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# The Bell Has Rung: Answering the Door for Student-Athlete Concussion Issues in the National Collegiate Athletic Association

Aaron Caputo

*Cleveland-Marshall College of Law*

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# THE BELL HAS RUNG: ANSWERING THE DOOR FOR STUDENT-ATHLETE CONCUSSION ISSUES IN THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

AARON CAPUTO, CLEVELAND MARSHALL COLLEGE OF LAW, J.D. 2019

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## I. INTRODUCTION

Recall your childhood. Remember when you would play on the playground and your parents would sit on the bench a couple feet away to make sure you didn't hurt yourself? Remember having the peace of mind that your parents would always be there to protect you? And if something did happen to you, your parents could always make the situation better? You would always hear someone shouting, "not too fast" or "get down from there," and if you scraped your knee, a bandage and some Neosporin were always waiting. You are graced with someone who always has your best interest in mind and will never let you end up in a situation where you would hurt yourself. That is what parents are for, right? Well, student-athletes have not received this care or guidance from its governing body that adopts such a parental role and prides itself on athlete safety—the National Collegiate Athletic Association ("NCAA"). Under the NCAA, student-athletes have been scraping their knees for decades. Except in this case, it is far worse than scraped knees; student-athletes are suffering from concussions and traumatic brain injuries ("TBIs") that can impact them for the rest of their lives.

Angel Mitchel is one of the many unfortunate examples. During her sophomore soccer season at Ouachita Baptist University, an NCAA division II school in Arkansas, Mitchel went for a header and collided with one of her teammates.<sup>1</sup> The two collided and Mitchel's left eye began to swell up immediately.<sup>2</sup> Mitchel notified the trainer that she felt sick.<sup>3</sup> The trainer asked Mitchel if she was dizzy, nauseated, and had a headache; Mitchel replied, "Yes, yes, and yes."<sup>4</sup> The athletic trainer sent Mitchel back to her dorm room with an ice pack and no further instructions.<sup>5</sup> A neurological test was administered the next day, but the results were inconclusive because she still could not see out of her left eye.<sup>6</sup> A couple of days later, Mitchel was instructed to run laps but appealed to the trainer because she was still sick.<sup>7</sup> The trainer told her, "You don't want to make the coach mad."<sup>8</sup> Unlike many student-athletes, Mitchel made the correct decision and decided to go to the hospital.<sup>9</sup> As Mitchel was leaving to go to the hospital, the coach told her that she should expect to sit out for a long time.<sup>10</sup> Mitchel was diagnosed with a severe concussion.<sup>11</sup> She had migraines that persisted

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<sup>1</sup> Peter Keating, *Why Does It Seem Like Nobody Cares About Female Concussions?*, ESPN (July 5, 2017), <http://www.espn.com/espnw/sports/article/19775123/why-does-seem-cares-female-concussions>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

for three years, and she never played soccer again.<sup>12</sup> This situation was never investigated, nor was the member institution ever punished by the NCAA.<sup>13</sup>

Concussions are a crisis in intercollegiate athletics.<sup>14</sup> Concussions for people under the age of 22 increased by 500% between the years 2010 and 2014.<sup>15</sup> The direct effects of a concussion usually impact an individual for a relatively short period of time, but the long-term effects of concussions can plague someone for the rest of his or her life.<sup>16</sup> Studies have shown that repetitive concussions have an impact on cognitive function and can lead to degenerative brain diseases.<sup>17</sup> As more concussions are suffered, the risk of long-term effects becomes greater.<sup>18</sup> In response to the rate and effects of concussions, the NCAA implemented a policy in hopes of reducing the number of concussions.<sup>19</sup>

The NCAA adopted a Concussion Management Plan (“CMP”) in 2010 that required every member institution to implement an individual concussion management plan with certain requirements.<sup>20</sup> The purpose of the plan is to protect student-athletes.<sup>21</sup> There are some flaws with the plan, which is to be expected, but the central problem is that the NCAA fails to guarantee that all member institutions implement a concussion management plan, and assuming a member institution has adopted the required concussion management plan, the NCAA refuses to apply its enforcement process when member institutions violate their concussion management plans.<sup>22</sup> Mitchel was a victim of this perpetual crisis.<sup>23</sup> For years, student-athletes have suffered from injuries identical to Mitchel’s because the NCAA has refused to ensure

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See generally Brain Injury Research Institute, *Frequently Asked Questions*, <http://www.protectthebrain.org/FAQs.aspx> (last visited Oct. 4, 2017) (Detailing the frequency of concussions in recreational sports).

<sup>15</sup> Ben Rains, *Study Shows Concussions up 500% in Youth Sports*, SPORTS ILLUSTRATED (July 13, 2016), <https://www.si.com/tech-media/2016/07/13/concussions-youth-sports-rising-nfl>.

<sup>16</sup> See Sean Colio & Reness J. Low, *What You Need to Know About Concussions*, (Jan. 5, 2015), <https://www.sports-health.com/sports-injuries/head-and-neck-injuries/what-you-need-know-about-concussions>.

<sup>17</sup> Daniel H. Daneshvar, MA, David O. Riley, Christopher J. Nowinski, Ann C. McKee, MD, Robert A. Stern, PhD & Robert Cantu, MD, *Long Term Consequences: Effects on Normal Development Profile after Concussion*, 22 PHYS. MED. REHABIL. CLIN. N. AM. (Sept. 23, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> 2015-2016 NCAA Division I Manual art. 3.2.4.17.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Sara Ganim, *Unnecessary Roughness? Players Question NCAA’s Record on Concussions*, CNN (Oct. 30, 2014), <http://www.cnn.com/interactive/2014/10/us/ncaa-concussions/index.html>; see also Whitney Johnson, *Deception, Degeneration and the Delegation of Duty: Contracting Safety Obligations Between the NCAA, Member Institutions, and Student-Athletes*, 49 VAL. U. L. REV. 1045, 1061 (2015); see also Keating, *supra* note 1.

<sup>23</sup> See Keating, *supra* note 1.

that member institutions are equipped with concussion management plans or apply its proper enforcement mechanism.<sup>24</sup>

This Note examines the NCAA's unwillingness to enforce the requirement that all NCAA institutions must implement a concussion management plan; the NCAA's refusal to apply its appropriate enforcement mechanism when member institutions violate their concussion management plans, which are instituted in order to protect student-athletes from concussions, how both of these failures result in more concussions and a higher probability of debilitating long-term effects, and solutions to remedy this grave injustice. Part II of this note describes what a concussion is, the long-term effects of concussions, the NCAA's management of concussions, and lawsuits challenging the NCAA in relation to concussions. Part III analyzes the inefficiencies of the NCAA in its management of concussions, the previous and current lawsuits' failure to stimulate change within the NCAA, and the proposed solutions that will help create a safe environment for student-athletes.

I. BACKGROUND: A HISTORY OF CONCUSSIONS, THE NCAA, AND LAWSUITS ARISING THEREFROM

A. *What is a Concussion?*

A concussion is a form of traumatic brain injury caused by a bump, blow, or jolt to the head or body, which causes the brain to move rapidly within the skull.<sup>25</sup> When the brain collides with the skull, bruising can occur.<sup>26</sup> In addition, different parts of the brain are pulled in separate directions, which causes shearing and tearing of nerve tissue.<sup>27</sup> The impact can alter the chemical balance and ions in the brain, which can impair nerve cell function.<sup>28</sup> As the cells in the brain begin to heal, the brain begins to regain its regular function, but it is incredibly vulnerable to further damage.<sup>29</sup> The length of time that one may experience symptoms of a concussion varies for each individual; it could be a few days, a few weeks, or even a few months.<sup>30</sup> Not only are concussions threatening to one's health, but they occur at an astonishing rate. An estimated 1.6-3.8 million sports and recreation related concussions occur in the United

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<sup>24</sup> Johnson, *supra* note 22, at 1048.

