seem to indicate that a court would find that the NCAA and

³²² *Pryor v. NCAA* 288, F.3d 548, 570 (3rd Cir. 2002).

³²³ *Id.*

³²⁴ *See Bloom v. NCAA*, 93 P.3d 621, 624 (Ct. App. Colo. 2004).

³²⁵ *See id.*

³²⁶ *Red 1 Investments, Inc. v. Amphion International Ltd.*, 2007 U.S. Dist. Lexis 85675, at *22 (E.D. Wash. 2007); *Reliance Insurance Co. v. Mast Construction Co.*, 84 F.3d 372, 377 (10th Cir. 1996); *EEOC v. International Longshoremens' Assoc.*, 1975 U.S. Dist. Lexis 13821 at *11 (D. Md. 1975).

member institutions acted in concert when they promulgate and enforce NCAA rules.

A cursory analysis of the relationship between the NCAA and member institutions seems to indicate both parties act in concert. Member institutions draft, submit, and approve association rules which the NCAA ultimately implements and enforces.³²⁷ Both the member institutions and the NCAA developed, passed, and administer the APP.³²⁸ Member institutions rely on the services of the NCAA Clearinghouse to help establish initial academic eligibility for all incoming student-athletes on athletic scholarship. The NCAA Board of Directors and NCAA committees are made of representatives from the association's member institutions.³²⁹ These facts seem to establish the NCAA and its membership have a commonality of incentives and similar interests.

Other factors also indicate that the NCAA and member institutions act in concert. The NCAA penalizes member institutions for failing to follow NCAA rules.³³⁰ The member institutions must enforce these penalties against their student-athletes or face further penalties or expulsion from the association.³³¹ The NCAA provides member institutions with waivers and adjustments for APR score calculations.³³² Member institutions participate in championships and tournaments sponsored by the NCAA.³³³ These facts indicate that the NCAA aides its member institutions to enforce association rules against student-athletes and provide athletic opportunities for them.

These examples are not an exhaustive list of all the ways in which the NCAA and member institutions act in concert. The formal relationship between the two parties is perhaps the most obvious rationale to find they act in concert. The member institutions and the NCAA comprise a private association governed under a common constitution and bylaws.³³⁴ This affiliation implies the parties have common interests, incentives, and work for common goals. Therefore, the NCAA would likely be subject to an injunction under FRCP 65(d) because it acted in

³²⁷ See NCAA Bylaws Article 5 (Legislative Authority and Process)

³²⁸ See *History of Academic Reform*, *supra* note 17

³²⁹ See NCAA Bylaws Article 4.2.1 (Division I Board of Directors, Composition); NCAA Bylaws Article 4.01.1 (Describes the organizational structure of the NCAA).

³³⁰ See NCAA Bylaws Article 11.1.2 (Responsibility for Violations of NCAA Regulations).

³³¹ See NCAA Bylaws Article 19 (Enforcement).

³³² See NCAA Bylaws Article 23.1.2(g) (Duties of NCAA to hear appeals/waivers by Member Institutions).

³³³ See NCAA Bylaws Article 18 (Championships and Postseason Football).

³³⁴ See NCAA Bylaws Article 1 (Names, Purpose and Fundamental Policy of NCAA).

concert with the member institution in creating and enforcing the APP penalty.

A student-athlete who employs procedural methods to enjoin the NCAA's use of the APP and APR may have some success. However, the student-athlete's Title VI and Section 1981 suits against the member institution may ultimately fail for the same reasons that a direct suit against the NCAA would.³³⁵ The student-athlete must still prove under Title VI or Section 1981 that the member institution intentionally discriminated against him or her. This element would be quite ironic if an African-American male sues an HBCU. The idea that a HBCU intentionally discriminated against African-Americans seems absurd and would be virtually impossible to prove. Given the difficulty of proving intentional discrimination, a student-athlete may have to rely on public policy grounds and not a cause of action to limit the APP's discriminatory racial impact.

