



POSITION STATEMENT

Fixing the Dysfunctional NCAA Enforcement System¹

April 7, 2015

EXECUTIVE SUMMARY

To fix the current dysfunctional NCAA enforcement system, The Drake Group² has issued a position statement calling for new rules that would increase due process and other protections for NCAA member institutions and college athletes.

Member Institution Protections

1. Experienced third-party investigators should conduct investigations and individuals who have experience as trial or appellate judges or administrative law judges should conduct infractions hearings and appeal hearings;
2. In cases of severe or significant breaches of conduct (Level I and Level II), a pre-hearing “discovery” process (authority should be requested from Congress) should occur;
3. In cases of severe or significant breaches of conduct (Level I and Level II cases), accused parties, including coaches, athletes, institutional employees, and institutions themselves, should be permitted to confront and cross-examine opposing witnesses at hearings;

¹ Preferred citation: Porto, B., Gurney, G., Lopiano, D., Ridpath, D.B., Sack, A., Willingham, M., Zimbalist, A. (2015) The Drake Group Position Statement: Fixing the Dysfunctional NCAA Enforcement System. (April 7, 2015). Retrieve at: <http://thedrakegroup.org/>

² The Drake Group is a national organization of faculty and others whose mission is to defend academic integrity in higher education from the corrosive aspects of commercialized college sports. The Drake Group goals include: (1) ensure that universities provide accountability of trustees, administrators, and faculty by publicly disclosing information about the quality of education college athletes receive; (2) advance proposals that ensure quality education for students who participate in intercollegiate athletics, (3) support faculty and staff whose job security and professional standing are threatened when they defend academic standards in intercollegiate sports; (4) influence public discourse on current issues and controversies in sports and higher education; and (5) coordinate local and national reform efforts with other groups that share its mission and goals. The Drake Group is “In residence” at the University of New Haven. For further information see: <http://thedrakegroup.org> or contact Gerald S. Gurney, *President at* geraldgurney@gmail.com

- 4. At the discretion of the hearing judge, a nonparty whom the NCAA or the accused institution has identified as having engaged in wrongdoing, or having enabled wrongdoing to occur, should be permitted to present an oral or written statement at the hearing, subject to rebuttal by the institution;**
- 5. Member institutions should be prohibited from firing or permanently reassigning employees or disassociating themselves from representatives of the institutions' athletic interests whom the Association or the accused institution have identified as having engaged in or enabled wrongdoing until after the case has been resolved and the nonparty's role in it has been determined; and**
- 6. All hearings and appellate proceedings should be open to the public, except when an accused party objects.**
- 7. The NCAA should be prohibited from using its executive authority to sanction a member institution (such as occurred in the Penn State/Sandusky case) unless it has followed its established enforcement procedure.**

Individual College Athlete Protection Through Binding Arbitration

- 1. The NCAA should be required to hire and to provide salary, benefits, and administrative expenses for, and NCAA member institutions should be required to provide all athletes with contact information for, one or more Athlete Welfare Advocates. The Advocates shall provide independent legal advice to college athletes at no cost to the athlete regarding the application of Association rules and the athletes' due process rights;**
- 2. Athletes declared ineligible for competition by their respective educational institutions or national athletic association for reasons other than an insufficient grade-point average, failure to make satisfactory progress toward a degree, or similar academic failure, should be permitted to appeal the eligibility determination and seek reinstatement by means of binding arbitration only;**
- 3. A panel of arbitrators certified by the American Arbitration Association (AAA), and approved by the athlete and the athletic association, would conduct the arbitration process in accordance with the AAA Commercial Arbitration Rules and Mediation Procedures; and**
- 4. The arbitration panel's decision should be final and binding on the athlete(s) involved, their educational institution(s), and any national athletic association of which the institution is a member.**

Whistle Blower Protection

- 1. College athletes, faculty, and other employees of NCAA member institutions who disclose unethical behavior or violations of NCAA or institutional rules related to the conduct of**

athletics programs should be protected from retaliation by their member institutions or institutional employees.