<sup>25</sup> Center for Disease Control, *Heads Up*, [https://www.cdc.gov/headsup/basics/concussion\\_what.html](https://www.cdc.gov/headsup/basics/concussion_what.html) (last updated Jan. 31, 2017).

<sup>26</sup> *A Bang to the Brain: What We Know About Concussions*, NIH (May 2013), <https://newsinhealth.nih.gov/2013/05/bang-brain>.

<sup>27</sup> *Id.*

<sup>28</sup> Center for Disease Control, *supra* note 25.

<sup>29</sup> Cailyn M. Reilly, *The NCAA Needs Smelling Salts When It Comes to Concussion Regulation in Major College Athletics*, 19 UCLA ENT. L. REV. 245, 251 (2012).

<sup>30</sup> *See* Colio & Low, *supra* note 16.

States each year.<sup>31</sup> There are millions of athletes who are subjected to significant brain injuries through concussions.<sup>32</sup>

Injuries to the brain are not only sustained by concussions but also by sub-concussive hits.<sup>33</sup> Sub-concussive hits are blows to the head or the body in which the effect on the brain is not exhibited by detectable symptoms.<sup>34</sup> These hits are commonplace in collegiate sports. Some examples of sub-concussive hits are tackles in football, headers in soccer, and checking in hockey and lacrosse.<sup>35</sup> Similar to concussions, sub-concussive hits may have an accumulative effect and lead to long-term effects later in life.<sup>36</sup>

### B. *How Bad Can the Effects of Concussions Be?*

#### 1. The Effects of Concussions are More Than Short Term

Concussions are a very dangerous condition, but the long-term effects suffered as a result of repeated concussions can be more perilous than the concussions themselves. Many other diseases and conditions stem from concussions and sub-concussive hits. These disorders debilitate athletes and prevent them from being able to live the life they previously lived. Research continues to grow in the area of long-term effects of concussions, but certain findings suggest that concussive injuries can disrupt fundamental elements of higher order neurocognition.<sup>37</sup> Concussions can lead to cognitive, physical, and emotional symptoms, such as confusion, vomiting, headaches, nausea, depression, moodiness, and amnesia.<sup>38</sup> Repetitive concussions can also lead to degenerative diseases such as Parkinson's disease, Amyotrophic Lateral Sclerosis ("ALS"), and Chronic Traumatic Encephalopathy ("CTE").<sup>39</sup> All of these results of concussions are horrifying, but the condition that is recently garnering the most attention is CTE.

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<sup>31</sup> *What You Need to Know About Brain Injuries & Concussions*, BRAIN INJURY RESEARCH INSTITUTE, <http://www.protectthebrain.org/FAQs.aspx> (last visited Oct. 2, 2017).

<sup>32</sup> *See id.*

<sup>33</sup> Concussion Legacy Foundation, *CTE Resources: Subconcussive Impacts*, <https://concussionfoundation.org/CTE-resources/subconcussive-impacts> (last visited Nov. 10, 2017).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Brian Johnson, Thomas Neuberger, Michael Gay, Mark Hallett & Semyon Slobounov, *Effects of Subconcussive Head Trauma on the Default Mode Network of the Brain*, JOURNAL OF NEUROTRAUMA (Dec. 1, 2014).

<sup>37</sup> *See* Kerry McInnes, Christopher L. Friesen, Diane E. Mackenzie, David A. Westwood & Shaun G. Boe, *Mild Traumatic Brain Injury (mTBI) and Chronic Cognitive Impairment: A Scoping Review*, 4 PLOS ONE (Apr. 11, 2017).

<sup>38</sup> Joseph Nordqvist, *Concussion Cause Long-Term Effects Lasting Decades*, MED. NEWS TODAY (June 9, 2015), <https://www.medicalnewstoday.com/articles/256518.php>.

<sup>39</sup> Daneshvar et al., *supra* note 17.

## 2. Chronic Traumatic Encephalopathy Has Burst onto the Scene

CTE is a degenerative brain disease found in brains that are subjected to repeated brain trauma.<sup>40</sup> Some of the symptoms include impulse control, aggression, depression, paranoia, memory loss, confusion, and progressive dementia.<sup>41</sup> As the disease progresses, the symptoms become more crippling.<sup>42</sup> CTE was first recognized in the sport of boxing.<sup>43</sup> The discussion of CTE's increased presence in sports began with Bennet Omalu's postmortem diagnosis of CTE in Mike Webster, a former professional football player, in 2002.<sup>44</sup> One of the most recent and notable cases of CTE was found in Aaron Hernandez in 2017.<sup>45</sup> Hernandez suffered from stage 3 CTE at age 27.<sup>46</sup> Researchers had never found stage 3 CTE in a brain younger than 46 years of age.<sup>47</sup> In recent years, there has been a large amount of research on CTE. A recent study was conducted in part by Dr. Ann McKee and published in *The Journal of the American Medical Association* ("JAMA").<sup>48</sup> In this study, Dr. McKee examined the brains of 202 deceased NFL, collegiate, and high school football players.<sup>49</sup> Her results were staggering: 110 out of 111 former NFL players, 48 out of 53 former collegiate players, and 3 out of 14 former high school players were diagnosed with CTE.<sup>50</sup> These statistics show that 91% of former collegiate football players in the study were diagnosed with CTE, which illuminates the dangers of collegiate athletics.<sup>51</sup>

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<sup>40</sup> Concussion Legacy Foundation, *CTE Resources: What is CTE?*, <https://concussionfoundation.org/CTE-resources/what-is-CTE> (last visited Oct. 10, 2017).

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> K. Adam Pretty, *Dropping the Ball: The Failure of the NCAA to Address Concussions in College Football*, 89 NOTRE DAME L. REV. 2359, 2365 (2014).

<sup>44</sup> *Id.*

<sup>45</sup> Adam Kilgore, *Aaron Hernandez suffered from most severe CTE ever found in a person his age*, THE WASH. POST (Nov. 9, 2017), [https://www.washingtonpost.com/sports/aaron-hernandez-suffered-from-most-severe-cte-ever-found-in-a-person-his-age/2017/11/09/fa7cd204-c57b-11e7-afe9-4f60b5a6c4a0\\_story.html?utm\\_term=.093cfa3e9f6d](https://www.washingtonpost.com/sports/aaron-hernandez-suffered-from-most-severe-cte-ever-found-in-a-person-his-age/2017/11/09/fa7cd204-c57b-11e7-afe9-4f60b5a6c4a0_story.html?utm_term=.093cfa3e9f6d).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jesse Mez, MD, MS, Daniel H. Daneshvar, MD, PhD, Patrick T. Kiernan, BA & Ann C. McKee, MD, *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 JOURNAL OF AMERICAN MEDICAL ASSOCIATION 4, (July 25, 2017).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See* Daniella Emanuel, *CTE Found in 99% of Studied Brains from deceased NFL Players*, CNN (July 26, 2017), <http://www.cnn.com/2017/07/25/health/cte-nfl-players-brains-study/index.html>.

Furthermore, CTE can only be diagnosed after death through a brain tissue analysis.<sup>52</sup> This hinders the ability of scientists to prevent it.<sup>53</sup>

### 3. Second Impact Syndrome: Why its Prevention Should be the First Priority

Another major concern regarding concussions is Second Impact Syndrome (“SIS”).<sup>54</sup> Affected brain cells are particularly vulnerable to sustaining further damage during the concussion recovery period.<sup>55</sup> Second Impact Syndrome is a condition in which a second concussion occurs before the first concussion is properly healed, causing rapid and severe brain swelling.<sup>56</sup> This usually happens when athletes are allowed to return to play before being completely healed.<sup>57</sup> SIS can be very dangerous to the brains of student-athletes.<sup>58</sup> In some instances, SIS is fatal.<sup>59</sup>

#### C. *The NCAA and the Evolution of its Concussion Management Plan*

##### 1. The NCAA and its History of Concussions

The NCAA is an unincorporated association that governs intercollegiate athletics.<sup>60</sup> The NCAA was established with the primary purpose of protecting student-athletes.<sup>61</sup> In 1906, intercollegiate football was responsible for 15-20 deaths per year, and President Theodore Roosevelt proposed an ultimatum to university presidents—implement safety measures or the game would be banned.<sup>62</sup> The university presidents conceded and the outcome was the Intercollegiate Athletic Association of the United States; it is now known as the NCAA.<sup>63</sup> As the organization evolved, one pillar of the

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<sup>52</sup> Concussion Legacy Foundation, *supra* note 40. See also Melissa Healy, *Scientists May Have Found a Way to Diagnose CTE in Football Players While They’re Still Alive*, L.A. TIMES (Sept. 26, 2017), <http://www.latimes.com/science/sciencenow/la-sci-sn-cte-biomarker-football-20170926-story.html> (researchers from Boston University’s School of Medicine have identified an inflammatory protein in spinal fluid that may signal the presence of CTE in the patient).