D. *Public Policy Rationales for Limiting the Discriminatory Impact of the APP*

A student-athlete would have difficulty proving the NCAA intended to discriminate when it created the APP. Nonetheless, a student-athlete could prove that the APP and the APR have a racial discriminatory impact. The NCAA should be concerned about this result and act swiftly to prevent it. Currently, the NCAA is attempting to alleviate the disparate discriminatory impact within the current APP structure. The NCAA refuses to acknowledge that the current APP structure helped create the problem in the first place. The NCAA hopes that granting APP penalty waivers and providing financial grants to HBCUs will alleviate the problem and allow the APP to survive. This stubborn and shortsighted approach will curtail the significant structural APP reform necessary to ensure equitable athletics opportunities for every student-athlete. Therefore, a student-athlete's primary recourse may be the utilization of public policy rationales and not a direct cause of action to challenge the NCAA's use of the APP.

i. Tax Exemption and Social Responsibility

A strong public policy argument to find the NCAA accountable for potential civil rights violations comes from *Bob Jones University v.*

³³⁵ The student-athlete would need to prove intentional racial discrimination by the NCAA or the member institution if he or she brings a Section 1981 suit directly against the NCAA or the member institution.

United States.³³⁶ The holding in *Bob Jones University* provides guidance that the NCAA's tax-exempt status comes with social responsibilities. The Supreme Court found that Bob Jones University's policy banning inter-racial dating was contrary to a "fundamental national public policy against racial discrimination."³³⁷ The Court determined that the IRS was within its rights to deny tax-exempt status to Bob Jones University because of its racially discriminatory practices.³³⁸ The Court found that entitlement to tax exemption requires the organization to meet certain common-law standards of "charity."³³⁹ The Court determined that tax-exempt status carries with it a responsibility not to discriminate.³⁴⁰

Accordingly, the NCAA's continued enforcement of APP could endanger its tax-exempt status. The *Bob Jones University* holding seems to jeopardize the NCAA's tax-exempt status if its rules continue to have a discriminatory racial impact. As a tax-exempt organization, the NCAA has an obligation not to discriminate if it wishes to maintain its tax-exempt status. Additionally, Congress has recently shown trepidation with the NCAA's tax-exempt status because of its significant income.³⁴¹ This trepidation coupled with the APP's discriminatory impact could motivate Congress to investigate the NCAA's use of the APP. This conclusion is certainly possible when one considers that the current Chairman of the House of Representatives, Ways and Means Committee is Representative Charles Rangel, an avid civil rights supporter.³⁴²

The APP has a discriminatory impact on HBCUs and African-American student athletes. The discriminatory impact of the APP could be analogized to the interracial dating policy that cost Bob Jones University its tax-exempt status.³⁴³ The NCAA would counter this reasoning by arguing that it implemented the APP with no intended racial animus, whereas Bob Jones University clearly meant to discriminate

³³⁶ *Bob Jones University v. United States*, 461 U.S. 574 (1983) (establishing that tax-exempt status is unavailable to private educational institutions that are racially discriminatory). The university banned inter-racial dating among its students and denied admission to students in an inter-racial marriage or students known to advocate inter-racial marriage or dating.

³³⁷ *Id.* at 593.

³³⁸ *Id.* at 595.

³³⁹ *Id.* at 586.

³⁴⁰ *Id.* at 591-93.

³⁴¹ See *Letter to House Ways and Means Committee*, http://www2.ncaa.org/portal/media_and_events/press_room/2006/november/20061115_response_to_housecommitteeonwaysandmeans.pdf. The NCAA's total income for the 2006-07 academic year was \$508,250,000.

³⁴² See Charles B. Rangel, *Congressional Accomplishments*, <http://www.house.gov/rangel/accomplishments.shtml>.

³⁴³ Bob Jones University lost its tax-exempt status until it dropped its ban on interracial dating in the year 2000.

against students based on race. The NCAA would claim it merely hoped to raise graduation rates among all student-athletes through the creation and use of the APP and APR. The NCAA would also likely state that the APP's impact is socio-economic and not racial.