Cost

- 1. The estimated \$9.1 million cost of such an enforcement system would be well within the capacity of a national organization that is generating close to \$1 billion annually and returning 90 percent to its Division I members.**

Introduction

The NCAA is the largest and best-known of four independent organizations that regulate intercollegiate athletics. Part of its self-governance structure is its membership approved enforcement process, which assesses penalties for violations of the Association's bylaws. This process has been much maligned since the 1970s by journalists, state and federal courts, academic commentators, and NCAA member institutions themselves have all criticized it.

A primary criticism of the NCAA enforcement process has been that it is arbitrary and capricious. That is, it is inconsistent and fails to provide due process for individuals and institutions accused of NCAA rules violations.

To be sure, enforcement is a challenging task for the NCAA. The temptation to violate NCAA rules so as to gain a competitive advantage is ever-present and has grown exponentially along with the financial rewards associated with success in big-time college sports. As a result, recruiting scandals, academic fraud, and impermissible eligibility certifications have occurred more frequently in recent decades. Before the television era, NCAA-member institutions and affiliated athletic conferences enjoyed considerable autonomy when enforcing NCAA rules and regulations. In a sense, NCAA policy mirrored the legislative policy toward local government commonly known as 'home rule.'

The United States Supreme Court's decision in *Tarkanian v. NCAA* in 1984 established the NCAA as a private entity authorized to conduct investigations without providing due process. Nevertheless, the NCAA examined its internal enforcement practices soon after the Court's decision. Former Solicitor General Rex Lee chaired the *Special Committee to Review the NCAA Enforcement and Infractions Process*. The Lee Committee recommended improving the process by providing greater protections for involved institutions and individuals. The Lee Committee advised the NCAA to:

1. Provide Initial Notice of Allegations. The NCAA membership agreed to enhance its notice of inquiry process to insure all parties are notified prior to an investigation.
2. Establish a summary disposition process. This was suggested as a method for accelerating the infractions process by adjudicating major violations at a reasonably early stage in the investigation.
3. Allow tape recordings and shared documentation of interviews.
4. Use former judges or other eminent legal authorities as hearing officers in cases involving major violations not resolved at the summary disposition process. Although the NCAA

adopted the hearing-officer recommendation, the hearing-officer positions no longer exist. More importantly, the NCAA never adopted the recommendation of a truly independent trier of fact.

5. Create an appellate process. An NCAA Infractions Appeals Committee was developed in 1993.

Even though the NCAA agreed to allow tape recording of interviews and to add outside individuals to the Committee on Infractions and the Infractions Appeals Committee, it rejected both an independent trier of fact and open hearings. The NCAA believed that open hearings would inhibit investigations and dissuade people with allegations and knowledge of misconduct from cooperating. The NCAA also worried that an independent trier of fact would be expensive and that the persons performing that function would not understand the complexities of college sports. However, the existing system is flawed because members of the Committee on Infractions and the Infractions Appeals Committee are employees of peer member institutions that have an inherent conflict of interest in adjudicating infractions cases. Their judgment can bar a competitor institution from competition, revenue sharing, and recruiting or reduce its scholarships, rendering its teams less competitive over the long term.

Although the Lee Committee's recommendations have arguably made the NCAA enforcement process fairer during the past two decades, numerous flaws continue to plague NCAA jurisprudence. Besides the glaring omissions of an independent trier of fact and open hearings, respectively, the rights of confrontation and cross-examination are notably absent from this quasi-judicial process. The NCAA's current "cooperative principle" requires member institutions to self-report violations of Association rules, investigate themselves, and assist the NCAA in such investigations or face enhanced penalties for not cooperating or for failing to correct faulty procedures. Still, institutions cannot force external third parties to cooperate with or supply information to NCAA investigations.

NCAA penalties can have numerous consequences. They can damage the reputations of institutions of higher education and cause coaches and athletic administrators to lose their jobs. They can also cause college athletes to lose participation and scholarship benefits. Accordingly, The Drake Group believes the NCAA must put in place strong processes designed to protect the rights of individuals and institutions. To restore public confidence in the governance of college sport, these processes should include discovery and enhanced procedural protections for individuals and institutions, to be overseen by former judges hired by the NCAA as independent contractors. Congress should mandate these enforcement system reforms by tying them to eligibility for Higher Education Act funding.³ Both discovery and the use of experienced judges would ensure due process for all and consistency of punishment.