<sup>53</sup> See Healy, *supra* note 52.

<sup>54</sup> Linda Carroll, *Second Concussion Can Be Devastating, Even After Clear CT Scan, Study Finds*, NBC (Jan. 1, 2013), <https://www.nbcnews.com/health/second-concussion-can-be-devastating-even-after-clear-ct-scan-1C7792164>.

<sup>55</sup> Reilly, *supra* note 29, at 250.

<sup>56</sup> *Second Impact Syndrome*, BrainAndSpinalCord.org, <http://www.brainandspinalcord.org/second-impact-syndrome/> (last visited Oct. 1, 2017).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Reilly, *supra* note 29, at 271.

<sup>61</sup> Peter A. Carfagna, *Representing the Professional Athlete*, 32 (West, 1<sup>st</sup> ed. 2009).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; see also Reilly, *supra* note 29, at 271.



organization that stayed consistent was the principle of student-athlete well-being.<sup>64</sup> Today, the organization itself claims that it is dedicated to the well-being and lifelong success of college athletes.<sup>65</sup> When faced with the crisis of concussions, many have called into question the NCAA's commitment to this fundamental principle.<sup>66</sup>

The NCAA had knowledge of the effects of concussions long before implementing any type of management plan. In 1933, the NCAA first acknowledged the dangers of concussions in its Handbook.<sup>67</sup> It stated that "concussions should not be regarded lightly," and it laid out recommendations for immediate treatment, including rest, constant supervision, and x-rays.<sup>68</sup> In 1994, the NCAA's Director of Sports Scientists, Randall Dick, published an article that found that "concussions accounted for at least 60 percent of head injuries in each of the monitored sports."<sup>69</sup> In 1996, three doctors, led by the president of the American Academy of Neurology, wrote a letter to the NCAA's executive director stating that concussions were overlooked as one of the most serious health problems facing amateur and professional athletes.<sup>70</sup> It was not until 2009 that the Committee on Safeguards and Medical Aspects of Sports recommended that the NCAA Playing Rules Oversight Council consider adopting standardized concussion rules.<sup>71</sup> Finally, on April 29, 2010, the NCAA enacted its Concussion Management Plan.<sup>72</sup> It became effective in August, 2010.<sup>73</sup>

## 2. The NCAA's Concussion Management System

The NCAA's initial Concussion Management Plan was passed and adopted into the NCAA Manual as bylaw 3.2.4.17 in 2010.<sup>74</sup> The plan required that each member institution implement a concussion management plan with only four requirements. The four requirements were: (1) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions and that they accept responsibility to report symptoms of a concussion to a medical staff member; (2) Student-athletes who are suspected of having concussion symptoms must be removed

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<sup>64</sup> 2015-2016 NCAA Division I Manual art. 2.2.

<sup>65</sup> NCAA, *What is the NCAA?*, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (Last visited Nov. 16, 2017).

<sup>66</sup> Associated Press, *NCAA Facing 43 Concussions Lawsuits after Latest Filings*, ESPN (Oct. 5, 2016), [http://www.espn.com/college-football/story/\\_/id/17722844/ncaa-facing-43-concussion-lawsuits-latest-filings](http://www.espn.com/college-football/story/_/id/17722844/ncaa-facing-43-concussion-lawsuits-latest-filings).

<sup>67</sup> Travis Waldron, *The NCAA's History with Concussions: A Timeline*, THINKPROGRESS (July 23, 2013), <https://thinkprogress.org/the-ncaas-history-with-concussions-a-timeline-530a8c5af0df/>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 2015-2016 NCAA Division I Manual § 3.2.4.17, *supra* note 19. In the current Manual, the NCAA Concussion Management plan can now be found as bylaw 3.2.4.18.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

from the current practice or game and evaluated by a medical staff member with experience in evaluating and managing concussions; (3) Student-athletes diagnosed with a concussion are prevented from returning to play on the same day that the concussion was sustained; and (4) Student-athletes diagnosed with a concussion must be cleared to play by a physician or a physician's designee.<sup>75</sup> As more research and results regarding concussions emerged, the NCAA began to implement more standards.

In 2014, the NCAA, along with other medical and sport organizations, announced Inter-Association Guidelines to improve safety for collegiate student-athletes.<sup>76</sup> These guidelines were not definite rules; they were only guidelines, so they functioned in the form of recommendations.<sup>77</sup> A subsequent amendment was made to the NCAA bylaws based on these Inter-Association Guidelines.<sup>78</sup> In 2015, NCAA bylaw 3.2.4.17.1 was introduced as an amendment based on the Inter-Association Guidelines to include certain additional requirements for the initial Concussion Management Plan.<sup>79</sup>

In addition to the adoption of the Inter-Association Guidelines, NCAA bylaw 3.2.4.17.1 also incorporated a set of guidelines, referred to as the NCAA Concussion Safety Protocol Checklist, for all member institutions of the "Power 5 Conferences."<sup>80</sup> The "Power 5 Conferences" are comprised of the five most powerful and autonomous conferences in the nation.<sup>81</sup> These conferences include: The Atlantic Coast Conference, the Big Ten Conference, the Big-12 Conference, the Pac-12 Conference, and the Southeastern Conference.<sup>82</sup> The new protocol instituted a requirement that every member institution within the "Power 5 Conferences" submit its concussion guidelines annually to the Concussion Safety Protocol Committee, which was created by this legislation.<sup>83</sup> The protocol further mandates that institutions provide all relevant information to the committee upon its request concerning any incident where

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<sup>75</sup> *Id.*

<sup>76</sup> 2014-2015 NCAA Sports Medicine Handbook, [https://www.ncaa.org/sites/default/files/SMH\\_Guideline\\_21\\_20160217.pdf](https://www.ncaa.org/sites/default/files/SMH_Guideline_21_20160217.pdf) (last visited Oct. 16, 2017); *see also* Brian Burnsed, *New Guidelines Aim to Improve Student-Athlete Safety* (July 8, 2014), <http://www.ncaa.org/about/resources/media-center/news/new-guidelines-aim-improve-student-athlete-safety>.

<sup>77</sup> *See generally* 2014-2015 NCAA Sports Medicine Handbook, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> 2015-2016 NCAA Division I Manual § 3.2.4.17.1.