The NCAA's arguments are not without merit and its goals are certainly laudable. However, Congress may only look at the APP's discriminatory results and not its rationales to determine whether the NCAA can continue to enjoy its tax-exempt status. A legitimate public policy argument could be made to strip the NCAA of its tax-exempt status if the APP continues to have a discriminatory impact on HBCUs and African-American males. However, the scope of Bob Jones has traditionally been limited and therefore a plaintiff's challenge to the APP would likely espouse a broader claim of discrimination.

ii. Educational Mission and Discouraging Discrimination

Public policy concerns seem to indicate that the NCAA's tax-exempt status carries some level of social responsibility. The nature of the NCAA and its member institution's educational mission requires an even larger commitment to a greater social good. The scope of the NCAA's relationship with its member institutions is built on a mutual desire to serve broad educational and social goals. There is established public policy to discourage racial discrimination in our educational institutions.³⁴⁴ Title VI clearly expresses that racial discrimination in educational settings violates public policy.³⁴⁵ The Supreme Court has held that the "government has a fundamental, overriding interest in eradicating racial discrimination in education."³⁴⁶ Therefore, significant public policy concerns would be raised if any NCAA rules require its member institutions to discriminate, violate civil rights laws, or fail to honor their own educational mission.

The APP scholarship penalties might well usurp some member institutions' autonomy by limiting their ability to grant athletic scholarships to certain student-athletes. These excluded student-athletes are most likely to be the most academically at-risk students and often times African-American. A fundamental part of an HBCU's mission is to provide educational opportunities for students who may not otherwise be able to attend college. The APP scholarship penalties directly hamper a HBCU's educational mission by limiting access to some student-athletes. The NCAA would claim that APP penalties only limit the stu-

³⁴⁴ See *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bob Jones University*, 461 U.S. at 604; Title IV and VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d - 2000d-7 (1964).

³⁴⁵ See *Bob Jones University*, 461 U.S. at 594.

³⁴⁶ *Id.* at 604.

dents' ability to participate in NCAA athletics, not attend college. This argument fails to acknowledge many urban student-athletes of color can only afford college on an athletic scholarship.

The NCAA would also claim it is honoring its own educational mission by demanding higher academic standards of student-athletes. This argument assumes that requiring higher academic standards of student-athletes will affect all races, genders, and social classes equally. This assumption is clearly flawed, given the evidence that the APP and previous NCAA academic reforms adversely impact financially disadvantaged African-American males.³⁴⁷ The scope of the APP's impact in the next few academic years will surely be an important consideration. If the discriminatory impact continues, a court or a legislative body could easily conclude that the NCAA is making its member institutions discriminate, violate civil rights laws, and disregard their educational mission. However, there is no guarantee that policy makers would heed the cause of academically at-risk student-athletes. As a result, this article hopes to inspire a court or Congress to force the NCAA to amend the APP by presenting a more equitable APP structure.

VI. THE APP'S PROBLEMS AND ALTERNATIVE APPROACHES

The APP appears to have a racially discriminatory impact on HBCUs and African-American males. Fundamental changes to the APP structure should occur to alleviate this problem. However, a more equitable APP system is difficult to achieve. The disparity in member institution financial resources exacerbates the problems with the APP. The NCAA itself admits that the most financially strapped member institutions will likely struggle the most to meet APP requirements.³⁴⁸

The member institutions that lack financial resources for student-athlete academic development and appropriate APP monitoring appear to be disproportionately punished under the current system. Consequently, the APP structure essentially makes the poor schools poorer by removing scholarships. In contrast, any new lock-step financial incentives that reward the best performers would likely make the rich schools richer. This is apparent since the wealthiest schools already show success due to the availability of financial resources for academic development and APP monitoring. This disparity in financial resources

³⁴⁷ See *Inside Higher Education*, <http://www.insidehighered.com/news/2007/05/03/apr;HBCUs,KatrinaAreaSchoolsStruggleinAPRReport>, *supra* note 127; See Mondello, *supra* note 42 at 132-39.