³ For instance, an amendment to the eligibility provisions of the Higher Education Act could specify that in the case of an institution that has an intercollegiate athletic program, the institution will not be a member of a nonprofit athletic association unless such association provides such individual and institutional due process rights.

Proposed New Due Process Rules and Procedures

Institutional Protections. The following new due process rules and procedures should be in place before the NCAA (a) issues a “show cause” order; (b) suspends a coach, athlete, or other athletics personnel from representing a member institution in athletics events; (c) suspends the telecommunications privileges of a member institution pertaining to athletic events; (d) levies a substantial financial penalty, or (e) suspends a member institution from participating in a collegiate athletic event.

- 8. Experienced third-party investigators should conduct investigations, and individuals with experience as trial or appellate judges or administrative law judges should conduct infractions hearings and appeal hearings.** The NCAA should hire both the investigators and the judges as independent contractors to remove the appearance or actuality of conflict of interest by NCAA staff or committees. These judges and investigators would participate in enforcement cases involving severe and significant breaches of conduct enforcement cases (i.e., Level I and Level II cases), but would be excluded from participating in breaches of conduct and incidental issues for which penalties are not onerous (Level III and Level IV cases). They would preside at hearings and appeals, issue subpoenas when necessary (such authority should be requested from Congress), and possess exclusive authority to adjudicate, resolve, and issue final judgments, including penalties in enforcement cases under their jurisdiction. Subpoena power is an important part of these proposed guidelines. It would enable the NCAA to compel witnesses to appear at hearings and testify, thereby ensuring the production of a complete and accurate record of events.
- 9. In cases of severe or significant breaches of conduct (Level I and Level II cases), a pre-hearing “discovery” process (authority should be requested from Congress) should occur.** It would include depositions and document production and the gathering and exchange of pertinent information by Association staff and counsel for accused parties;
- 10. In cases of severe or significant breaches of conduct (Level I and Level II cases), accused parties, including coaches, athletes, institutional employees, and institutions themselves, should be permitted to confront and cross-examine opposing witnesses at hearings;**
- 11. At the discretion of the hearing judge, a nonparty whom the NCAA or the accused institution has identified as having engaged in wrongdoing, or having enabled wrongdoing to occur, may be permitted to present an oral or written statement at the hearing, subject to rebuttal by the institution.** At any party’s request, the judge shall require the statements to be given under oath or affirmation (authority should be requested of Congress);
- 12. Member institutions should be prohibited from firing or permanently reassigning employees or disassociating themselves from representatives of the institutions’ athletic interests whom the Association or the accused institution have identified as having**

engaged in or enabled wrongdoing until after the case has been resolved and the nonparty's role in it has been determined; and

- 13. All hearings and appellate proceedings should be open to the public, except when an accused party objects.** This rule should not apply to the post-hearing deliberations of the appellate panels, which would be closed to the public in accordance with the established procedures of appellate tribunals regarding post-argument deliberations.
- 14. The NCAA should be prohibited from using its executive authority to sanction a member institution (such as occurred in the Penn State/Sandusky case) unless it has followed its established enforcement procedure.**

Individual College Athlete Protections. The due process provisions outlined above would not be required in the cases of reductions to an athlete's financial aid dollar amount or award period or claims for reinstatement of athletic eligibility, which claims should be the exclusive responsibility of arbitration panels. These eligibility and financial aid decisions require timely action because the loss of eligibility or of financial support for one's education could be immediate. Therefore, the following due process provisions should be adopted to protect the rights of individual college athletes:

- 1. The NCAA should be required to hire and to provide salary, benefits and administrative expenses for, and NCAA member institutions should be required to provide all athletes with contact information for, one or more Athlete Welfare Advocates, who shall provide independent legal advice to college athletes at no cost to the athlete regarding the application of Association rules and the athletes' due process rights;**
- 2. Athletes declared ineligible for competition by their respective educational institutions or a national athletic association for reasons other than an insufficient grade-point average, failure to make satisfactory progress toward a degree, or similar academic failure, should have the right to appeal the eligibility determination and seek reinstatement by means of binding arbitration only;**
- 3. A panel of arbitrators certified by the American Arbitration Association (AAA), and approved by the athlete and the athletic association, would conduct the arbitration process in accordance with the AAA Commercial Arbitration Rules and Mediation Procedures.** Binding arbitration would replace an appeal to any NCAA committee that reviews an institution's requests for the reinstatement of athletic eligibility in accordance with NCAA rules; and
- 4. The arbitration panel's decision should be final and would bind the athlete(s) involved, the athlete's educational institution, and any national athletic association of which the institution is a member.**

Whistle Blower Protection

Another important provision that should be required of any national governance organization and its member institutions is “whistle-blower protection.” College athletes, faculty, and other employees of NCAA member institutions who disclose unethical behavior or violations of NCAA or institutional rules related to the conduct of athletics programs should be protected from retaliation by their member institutions or institutional employees.

New Enforcement System Provisions Well Within the Financial Capacity of the NCAA

The estimated \$9.1 million cost of such an enforcement system is well within the capacity of a national organization that is generating close to \$1 billion annually and returning 90 percent to its Division I members.⁴

Calculation of Approximate Cost of Changes in NCAA Enforcement Process

Trying to determine the likely costs of implementing the due process changes called for by the above detailed reform provisions is difficult because it is hard to know with certainty how many judges will be needed and how many days they will work. Similarly, we do not know the number of binding arbitrations that might be required. Nonetheless, the following “ballpark figures” represent an educated guess, at the high end, of what such an enforcement system might cost in addition to current NCAA staff and operating expenses for these functions.

Summary of Estimated Costs

30 Hearings per Year	
Hearing Judges – 6, with each judge hearing 5 cases per year @ 7 days per case @ \$2,000 per day (\$70,000 per judge)	\$420,000
Hearing Judges’ Expenses – meals and incidentals @ \$152 per day x 210 days	\$ 31,920
20 Appeals per Year	
Appeals Judges – 6, with each judge working 10 appeals at 4 days per appeal @ \$2,500 per day (\$100,000 per judge)	\$600,000
Appeals Judges’ Expenses - meals and incidentals @ \$152 per day x 240 days	\$ 36,480
Judge Transportation Expenses – 30 hearing judge trips and 60 appeals Judge (3 judges per panel times 20 cases) @ \$250 per trip	\$ 22,500
Investigators – 30 cases per year at 250 hours per case @ \$500 per Hour	3,750,000
Investigator travel and per diem costs – 30 cases x \$15,000 per case	450,000
Security guards and costs for hearings open to the public	600,000
Athlete Advocate expenses- See below but the intent is to have a pool of names that work pro-bono or at low cost for an hourly or pre- determined amount. Incidental and travel expenses apply	3,000,000
Binding Arbitration for Eligibility Issues/Reinstatement @ \$2000 Per day per case. Total is estimated as a total pool amount.	250,000
Total	<u>\$ 9,160,900</u>

⁴ See *Finances*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Jan. 3, 2015)