<sup>80</sup> *See* Thomas A. Buckley, EdD, Christine M. Baugh, MPH, William P. Meehan, III, MD & Melissa S. DiFabio, MEd, *Concussion Management Plan Compliance: A Study of NCAA Power 5 Conference School*, 5 ORTH. J. SPORTS MED. 4 (Apr. 25, 2017).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

a student-athlete sustained a concussion.<sup>84</sup> In addition to these rules, the NCAA embarked on a significant concussion study with the Department of Defense in 2014.<sup>85</sup>

In May of 2014, the NCAA in conjunction with the Department of Defense launched a thirty-million-dollar study on concussions that is managed by the Concussion Assessment, Research and Education (“CARE”) Consortium.<sup>86</sup> The CARE Consortium offers a large-scale study on student-athletes from over 30 campuses across the country that helps address the short-term and long-term effects of concussions, which is intended to fill the current gaps in concussion knowledge.<sup>87</sup> The NCAA notes that the purpose of the research is “to gain a better understanding of the neurobiopsychosocial nature of concussive injury and recovery in order to ultimately enhance the safety and health of our student-athletes, service members, youth sports participants, and the broader public.”<sup>88</sup> Over 40,000 participants have participated in the study with more than 3,000 individual concussions studied.<sup>89</sup> In January of 2017, some initial results of the study were released.<sup>90</sup> One result of their research was that student-athletes that are removed from play immediately after suffering a concussion return to play roughly two days faster than student-athletes who continue to play after the injury.<sup>91</sup> Another conclusion from the study was a shift in the attitudes regarding concussions. In a previous study, football players returned to play an average 6.7 days after their initial injury.<sup>92</sup> But in the recent study, student-athletes are returning to play an average of 14.3 days after suffering a concussion.<sup>93</sup> One last determination from the study was that two-thirds of the concussions occurred during practice, while the rest occurred during participation.<sup>94</sup> The NCAA believes that regulating contact in practice will affect the amount of concussions.<sup>95</sup> The CARE Consortium has seen developments in recent months. In the fall of 2017, the NCAA contributed an additional \$12.5 million to the CARE Consortium.<sup>96</sup> Additionally, in

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<sup>84</sup> See NCAA Division I Manual § 3.2.4.17.1, *supra* note 79; see also Johnson, *supra* note 22.

<sup>85</sup> NCAA, *NCAA DoD launch concussion study* (May 29, 2014), <http://www.ncaa.org/about/resources/media-center/news/ncaa-dod-launch-concussion-study>.

<sup>86</sup> *Id.*

<sup>87</sup> NCAA-DOD Grand Alliance Care Consortium, *Why was the CARE Consortium Created?*, <http://www.careconsortium.net/about/> (last visited Feb. 24, 2018).

<sup>88</sup> NCAA, *NCAA-DoD Care Consortium*, <http://www.ncaa.org/sport-science-institute/topics/ncaa-dod-care-consortium> (last visited Mar. 3, 2018).

<sup>89</sup> NCAA, *NCAA-DoD Care Consortium*, <http://www.ncaa.org/sport-science-institute/topics/ncaa-dod-care-consortium> (last visited Mar. 3, 2018).

<sup>90</sup> Brian Burnsed, *Researchers Discuss initial CARE concussion study findings* (Jan. 31, 2017), <http://www.ncaa.org/about/resources/media-center/news/researchers-discuss-initial-care-concussion-study-findings>.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> NCAA, *supra* note 89.

February of 2018, the NCAA and DOD solidified plans to transition from CARE's first phase (acute effects of concussion and repetitive impact exposure) to its next phase (persistent and cumulative effects of concussion and repetitive head impact exposure).<sup>97</sup>

a. Inherent Flaws of the NCAA's Concussion Management System

The NCAA's Concussion Management Plan contains inherent flaws that subject student-athletes to brain injuries that the legislation was designed to prevent. One issue is that the NCAA's CMP does not establish an entire concussion management plan that is uniform across every member institution; it only includes certain requirements that each member institution must include in their plan.<sup>98</sup> Outside of the requirements, member institutions have complete discretion when it comes to concussion protocol in their individual plans.<sup>99</sup> For example, if a member institution wants to ask their quarterback to recite the alphabet and assume that's enough, they're allowed to do so.<sup>100</sup> This flaw has been partially remedied for member institutions that comprise the "Power 5 Conferences" because each member institution is required to submit its plans to the Concussion Safety Protocol Committee for review. This does not create a uniform concussion protocol for these institutions, but it does ensure that their plans meet the best-known practices for concussion management. While this is a step in the right direction, it still leaves over 1,000 member institutions whose plans are not being reviewed. Because additional research on concussion management continues to develop, a uniform concussion management system may be on the horizon.

The second issue is that the duty to report concussions falls on student-athletes.<sup>101</sup> Student-athletes face three issues when it comes to reporting concussions. First, student-athletes are often not capable of determining if they have concussion symptoms.<sup>102</sup> Student-athletes may not be able to recognize if they are experiencing concussions symptoms due to a lack of education about the symptoms or because they are not medically capable to make determinations about symptoms.<sup>103</sup> Secondly, even if student-athletes are aware of concussion symptoms, they do not want to report those symptoms for fear of losing their spot on the team and financial support.<sup>104</sup> If a student-athlete has to cease participation due to a concussion, another player has to step in and take his or her place. If the replacement player performs well enough, the concussed

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<sup>97</sup> *See id.*

<sup>98</sup> 2015-2016 NCAA Division I Manual art. 3.2.4.17, *supra* note 19; *see also* Kevin Trahan, *Another week of head injuries shows college football's concussion problem isn't going away*, SBINATION (Nov. 22, 2015), <https://www.sbnation.com/college-football/2015/11/22/9777392/ncaa-concussion-protocol-trainers>.

<sup>99</sup> Trahan, *supra* note 98.

<sup>100</sup> *Id.*

<sup>101</sup> 2015-2016 NCAA Division I Manual art. 3.2.4.17, *supra* note 19. Section 3.2.4.17(a) of the NCAA Division I Manual requires students to acknowledge that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member.

<sup>102</sup> Johnson, *supra* note 22, at 1068.

<sup>103</sup> *Id.*; *see also* Reilly, *supra* note 29, at 276.

<sup>104</sup> Johnson, *supra* note 22, at 1070, 1071.

student-athlete may never see the field again. Also, many student-athletes benefit from athletic scholarships or financial assistance. If a student-athlete is unable to play for a certain period of time because of his or her concussion, financial assistance may be revoked.<sup>105</sup> This incentivizes student-athletes to conceal concussion symptoms. Lastly, the stigma that athletes must be fierce competitors deters student-athletes from reporting their symptoms.<sup>106</sup> Student-athletes believe that disclosing injuries is a sign of weakness, and they allow the contemporary culture of athletics to affect their decision to report concussion symptoms.<sup>107</sup>

The third issue is that coaches and medical personnel of member institutions have certain incentives to violate concussion management plans. Coaches' salaries and job security are reflected by winning percentage and championships, therefore, they want to have the best student-athletes on the field at all times.<sup>108</sup> Coaches are highly incentivized by winning, which sometimes comes at the cost of the student-athlete.<sup>109</sup> Moreover, college athletic trainers and medical personnel feel pressured by coaches to return concussed student-athletes to play before they are medically cleared to do so.<sup>110</sup> When trainers disagree with coaches about a student-athletes' ability to play, they often face repercussions.<sup>111</sup> This leads to highly questionable decisions on behalf of the team's medical staff in which student-athletes are returned to play and subjected to the risks of concussions.<sup>112</sup> These inherent flaws in the NCAA's Concussion Management Plan provide the rationale for an effective NCAA enforcement mechanism. If the NCAA were to improve enforcement, the inherent flaws would begin to diminish. A background of the NCAA's current infractions program will provide an understanding of the NCAA's process in enforcing its Constitution and bylaws.

### 3. The NCAA's Current Infractions Program

According to article 1.3.2 of the NCAA Manual, the NCAA enforcement process shall apply to a member institution when it fails to comply with the legislation.<sup>113</sup> The NCAA's enforcement power is executed through the NCAA's current Infractions Program, which is incorporated in article 19 of the NCAA Manual.<sup>114</sup> The NCAA's

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1072.

<sup>107</sup> *Id.*

<sup>108</sup> Pretty, *supra* note 43, at 2371.

<sup>109</sup> Johnson, *supra* note 22, at 1073.