³⁴⁸ See *Inside Higher Education*, *supra* note 347; See also, *HBCUs, Katrina Area Schools Struggle in APR Report*, *supra* note 127.

is an inherent flaw that will plague any incentive/disincentive APP system.

Another inherent problem is that APP penalties affect the behavior and decisions of a school's academic advisors, coaches, and athletic directors far more than any public recognition awards. This disincentive-based approach is appropriate for combating NCAA violations in the areas of extra-benefits, recruiting and academic fraud. The NCAA should punish schools for abuses in these areas. However, it seems unduly harsh to punish a school for a student-athlete's genuine academic struggles. To combat this unfairness, meaningful financial and structural incentives should augment APR penalties in an effort to yield a more equitable APP.

The current APP relies heavily on punishments. These punishments can be quite severe. As a result, schools may deny admission to some at-risk student-athletes³⁴⁹ because a failure to graduate them could result in severe punishment. These NCAA penalties may ultimately result in less competitive teams and lost revenue for the penalized school. Missed bowl games, banishment from pre and post-season tournament participation, and a lack of television appearances all reduce an athletic department's fiscal bottom line. The risk of lost revenue may result in the school denying admission to at-risk student-athletes.

The NCAA should provide incentives to encourage member-schools to educate at-risk student-athletes instead of just ignoring them. Without incentives, the risk of failure becomes too high for the university to take the chance on admitting at-risk student-athletes with adequate athletic ability. Further, having an academic reform program that mainly punishes schools with limited financial resources is unacceptable on moral grounds. The NCAA should create, not stifle, a supportive environment for schools to educate at-risk student-athletes. A fundamental goal of any NCAA academic reform package should be to create educational opportunities for student-athletes not eliminate them.

The easiest way to end the discriminatory effect of the APP is to shift from a system of disincentives to an exclusively incentive based program. If there were no penalties, there would be no discriminatory impact. However, this would also be problematic because of the financial disparity between wealthy and financially strapped schools. The wealthiest schools would consistently perform well because of their

³⁴⁹ The at-risk student-athletes with adequate athletic ability would likely suffer the most. At-risk student-athletes with exceptional athletic ability would likely be admitted to a member school regardless of the risk associated with his/her academic ability.

substantial financial resources and as a result, receive all the incentives. The financially strapped schools would struggle to meet APR benchmarks because they would not have the resources to compete academically and as a result, they would never receive incentives. Another problem also exists if the NCAA provides lock-step financial assistance for poor performance. Such a plan would provide incentives to score poorly in hopes of receiving a financial grant. This would defeat the entire purpose of academic reform and the educational institutions.

The NCAA could minimize the effect of these inherent flaws with a new approach to the APP. The NCAA could use the APR and GSR as diagnostic tools that identify member institutions that deserve reward but also need help. The NCAA could direct both financial and human resources to struggling schools in an effort to help provide solutions. This approach could result in higher graduation rates without sacrificing opportunities for student-athletes. The current APP structure has resulted in an undeniable discriminatory “class” impact, if not a racial impact. Given the current structural problems with the APP, creative reforms should be adopted to eliminate the negative effects of the APP.

First, economic and structural incentives need to augment the current penalties. Economic grants should be awarded to schools with the most financial and academic need. Structural incentives should be available to all NCAA member institutions that score well on the APR. Second, the NCAA should take the initiative to better prepare elementary, middle, and high school students for the academic rigors of college. Finally, the higher education community should accept new perceptions of how academic reform can work.