Detailed Explanation of Estimates

- **Retired Judges**
 - The current NCAA Infractions Committee provides for up to 24 members, or eight panels of three members each. In contrast, retired judges under the new due process legislation will be highly experienced at considering disputes, therefore only one hearing judge per case is proposed, just as in a civil or criminal court. The number of teams under NCAA penalty in recent years has been 20-25. Overestimating case load, six “hearing” judges could consider 30 cases per year, although provision could be made for up to eight if necessary.
 - The current Infractions Appeals Committee has five members, all of whom hear all appeals. Having six “appeals” judges would ensure that the same three-person panel would not sit on every case, thereby reducing the likelihood that one or two highly influential members would affect the outcome of every appeal. The United States Courts of Appeals use this system of rotating three-member panels.
 - Assume six hearing judges, with each one hearing five cases per year, each of which would involve seven days of work (including pre-hearing discovery). Further assume that the hearing judges are paid at the high end of what arbitrators earn in labor-management disputes involving the NFL, NHL, or MLB, which would be \$2,000 a day. They would be paid a per diem because they would be independent contractors.
 - Based on these assumptions, each hearing judge would hear five cases per year, working seven days per case, or 35 days at \$2,000 per day for an annual total of \$70,000. Adding to that the \$152 Indianapolis per diem for meals and incidentals under Indiana law boosts the total by \$5,320 (152 x \$35). Thus, the annual total for each hearing judge would be \$75,320. Multiplied by six, the annual total for the hearing judges is \$451,920.
 - Regarding the appeals judges, note that not every case is appealed. Thus, assume 20 appeals per year, with each judge participating in half of them. Assuming four days of work per case at \$2,500 per day (appellate judges earn more than trial judges); each judge would earn \$10,000 per appeal for 10 appeals, or \$100,000 per year. Adding the \$152 per diem for meals and incidentals times 240 days of work (twenty appeals times four days per appeal times three judges per appeal) results in \$36,480 in per diem costs. Multiplying by six judges yields a total for the appeals judges of \$640,800 per year.
 - As to transportation costs, the NCAA would presumably be able to find enough retired judges in Indiana and the neighboring states to handle these matters. Thus, a transportation budget of \$250 per judge per case (30 hearings requiring 30 judges and 20 appeals requiring 60 judges) or \$22,500 would cover these estimated costs.
 - Finally, adding the costs for both sets of judges produces a total annual judicial cost of \$1,110,900.
- **Binding Arbitration**
 - This cost is based on a rate of \$2000 per day per professional arbitrator which is a high-end estimate. Most eligibility appeals can be heard in one day, although additional time will be required for the three-member panel to deliberate, reach a decision, and issue that decision in writing.
- **Third Party Investigators**
 - The investigators are likely to be lawyers. Presumably, the NCAA could hire retired lawyers as independent contractors to do this work. It probably would not make sense to hire someone

who already has a busy law practice. Nor should the NCAA hire law professors from NCAA member institutions. One model would be to hire, say, six retired lawyers, with each one working alone, supported by the NCAA's clerical staff, as needed. Another model would be to have two-person investigative teams consisting of a retired lawyer and a retired law enforcement officer, perhaps, to assist.

- Assuming the model adopted is a lawyer working alone and assuming thirty cases per year, each investigating lawyer would handle five cases. Five cases, at 250 hours per case, and \$500 per hour (a middle-range rate in employment arbitration cases, which seem like a reasonable analog) gets us to \$125,000 per case for the investigator. Multiplying that by five cases equals \$625,000 per investigator per year. Then multiplying \$625,000 per investigator per year multiplied by six investigators gets us to \$3,750,000 per year in investigative costs.
- Adding \$15,000 per case in travel expenses multiplied by thirty cases, we get \$450,000 in travel expenses. Finally, adding \$450,000 to \$3,750,000 gets us to \$4,200,000 in annual investigative costs.
- This estimate is probably a bit high, but it is in the ballpark. Two-person investigative teams would make it higher, although the retired law enforcement officers would not command the same hourly rate that the retired lawyers would (probably half or less) so the cost-per-investigation would not double.
- **Athlete Advocates**
 - This is a critical aspect of due process so that involved athletes who do not have access to appropriate and knowledgeable counsel can be represented effectively. NCAA rules are nebulous on who can pay for and provide counsel for athletes involved in NCAA investigations. The intent would be to develop a potential pool of athlete advocates who are willing to work pro-bono or with a pre-established contingency fee to control costs. There will be substantial incidental and transportation costs so again this is just an estimate.
 - Potential athlete advocates include attorneys, professors, and administrators of the Collegiate Athletes Players Association, The Drake Group, and various Sports Law practices. There will likely be no shortage of available, interested, and qualified people for this important task.
- **Other Costs**
 - Two other costs could also arise. To open enforcement hearings to the public, the NCAA may have to hire additional security guards. Assuming salaries and benefits totaling \$100,000 per person and the hiring of six guards, these costs could be as high as \$600,000.