<sup>110</sup> Brad Wolverton, *Coach Makes the Call: Athletic Trainers Who Butt Heads with Coaches Over Concussion Treatment Take Career Hits*, THE CHRONICLE OF HIGHER EDUCATION (Sept. 2, 2013), <https://www.chronicle.com/article/Trainers-Butt-Heads-With/141333>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> 2015-2016 NCAA Division I Manual art. 1.3.2; *see also* 2015-2016 NCAA Division I Manual art. 19.01.2 (stating that the infractions program shall hold institutions, coaches, administrators, and student-athletes who violate the constitutions and bylaws accountable for their conduct, both at the individual and institutional levels).

<sup>114</sup> *see generally* 2015-2016 NCAA Division I Manual art. 19.

infractions process begins with the legislation that the NCAA adopts.<sup>115</sup> When a member institution or student-athlete has allegedly violated a rule or bylaw, the NCAA enforcement staff investigates, provides notice of a potential violation to member institutions and involved individuals, and presents information about potential violations to the appropriate division's Committee on Infractions ("COI").<sup>116</sup> Subsequently, the COI considers the facts and the positions of all affected parties.<sup>117</sup> Members of the COI then deliberate, conclude whether a violation has occurred, and issue a written decision.<sup>118</sup> If the COI believes an infraction occurred, a penalty will be rendered. In Division I athletics, violations fall into one of four categories: (1) Severe Breach of Conduct; (2) Significant Breach of Conduct; (3) Breach of Conduct; and (4) Incidental Infraction.<sup>119</sup> In Division II and Division III athletics, the violations fall into two categories: (1) Major Violations; and (2) Secondary Violations.<sup>120</sup> If a member institution or affected individual does not agree with the COI's decision, they are permitted to request a review of the decision.<sup>121</sup> If the decision is confirmed, the COI is responsible for ensuring compliance with the penalties and requirements.<sup>122</sup> This infractions program was created to ensure that member institutions abide by the NCAA Constitution and bylaws that have been established, but the NCAA has failed to utilize this program correctly. As a result of the implementation and subsequent violations of the NCAA's Concussion Management Plan as well as the NCAA's problematic response, lawsuits have been filed regarding the NCAA's management of concussions.

*D. Lawsuits against the NCAA in regards to Concussion Management*

*I. In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*

The first class action settlement reached on this issue occurred in the case of *In re National Collegiate Athletic Association Student-Athlete Concussion Injury*.<sup>123</sup> The lawsuit originated from a complaint filed by Adrian Arrington.<sup>124</sup> The proposed settlement class contained all persons who played an NCAA-sanctioned sport at

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<sup>115</sup> NCAA, *Division I Infractions Process*, <http://www.ncaa.org/enforcement/division-i-infractions-process> (last visited Feb. 15, 2018).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See 2015-2016 NCAA Division I Manual art. 19.1.

<sup>120</sup> NCAA, *supra* note 115

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*; see also Appendix, A.

<sup>123</sup> *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, 314 F.R.D. 580 (N.D. Ill. 2016).

<sup>124</sup> See generally Complaint, *Arrington v. NCAA*, No. 11-cv-06356 (N.D. Ill. July 19, 2013).

an NCAA member institution on or prior to the Preliminary Approval Date.<sup>125</sup> The plaintiffs contended that the NCAA was negligent when it breached its duty to student-athletes at NCAA member institutions. It breached its duty by: (1) by failing to adopt appropriate rules regarding concussions and reasonably enforcing those rules; (2) failing to address and/or correct the coaching of tackling methodologies that lead to concussions; (3) failing to warn student-athletes of the risk of unreasonable harm resulting from repeated concussions; and (4) failing to implement a support system for students who, after sustaining concussions, are unable to either play football or lead a normal life.<sup>126</sup> A preliminary settlement was reached for \$75 million, with the NCAA refusing to admit any fault.<sup>127</sup> A final hearing is required in order to determine if the settlement is fair, reasonable, and adequate.<sup>128</sup> The final fairness hearing took place on February 25, 2019.<sup>129</sup> Of the \$75 million, \$70 million will be allocated to a Medical Monitoring Program for student-athletes that will last for fifty years.<sup>130</sup> The other \$5 million of the settlement will be allocated to concussion related research for the first ten years of the Medical Monitoring Period.<sup>131</sup> This settlement has had a significant effect on the NCAA.

On one hand, the NCAA knew that it needed to improve the Concussion Management Plan. In response to the preliminary approval, the NCAA has agreed to implement six changes to the Concussion Management Plan.<sup>132</sup> In addition, the ruling stated that no future claims shall be brought against the NCAA on a class wide basis

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<sup>125</sup> *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, 314 F.R.D. at 584.

<sup>126</sup> *See Arrington, supra* note 124.

<sup>127</sup> *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, 314 F.R.D. at 584.

<sup>128</sup> *National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, <http://www.collegeathleteconcussionsettlement> (last visited Feb. 28, 2018).

<sup>129</sup> Zachary Zagger, *NCAA Will Likely Face Over 200 New Concussion Suits*, LAW 360 (Jan. 19, 2019),

<https://www.law360.com/articles/1122373/ncaa-will-likely-face-over-200-new-concussion-suits>.

<sup>130</sup> *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, 314 F.R.D. at 585.

<sup>131</sup> *Id.* at 586.

<sup>132</sup> *Id.*

The NCAA will require: (1) that all student-athletes must undergo baseline testing before participation in the sport; (2) A student-athlete who has been diagnosed with a concussion will be prohibited from returning to participation on the same day her or she sustained the concussion and must be cleared by a physician before returning to participation; (3) Medical personnel who are trained in diagnosing, treatment, and management of a concussion are required to be at all games of Contact Sports; (4) the institution of a uniform process for schools to report diagnosed concussions and their resolution, and for concerned persons to directly report potential problems directly to the NCAA; (5) member institutions to provide concussion training and education to student-athletes, coaches, and trainers before the season begins; and (6) education for faculty with respect to accommodations for students suffering from concussions.

in relation to concussions.<sup>133</sup> One modification was made to this statement, which states that personal injury claims are allowed to be pursued on a class-action basis as long as those suits do not seek a nationwide class or a class consisting of athletes from more than one NCAA member institution.<sup>134</sup> As a result, lawsuits have flooded the courts.<sup>135</sup> As of February, 2019, the NCAA is facing over 300 class-action lawsuits on behalf of former student-athletes in relation to the management of concussions.<sup>136</sup>

## 2. Sheely v. NCAA

The next significant lawsuit filed against the NCAA related to concussion management emerged from the death of a college football player. Derek Sheely was a football player at Frostburg State University, a Division III college in Maryland.<sup>137</sup> Over a series of Frostburg State football practices in August of 2011, Sheely participated in dangerous preseason practice drills. During the practices, Sheely began to persistently bleed out of his forehead.<sup>138</sup> Sheely told his coach that he did not feel right and that he had a headache.<sup>139</sup> The coach insisted that he continue the drills, and shortly thereafter, Sheely collapsed.<sup>140</sup> He died six days later.<sup>141</sup> Sheely's family believed that Derek died from Second Impact Syndrome.<sup>142</sup> Sheely's family filed a wrongful death lawsuit in 2013 against the NCAA, members of the Frostburg State coaching staff, and the helmet manufacturer Schutt.<sup>143</sup> Sheely's family claimed that

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<sup>133</sup> Jon Solomon, *NCAA Settlement: Football Players Carry 3 Times risk of CTE Symptoms*, CBS (July 30, 2014), <https://www.cbssports.com/college-football/news/ncaa-settlement-football-players-carry-3-times-risk-of-cte-symptoms/>.

<sup>134</sup> Steve Berkowitz, *Ex-College Football Players Sue NCAA, Conferences, Schools over Concussions*, USA TODAY (July 14, 2016), <https://www.usatoday.com/story/sports/ncaaf/2016/05/17/former-college-football-players-sue-ncaa-concussions-lawsuit/84491572/>.

<sup>135</sup> See Associated Press, *supra* note 66.

<sup>136</sup> Ralph D. Russo, *Wave of concussion lawsuits to test NCAA's liability*, LAW 360 (Feb. 7, 2019), <https://apnews.com/4a4ed68e4c3a426abc4e34606ae4a399>.