A. *Providing Support For Member Institutions*

The current financial inequity among the member schools must be tempered if an APP incentive/disincentive system is going to be successful. Real incentives and real punishments must complement each other. Appropriate punishments are currently in place. Appropriate incentives are noticeably lacking from the current APP. However, lock-step financial incentives will only make the rich schools richer. The poorest schools need financial help to meet basic academic expectations. Therefore, a more equitable APP will result by providing financial grants to the poorest schools and structural incentives to offset penalties for all member institutions.

i. Academic Foundation Grants

Direct financial grants from the NCAA to the poorest member institutions will help reduce financial disparity among member institutions. The total amount of annual revenue a member institution's athletic department generates would be the primary consideration for what self-help measures a school must first take to meet APP goals. BCS schools with annual athletic revenues in the tens of millions and high APR scores would not receive direct NCAA aid for academic support. HBCU's with limited revenue and low APR scores will qualify for an "Academic Foundation Grant" ("AFG").

AFGs would serve to establish a basic academic foundation for student-athletes at schools that struggle the most academically and financially. AFGs would be used to purchase computers, books, educational aides, dedicated learning facilities, and provide for academic support staffs. The programs struggling the most academically according to the APR and GSR would qualify if their total annual athletics revenue were small enough. Gross revenue should be used as a measure of need and not net profit. Many schools can manipulate their accounting records to show a financial loss even with tens of millions in revenue. The schools in the worst position financially and academically should receive AFGs not wealthy schools. Wealthy schools can provide academic support without the NCAA's financial support and should be required to do so.

AFGs would help ensure that all of its members' student-athletes have an adequate level of academic support. The NCAA should help the poorest schools establish a basic level of academic support before it assesses any APP penalties against them. Once a certain level of academic support is achieved, the student-athletes' academic accountability rises and disincentives become appropriate to ensure APP compliance.

ii. APP Structural Incentives

Financial assistance would help offset the discriminatory impact of the APP at the poorest schools. However, wealthy schools should also be rewarded for superior adherence to APP rules as well. Structural incentives are appropriate rewards for any member institution that achieve exemplary APR scores. The NCAA should reward member institutions for academic success and not immediately look to punishment to assure compliance. If any school meets certain APR score benchmarks, the NCAA should provide the school with structural incentives to offset structural penalties.

iii. Contemporaneous and Historical Penalty “Incentive Waivers”

If a team meets APR benchmarks for two consecutive seasons, the team could be awarded a guaranteed waiver from one future contemporaneous penalty. If the team meets APR benchmarks for four consecutive seasons, the team could be granted an additional guaranteed waiver from one future historical penalty. These “contemporaneous incentive waivers” would have a 10% cap identical to the 10% cap on contemporaneous scholarship penalties. Therefore, a team with 20 available scholarships can only stockpile a maximum of two “contemporaneous incentive waivers.”³⁵⁰ The “historical incentive waivers” would be available for use by the team for period of three years from the time they were earned. These incentives for meeting APR benchmarks would reward a team’s long-term academic success and provide justifiable relief from short-term failures.

iv. “Innovation in Education” Pilot Programs

Another incentive should be available to the academic support administrators at the programs that exhibit exceptional academic results. The NCAA should reward top-performing schools with financial grants to develop pilot academic development initiatives under a program named the “Innovation in Education Pilot Program.” The goal of these pilot programs would be to create innovative and promising educational techniques to help instruct student-athletes. This program would ideally create enhanced academic support curriculums for student-athletes. These programs and the data they yield will be shared with the NCAA and all of its member institutions. More student-athletes would graduate if the NCAA helps successful academic development professionals create productive academic enhancement programs that could be shared with all of its members.

v. The NCAA’s Matching Grants Program and Why it is Problematic

A NCAA working group directed with the duty of analyzing and finding solutions for the APP’s disparate impact on HBCUs has re-

³⁵⁰ The 10% cap calculations for head-count sports and equivalency sports would be made in the same manner as the 10% cap calculations are made for contemporaneous scholarship penalties. Therefore, a head-count sport with thirteen scholarships (e.g. men’s basketball) would have a maximum award of two “contemporaneous waivers”. An equivalency sport with 11.7 scholarships (e.g. baseball) would have a maximum award of 1.7 “contemporaneous waivers.”

cently recommended a “Matching Grant” program for these schools.³⁵¹ This is a positive step forward for the NCAA but this program is problematic for a couple of reasons. First, the amount of the grants is too low.³⁵² HBCUs receiving the grants would still lag behind wealthy BCS schools in the provision of academic support. The grants will not necessarily end the problem that the APP has created.

Second, the NCAA should not require a financially strapped school to earmark any of its limited resources to meet association rules that may be discriminatory. The NCAA is currently standing on morally shaky ground and facing potential legal challenges because of the APP’s impact. The NCAA would frustrate the public’s confidence in it by forcing HBCUs to ante up before it will help them. The public’s hope is that the NCAA will solve the APP’s discriminatory impact amicably with its member schools.

The matching grant program appears to be the NCAA’s attempt at solving the problems with the APP. The NCAA asserts that its goal is to help provide genuine educational opportunities for all of its student-athletes. If this is true, it should provide significant “Academic Foundation Grants” with no strings attached. AFG’s would help build an acceptable academic foundation at all NCAA schools while limiting the discriminatory impact of the APP. Interestingly, creating a solid educational foundation starts long before the student-athlete applies to college.

B. *Building Stronger Academic Foundations at All Levels of Education*

The NCAA should help cultivate student’s academic abilities at all levels of education. The NCAA must commit both financial and human resources to help impoverished elementary, middle, and secondary schools to accomplish this goal. Schools in financially depressed urban environments, where many of the at-risk student-athletes hail from, require support to help prepare their students for college. Student-athletes that are academically prepared prior to college would likely meet NCAA academic eligibility requirements.

NCAA financial grants to impoverished school systems would better prepare future student-athletes for the academic rigors of college. These grants would provide for academic resources like textbooks, computers, academic support staff, and facilities. The NCAA can help

³⁵¹ Report of the NCAA Minority Opportunities and Interests Committee (2007), http://www.ncaa.org/wps/wcm/connect/NCAA/Legislation%20and%20Governance/Committees/Division%20I/Management%20Council/2007/April/24_moic.htm (Subsection 9).

³⁵² See *supra* note 143.

level the educational playing field for academically at-risk student-athletes by providing aid to our country's most needy schools. This financial support could serve as a preventative measure to combat low graduation rates before they become an issue.

Every student-athlete would have a chance to compete academically if the NCAA provides financial support and academic development resources to schools at all educational levels. Member schools that meet APR benchmarks can earn the right to help determine which communities and schools are awarded these financial grants. This would enable member schools to direct grants to schools in the communities from which it recruits a majority of its student-athletes. For example, the University of Maryland could select schools in inner city Baltimore or Washington D.C. as grant recipients. Obviously, the grantee school would have to demonstrate a genuine financial need prior to any grant being awarded. Nonetheless, this program would provide academic support for potential student-athletes at all levels and reward member institutions for APP successes.

Unfortunately, financial grants are not enough. The NCAA and its member institutions must explore the possibility of having student-athletes serve as mentors for elementary and middle school students in their geographic region. Individual schools would administer this program, called "Athletes as Advisors," under the guidance of the NCAA.³⁵³ The program could bring students from economically impoverished schools to the universities for what is essentially an "after school" program. This would require insurance, transportation, and a financial commitment from the NCAA. Additionally, the time commitment is also already steep for current NCAA student-athletes.³⁵⁴ However, all the concerned parties could benefit if the schools allow student-athletes to earn academic credit through this program during their off-season.

Elementary and middle school students would benefit emotionally and academically from having caring adults endeavor to better their lives. Current NCAA student-athletes would recognize their own social obligations as student-athletes and benefit as well. The NCAA student-athletes would also benefit intellectually from the educational component of the program. The NCAA benefits by having socially aware and

³⁵³ The NCAA already has a program like this called "First Team" for high school men's basketball players. See Welcome to NCAA First Team <http://www.ncaa.org/wps/portal/> (follow Academics & Athletes hyperlink; then follow Youth hyperlink; then follow First Team hyperlink).

³⁵⁴ A student-athlete's time is especially limited during the playing season because of class, tutoring, practice, travel, and competition.

educated current student-athletes and by providing social and academic support for future student-athletes.