<sup>137</sup> Michael Dresser, *NCAA, State Reach Settlement in Case of Frostburg Football Player Who Died After Head Injury*, THE BALT. SUN (July 27, 2016), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ncaa-lawsuit-20160725-story.html>.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Jon Solomon, *Judge Rules NCAA Must Go to Trial in Death of Football Player*, CBS (Apr. 6, 2016), <https://www.cbssports.com/college-football/news/judge-rules-ncaa-must-go-to-trial-in-death-of-football-player/>.

<sup>143</sup> SI Wire, *NCAA Faces Trial After Ruling in Death of DIII Football Player*, SPORTS ILLUSTRATED (Apr. 6, 2016), <https://www.si.com/college-football/2016/04/06/ncaa-trial-judge-ruling-death-derek-sheely-frostburg-state>.



the NCAA was negligent, which resulted in Derek's death.<sup>144</sup> They also claimed that the NCAA failed to enforce or investigate its concussion rules.<sup>145</sup> The NCAA's main argument was that it does not have a duty to protect student-athletes.<sup>146</sup> The court denied the NCAA's motion for summary judgment because the NCAA has a "special relationship" to student-athletes since its mission statement states its commitment to protect those athletes.<sup>147</sup> It was also determined that Second Impact Syndrome is not an inherent risk of football, so a legal duty to warn exists, and there is enough dispute in the case for a jury to hear the arguments.<sup>148</sup> The lawsuit was eventually settled in 2016 for 1.2 million dollars.<sup>149</sup>

### 3. Brandon et al. v. NCAA & Mason v. NCAA

While the previous lawsuits claimed that the NCAA was negligent in its management of concussions, a new wave of lawsuits have been filed against the NCAA under a different legal theory.<sup>150</sup> Former student-athletes have been challenging the NCAA on a breach of contract basis.<sup>151</sup> Contractual challenges against the NCAA are not unheard of but they are by no means common. The natural question to ask is: what contract do the NCAA and student-athletes enter into with each other? There is no contract between the NCAA and a student-athlete, but an action for breach of contract can be brought when the parties to a contract intended the contract to benefit a third party.<sup>152</sup> In order for a school to become a member institution, it must agree to abide by and enforce the NCAA's Constitution and bylaws.<sup>153</sup> "It is unquestionable that the contract between the NCAA and a member institution is meant to confer a benefit to student-athletes. Member institutions promise to enforce the NCAA's legislation as it relates to student-athletes and "protect and enhance the physical and educational well-being of student-athletes."<sup>154</sup> Therefore, student-athletes can be identified as third party beneficiaries to the contract between a member

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<sup>144</sup> Complaint at 43, *Kristen L. Sheely et al. v. NCAA*, No. 380569-V (Montgomery Cnty. Ct. Md. Aug. 22, 2013).

<sup>145</sup> *Id.* at 19.

<sup>146</sup> Solomon, *supra* note 142.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> David Dishneau, *NCAA to Pay \$1.2 Million to Settle Lawsuit in Death of Frostburg Football Player*, THE BALTIMORE SUN (Aug. 8, 2016 3:32 PM), <http://www.baltimoresun.com/news/maryland/bs-md-ncaa-settlement-20160808-story.html>.

<sup>150</sup> See *Brandon et al. v. NCAA*, No. 1:17-cv-00074 (S.D. Ind. Jan. 9, 2017); *Mason v. NCAA*, No. 2:16-cv-01536 (W.D. Pa. Nov. 29, 2016) (both plaintiffs are former student athletes filing recent breach of contract claims against the NCAA claiming that it violated the Constitution and its Bylaws by failing to make sure collegiate athletics were being conducted in a safe manner).

<sup>151</sup> *Id.*

<sup>152</sup> See *Oliver v. NCAA*, 920 N.E.2d 203, 211 (Ohio 2009).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

institution and the NCAA. Student-athletes claim that the NCAA has breached the contract in a couple of ways. First, the NCAA breached Article 2.2 of the NCAA Constitution<sup>155</sup> by failing to conduct intercollegiate athletics in a manner designed to protect and enhance the physical and educational well-being of student-athletes.<sup>156</sup> Secondly, the NCAA breached Article 2.2.3<sup>157</sup> by failing to enforce the requirement that each member institution protect the health of, and provide a safe environment for, each of its student-athletes.<sup>158</sup> The plaintiffs in these cases are seeking damages for injuries that they have suffered as a result of the alleged breach of contract on behalf of the NCAA.<sup>159</sup> The causes of action asserted in these cases provide a useful avenue for student athletes to challenge the NCAA's mismanagement of concussions.

#### 4. The “Bellwether” Cases

The “Bellwether” cases are integral to this area and will determine the future of NCAA concussion litigation. Because student athletes are only permitted to pursue personal injury claims on a personal or limited class-action basis, hundreds of cases have been filed against the NCAA and member institutions.<sup>160</sup> The hundreds of cases have been consolidated as part of a multidistrict litigation (“MDL”) and are proceeding in front of Judge Lee of the Northern District Court of Illinois, the same judge who presided over *In Re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*.<sup>161</sup> Four “sample cases” have been chosen out of the hundreds to determine whether the remainder of the cases shall proceed.<sup>162</sup> Both the plaintiffs and the defendants chose two cases that they believed were best representations of the entire class.<sup>163</sup> These cases are being called the “Bellwether” cases.<sup>164</sup> These cases are still in their infancy, but in one of the cases that the NCAA chose, *Rose et al v. National Collegiate Athletic Association et al*, Judge Lee denied the NCAA's motion to dismiss with regards to the plaintiff's claims for negligence,

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<sup>155</sup> 2015-2016 NCAA Division I Manual art. 2.2, *supra* note 64. Article 2.2 states, “Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”

<sup>156</sup> Complaint at 48, Brandon et al., No. 1:17-cv-00074

<sup>157</sup> 2015-2016 NCAA Division I Manual art. 2.2.3. Article 2.2.3 states, “It is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.”

<sup>158</sup> Complaint at 48, Brandon et al., No. 1:17-cv-00074.

<sup>159</sup> *Id.* at 59.

<sup>160</sup> Russo, *supra* note 136. As of February, 2019, over 300 lawsuits had been filed against the NCAA. *Id.*

<sup>161</sup> Zagger, *supra* note 129.

<sup>162</sup> Peter A. Carfagna, *Representing the Professional Athlete*, 52 (West, 3<sup>rd</sup> ed. 2018). The cases are: (1) *Langston et al v. Mid-America Intercollegiate Athletics Association et al*; (2) *Weston v. Big Sky Conference, Inc., et al*; (3) *Richardson v. Southeastern Conference, et al*; (4) *Rose et al v. National Collegiate Athletic Association et al*.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

fraudulent concealment, and breach of expressed contract.<sup>165</sup> The “Bellwether” cases carry the weight of the remaining concussion cases, and the more successful they are, the worse it will get for the NCAA.

## II. HOW THE NCAA IS FAILING ITS STUDENT-ATHLETES AND PROPOSED SOLUTIONS THAT WILL PROTECT STUDENT ATHLETES IN THE FUTURE

### A. *The NCAA’s Failure to Enforce its Concussion Management Plan*

The NCAA has failed to adequately enforce its Concussion Management Plan, which has created a set of rules without any teeth.<sup>166</sup> Chris Strobel, the NCAA’s Director of Enforcement, stated, “The [concussion] legislation was specifically written to require institutions to have a plan and describe what minimum components had to be part of the plan. The policy was not about whether or not they were following their plan—except for those isolated circumstances of systematic or blatant violations.”<sup>167</sup> This exhibits the NCAA’s desire not to enforce the plan. As previously mentioned, inherent inefficiencies exist within the CMP, but they can be remedied through proper enforcement, and therefore, enforcement is the NCAA’s key problem. The enforcement dynamic for the NCAA is two-fold: (1) the enforcement that member institutions have a concussion management plan in accordance with bylaw 3.2.4.17 and (2) The NCAA’s enforcement that the member institutions adhere to those plans.<sup>168</sup>

Initially, the NCAA only required that member institutions create some form of concussion plan that contained the four requirements.<sup>169</sup> It put the responsibility of implementing and enforcing the plan upon member institutions themselves, and the NCAA would only get involved when systematic violations existed.<sup>170</sup> In a 2014 study, Christine Baugh, a doctoral candidate at Harvard University at the time, surveyed coaches, sports medicine clinicians, and compliance administrators at schools to determine how well they were implementing concussion management plans.<sup>171</sup> Only roughly 82% of the respondents stated that their school had a

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<sup>165</sup> Rick Archer, *NCAA Must Face Ex-Purdue Players’ Concussion Claims*, LAW 360 (Oct. 1, 2018), <https://www.law360.com/articles/1087735/ncaa-must-face-ex-purdue-players-concussion-claims>.

<sup>166</sup> Jon Solomon, *Why the NCAA Won’t Adopt Concussion Policies—At Least Not Yet*, CBS (Feb. 18, 2015), <https://www.cbssports.com/college-football/news/why-the-ncaa-wont-adopt-concussion-penalties----at-least-not-yet/>; see also Johnson, *supra* note 22, at 1059.

<sup>167</sup> Stav Ziv, *How Well Are Schools Following the NCAA’s Concussion Policy*, NEWSWEEK (Oct. 25, 2014), <http://www.newsweek.com/how-well-are-schools-following-ncaas-concussion-policy-279821>.

<sup>168</sup> Ganim, *supra* note 22; see also Johnson, *supra* note 22, at 1058; see also Keating, *supra* note 1.

<sup>169</sup> See NCAA Division I Manual, *supra* note 79.

<sup>170</sup> See Johnson, *supra* note 22, at 1058.

<sup>171</sup> Christine M. Baugh & Emily Kroshus, *Concussion Management in U.S. College Football: Progress and Pitfalls*, 1 CONCUSSION 49 (Aug. 6, 2015).

concussion management plan in place.<sup>172</sup> This shows clear disregard for the NCAA's Concussion Management Plan. The NCAA eventually took steps to partially combat this problem by requiring that every member institution in one of the "Power 5 Conferences" submit its concussion protocol to the Concussion Safety Protocol Committee and provide relevant information to the committee, upon request, concerning any incident where a student-athlete sustained a concussion.<sup>173</sup> According to a study published in 2017, overall compliance with the NCAA's Concussion Management Plan was high for these member institutions.<sup>174</sup> A glaring problem with this piece of legislation is that it only applies to "Power 5 Conference" member institutions. "Power 5 Conferences" only comprise 65 of the upwards of 1,200 NCAA member institutions.<sup>175</sup> This leaves over one-thousand NCAA institutions whose concussion management plans are not being reviewed.<sup>176</sup>

The second issue is that the NCAA is not investigating and applying its proper enforcement procedures when member institutions do not comply with the concussion management plans they have adopted.<sup>177</sup> The NCAA puts the responsibility of enforcing concussion management plans and reporting violations on the member institutions themselves.<sup>178</sup> Since the NCAA concussion policy's implementation, a member institution has yet to report a violation to the NCAA.<sup>179</sup> There are many factors that lead member institutions to willfully disregard their concussion management plans and many reasons why they do not report this non-compliance. For example, a conflict of interest exists for member institutions when they are required to report violations of their respective concussion management plans.<sup>180</sup> Member institutions do not want to report violations because they do not want to be penalized, show a lack of institutional control, and make themselves vulnerable to litigation.<sup>181</sup> Even though the NCAA is aware of this, it is still not investigating or applying its enforcement procedures when member institutions violate their concussion management plans.<sup>182</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> 2015-2016 NCAA Division I Manual § 3.2.4.17.1, *supra* note 79; *see also* Thomas A. Buckley, EdD et al., *supra* note 80.

<sup>174</sup> Buckley, EdD et al., *supra* note 80.

<sup>175</sup> NCAA, *Member Institutions*, <http://www.ncaa.org/about/who-we-are/membership> (last visited Nov. 17, 2017).

<sup>176</sup> Baugh & Kroshus, *supra* note 171.

<sup>177</sup> *See* Johnson, *supra* note 22, at 1087.

<sup>178</sup> 2015-2016 NCAA Division I Manual art. 1.3.2, *supra* note 113.

<sup>179</sup> *See* Johnson, *supra* note 22, at 1084.

<sup>180</sup> *Id.* at 1067.

<sup>181</sup> *Id.* at 1084.

<sup>182</sup> *See* Keating, *supra* note 1; *see also* Dan Diamond, *Arizona Just Broke the NCAA's Concussion Policy. Will it Matter?*, FORBES (Oct. 27, 2012, 9:27 PM), <https://www.forbes.com/sites/dandiamond/2012/10/27/arizona-just-broke-the-ncaas-concussion-policy-will-it-matter/#1c94e94d4e06> (illustrating the NCAA's failure to apply its

*B. Why Previous Lawsuits Will Not Reach the Preferred Outcome*

The previous negligence and breach of contract lawsuits against the NCAA will not stimulate the change that is needed in order to protect student-athletes from concussions and long-term effects of concussions in the future. However, these previous lawsuits do provide a valid framework for future compelling lawsuits against the NCAA.<sup>183</sup> The claims assert that the NCAA breached its duty to student-athletes and/or the contract between the NCAA and member institutions with student-athletes as third party beneficiaries.<sup>184</sup> The problem with these lawsuits is that the remedy for the student-athletes is monetary damages. While damages may be a sufficient remedy for the student-athletes that are filing the lawsuits, it will provide no protection to the future student-athletes who are still susceptible to the flawed NCAA procedures that result in concussions and long-term effects of those concussions. Future student-athletes will not be protected if the NCAA is only required to continue shelling out monetary payments. The only way for student-athletes to create a structural change in the NCAA is through a contractual lawsuit filed by current student-athletes that seeks specific performance as a remedy.

*C. A Judicial Challenge that Will Force the NCAA to Change*

The NCAA's Concussion Management Plan needs to be enforced, and investigations need to be launched when member institutions do not implement concussion management plans or fail to comply with concussion management plans or else student-athletes will continue to suffer brain injuries and their lives will never be the same. Action outside of the NCAA needs to be taken in order to overcome this hurdle and to help protect the well-being of student-athletes. One way for this to happen is through the judicial system. A student-athlete must file a contractual challenge against the NCAA demanding specific performance as the remedy. A successful suit would compel the NCAA to ensure all member institutions implement a concussion management plan and apply the proper enforcement procedures when member institutions do not comply with it.

Unlike the previous lawsuits, a former NCAA student-athlete will most likely not file this lawsuit because he or she would be seeking monetary damages from the NCAA, not specific performance. Therefore, a current student-athlete must file the claim against the NCAA. Plaintiffs who assert contractual challenges against the NCAA have not had a problem showing standing.<sup>185</sup> A party has standing to seek relief when he or she has suffered actual injury to a legally protected interest.<sup>186</sup> Just as the student-athletes challenging the NCAA on a contractual basis in previous cases, there is no contract between the NCAA and student-athletes. However, student-athletes are

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proper enforcement procedures when The University of Arizona's quarterback was returned to play with an obvious concussion).

<sup>183</sup> See generally Complaint, Kristen L. Sheely et al. v. NCAA, No. 380569-V; *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, 314 F.R.D. 580; Brandon et al. v. NCAA, No. 1:17-cv-00074; Mason v. NCAA, No. 2:16-cv-01536.

<sup>184</sup> *Oliver*, 920 N.E.2d at 211.

<sup>185</sup> *Bloom v. NCAA*, 93 P.3d 621 (Colo.App. 2004); *Oliver*, 920 N.E.2d, 203.