The key to success, however, is having “Athletes as Advisors” entail a genuine educational requirement to justify awarding of academic credit. The public must view the program as beneficial, not as way to let college athletes “off easy” academically. If the academic requirements are legitimate and the time requirements are manageable, many children could benefit from having NCAA student-athletes as mentors. Support at all levels of educations could help but understanding the needs of our current student-athletes is important as well.

C. New Perceptions of Academic Reform and Our Student-Athletes

Student-athletes would benefit from new perceptions about how NCAA academic reform should work. Individual student-athletes all learn differently and understanding this is imperative to providing a genuine educational opportunity. Using a “cookie-cutter” educational plan, like the APP, is counter-productive to helping educate all student-athletes. The NCAA must accept that the member institutions recognize their student-athlete’s academic needs the best. Allowing the institutions the latitude to provide alternative educational paths for student-athletes would promote higher graduation rates. The NCAA would foster student-athlete academic success by giving greater deference to the member institutions’ needs when granting APR adjustments and waivers.³⁵⁵

The student-athlete would view his or her educational experience positively if the member institution prescribes a functional plan to educate him or her specifically. The NCAA can help student-athletes meet their academic goals by allowing APR adjustments and waivers for particularized academic concerns. Concerns regarding student-athletes’ learning disabilities, family background, and educational foundation are just a few examples. A regimented educational program forces an artificial assessment of academic progress to every student-athlete. All students deserve an educational experience that fulfills their intellectual and emotional needs. This approach would allow a true and fair

³⁵⁵ This assumption recognizes that member schools have a mixed record when it comes to complying with NCAA rules in the areas of academic fraud and provision of extra benefits. I am not claiming that member schools are free of accountability or deserve complete latitude from NCAA oversight. However, currently member-institutions are taking genuine strides to comply with NCAA rules regarding academic fraud and providing appropriate academic support for student-athletes. I am convinced that member schools are taking academic integrity seriously and will serve their student-athletes well if given the opportunity.

assessment to be made of the student-athletes' educational growth and the member institutions' ability to educate their student-athletes.

NCAA expectations about how member institutions should educate their student-athletes must fundamentally change. Effective educational support requires an intimate awareness of the student-athlete's social, educational, and family background. A blanket approach to evaluating a student-athlete's academic progress, like the APP, cannot accomplish this goal. The APP ignores that many student-athletes have never had to perform at such a high academic level. A limited educational foundation may prevent many student-athletes from succeeding even if they want to. A blanket approach does not account for these considerations and it ignores that these young competitors may respond positively if they are challenged to succeed. The APP, in its current form, eliminates an institution's ability to make individualized academic determinations that could benefit student-athletes.

A student-athlete would be more likely to graduate if his or her educational experience is a positive one. A positive educational experience may even motivate student-athletes that left early for professional leagues to finish their degree. The NCAA must accept that schools are best equipped to understand and cater to the specific educational needs of their student-athletes. Broad academic regulations limit a university's autonomy and ability to provide an individualized educational path for each student-athlete. The APP's dogmatic approach to measuring academic progress is problematic and imprecise.

VII. CONCLUSION

The APP's disparate impact on HBCUs and African-American student-athletes seems apparent. Concluding that the NCAA considered this consequence when it created the APP is possible given the history of Prop. 16. Concluding that the NCAA structured the APR to limit opportunities for the most academically at-risk student-athletes is more difficult to presume. The NCAA Board of Directors and member institutions may have allowed stereotypical views of young African-American student-athletes influence what form NCAA academic reform should take. The abysmal track record Division I institutions have of appointing African-Americans to administrative positions in athletic departments and head coaching positions could justify this skeptical view of the NCAA and its member institutions' administrators.³⁵⁶

³⁵⁶ See Leilana McKindra, *Minority Panel Asks for Accountability in Hiring*, NCAA News, Feb 1, 2008, available at <http://www.ncaa.org/wps/portal/followLibraryhyperlink>; then follow NCAA News Articles hyperlink; then follow 2008 hyperlink; then follow Association-wide hyperlink; then follow 02/01/2008 Minority panel asks for accountability in hiring

The NCAA may have intentionally instituted the APP and APR knowing these academic reforms would keep many African-American student-athletes from ever attending college. Perhaps the NCAA not only knew but also intended to exclude some African-American student-athletes from college. It is possible that some members of the NCAA Board of Directors and administrators at the member institutions could be judgmental of poor, urban student-athletes of color. Given the deep history and sorrowful continuation of racism in this country, this conclusion is plausible.

On the other hand, it is reasonable to assume that Myles Brand and the NCAA Board of Directors are genuinely concerned for the well-being of all student-athletes. They likely take their responsibility as educators and administrators seriously. Nevertheless, the apparent discriminatory impact caused by the APP needs to be highlighted. President Brand and the NCAA blame the disparate impact of APP punishments on social class and not race. This contention seems contrived given the accumulated knowledge that lingers in the wake of *Cureton* and *Pryor* about how NCAA academic reform affects African-American males.³⁵⁷ Dr. Nathan Tublitz, the Co-Chairman of the Coalition on Intercollegiate Athletics, affirmed this conclusion in a recent Wall Street Journal article.³⁵⁸ Calculated rhetoric related to social class seems to indicate that the NCAA may be well aware but refuses to admit that socio-economic class is often a proxy for race and is functionally equivalent.³⁵⁹ Sadly, in the context of the APP, this functional equivalency may limit many African-American student-athletes opportunity to attend college.

It would be an arduous task, both legally and emotionally, for a plaintiff to prove that the NCAA intentionally discriminated against

hyperlink); Mark Maske, *Diversity Rule Goes to College*, Wash. Post, Feb 8, 2008 available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/07/AR2008020704232.html>; Tom Barnhart, *Croom: Minority Hirings 'Can't Get Worse'*, Atlanta Journal Const., Feb 19, 2008, available at http://www.ajc.com/uga/content/sports/stories/2008/02/18/ncaa_0219.html; Roland S. Martin, Commentary: *Colleges Block Black Coaches Out. . . Again*, CNN, Nov 27, 2007, available at <http://www.cnn.com/2007/US/11/27/roland.martin/index.html>.

³⁵⁷ See *Gaps 'Narrowing Slightly' in Study of NCAA's Teams Graduation Rates*, March 17, 2008, <http://sports.espn.go.com/ncb/ncaatourney08/news/story?id=3297989>. A study released in March 2008 by the University of Central Florida's Institute for Diversity and Ethics in Sport indicates that there is a persistent gap between graduation rates of white male basketball players and African-American male basketball players.

³⁵⁸ Mark Yost, *Has Serious Academic Reform of College Athletics Arrived?*, Wall Street Journal Online, March 19, 2008, http://online.wsj.com/article/SB120589156486247445.html?mod=googlenews_wsj. (asserting that educators and the NCAA recognize that that African-Americans are disproportionately impacted by the APP and an effort must be made to bridge that gap.)

³⁵⁹ See DeNavas-Walt, *supra* note 133.

African-Americans through its creation and subsequent use of the APP and APR. If the NCAA allows the potentially discriminatory impact of the APP to fester into a lawsuit, it would be a “black-eye” for the NCAA and all of its member institutions. A greater shame, however, would be allowing the APP to continue eliminating educational opportunities for academically at-risk student-athletes. The NCAA should resolve to enhance educational opportunities not eliminate them. When our classrooms and athletic teams represent every race, gender, and socio-economic class everyone benefits.

The onus is now on the NCAA and its member institutions to fix the APP. If they do not and the NCAA continues to punish member institutions for their limited academic failures,³⁶⁰ Myles Brand could end up on a witness stand defending the flawed and discriminatory policies of the NCAA.

³⁶⁰ See *supra* note 112 (showing that only 112 of the 6,110 teams tracked were punished under the first level of historical penalties).