<sup>186</sup> *Bloom*, 93 P.3d at 623 (citing *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1314 (Colo. App. 1998)).

third party beneficiaries to the contract between the NCAA and their respective member institutions because the NCAA's Constitution and bylaws provide a clear intent to benefit student-athletes.<sup>187</sup> Because they are third party beneficiaries, they have a legally protected interest, and therefore, have standing to challenge the NCAA.<sup>188</sup>

Next, the student-athlete will need to demonstrate the NCAA's conduct that establishes a breach of the contract. In order to establish a breach of contract, the student-athlete(s) must show that the NCAA failed to perform a material obligation under the contract.<sup>189</sup> Similar to the previous contractual challenges to the NCAA, the student-athlete bringing this lawsuit will state that the NCAA's material breach occurred when the NCAA failed to perform certain obligations it had within its constitution and bylaws. Four expressed provisions of the NCAA's constitution and bylaws will be challenged on behalf of the student-athletes. The first challenged provision will be Bylaw 3.2.4.17, which contains the Concussion Management Plan.<sup>190</sup> This states that "Each member institution shall have a concussion management plan for its student-athletes."<sup>191</sup> The NCAA has violated this clause by not ensuring that every member institution is equipped with a concussion management plan. Only members of the "Power 5 Conferences" are required to submit their concussion management plans to the NCAA.<sup>192</sup> This means that the NCAA is not ensuring the existence of a concussion management plan for over 1,000 member institutions.<sup>193</sup> The second is Article 2.2 of the NCAA constitution which states, "Intercollegiate athletic programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes."<sup>194</sup> The third challenged provision is Article 2.2.3.<sup>195</sup> This section requires "each member institution to protect the health of, and provide a safe environment for, each of its participating athletes."<sup>196</sup> The last challenged provision will be Article 1.3.2 which states that the NCAA enforcement process shall apply to a member institution when it fails to apply the legislation.<sup>197</sup> The NCAA is breaching these last three provisions by failing to apply its enforcement procedures when member institutions violate their concussion management plans. By not applying its proper enforcement procedures, it is clearly not abiding by proper enforcement procedures, protecting student-athletes' physical well-being, or providing a safe environment for student-athletes. The NCAA is leaving student-athletes severely vulnerable to concussions and long-term effects of concussions.

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<sup>187</sup> *Bloom*, 93 P.3d at 624.

<sup>188</sup> *Id.*

<sup>189</sup> *Hall v. NCAA*, 985 F.Supp. 782, 797 (N.D.Ill. 1997).

<sup>190</sup> 2015-2016 NCAA Division I Manual § 3.2.4.17, *supra* note 79.

<sup>191</sup> *Id.*

<sup>192</sup> Buckley, EdD et al., *supra* note 80.

<sup>193</sup> *Id.*

<sup>194</sup> 2015-2016 NCAA Division I Manual art. 2.2, *supra* note 64.

<sup>195</sup> 2015-2016 NCAA Division I Manual art. 2.2.3, *supra* note 157.

<sup>196</sup> *Id.*

<sup>197</sup> 2015-2016 NCAA Division I Manual art. 1.3.2, *supra* note 113.

The last and most dynamic piece to this lawsuit would be the remedy demanded by the student-athletes. In order to bring about change in the NCAA to protect students from immediate and future injuries, the student-athlete(s) bringing this lawsuit are going to need to demand specific performance as a remedy. By demanding specific performance, student-athlete(s) are asking the court to compel the NCAA to abide by its contractual duties and force the NCAA to ensure all member institutions implement a concussion management plan and apply the appropriate enforcement mechanism when member institutions violate their plans.

A court will first have to find that it has the authority to intervene in a matter between student-athletes and the NCAA. The student-athlete will claim that courts have the authority to intervene in a matter between themselves and the NCAA, which is a voluntary association.<sup>198</sup> The general rule is that "Courts will not interfere with the management and internal affairs of a voluntary association."<sup>199</sup> However, in another case against the NCAA, the court found that courts were authorized to intervene.<sup>200</sup> The court found that the necessity of court action is apparent where the position of a voluntary association is so dominant in its field that membership in a practical sense is not voluntary but economically necessary.<sup>201</sup> In *Board of Regents v. NCAA*, the courts chose to intervene when the plaintiffs were challenging the NCAA.<sup>202</sup> In this case, the student-athletes will also be challenging the all-powerful NCAA, so courts will be likely to intervene in matters with the NCAA.

After establishing the ability for the courts to interfere, it is necessary for the student-athlete to show that the court is justified in granting specific performance. The equity to compel specific performance of a contract arises where an agreement, binding at law, has been infringed, and the remedy at law by damages is inadequate.<sup>203</sup> The NCAA is subjecting student-athletes to repetitive brain injuries and long-term effects as a result of those brain injuries by not enforcing the clauses in its Constitution and bylaws. No amount of monetary damages will be able to reconcile the damage done to these student-athlete(s)' brains. Student-athletes will have to convince the court that loss of cognitive ability and the ability to live a fully functional life cannot be cured by any amount of money. Awarding monetary damages to student-athletes for the injuries that they suffer as a result of concussions begs the question: how much do student-athletes' lives cost? This is the wrong question to ask. The NCAA has an obligation to protect student-athletes, and it is not fulfilling that obligation. The question that should be asked is: When will the NCAA do what is right and what they are obligated to do? The courts can answer this question. If the NCAA does not begin to enforce these rules, it will continue to perpetuate the crisis of student-athlete concussions and subsequent long-term effect of those concussions. If ruled in the student-athlete(s)' favor, the court would compel the NCAA to ensure that every

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<sup>198</sup> Reilly, *supra* note 29, at 271.

<sup>199</sup> *Levant v. Whitley*, 755 A.2d 1036, 1043 (D.C. 2000).

<sup>200</sup> *Bd. of Regents v. NCAA*, 707 F.2d 1147 (10th Cir.1983).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Dow v. N. R.R.*, 36 A. 510, 543 (N.H. 1886); *see also Cent. Coast Baptist Assn. v. First Baptist Church of Las Lomas*, 65 Cal.Rptr.3d 100 (2007) (holding that a church violated a clause in its bylaws and ordered enforcement of that clause).

member institution is equipped with a concussion management plan and apply its enforcement procedures when member institutions violate their concussion management plans.

*D. Compel Submission of Concussion Management Plans for All Member Institutions*

While Litigation against the NCAA can achieve the desired result, downsides do exist; it can be incredibly lengthy, costly, and no one can predict a jury verdict. Therefore, an expeditious two-step solution exists to help protect student-athletes from brain injuries. The first step is to ensure that all member institutions are implementing a concussion management plan that abides by the Inter-Association Consensus: Diagnosis and Management of Sport-Related Concussion Guidelines as required under NCAA bylaw 3.2.4.17.1.<sup>204</sup> In order to do this, an expansion program to the Concussion Safety Protocol Committee needs to be developed. Currently, the Concussion Safety Protocol Committee reviews concussion management plans of member institutions within the “Power 5 Conferences.”<sup>205</sup> As noted above, compliance with the NCAA’s CMP among member institutions of the “Power 5 Conferences” has been high.<sup>206</sup> The concern is that over 1,200 more schools fall outside of the “Power 5 Conferences” than those that fall within it.<sup>207</sup> It is time for the Concussion Safety Protocol Committee to begin expanding its assessment of concussion management plans to member institutions outside of the “Power 5 Conferences.”

In order to achieve the utilitarian result and protect as many student-athletes as possible, every member institution in the country must submit its concussion management plan to ensure compliance with Inter-Association Consensus: Diagnosis and Management of Sport-Related Concussion Guidelines.<sup>208</sup> In order to review every member institution’s concussion management plan, there needs to be a procedure that includes an increase in the number of Concussion Management Protocol Committee personnel reviewing plans and a gradual increase in the number of plans submitted for review. Additional funding will need to be appropriated by the NCAA to the Concussion Safety Protocol Committee in order to provide the resources needed for the increased volume of plans to be reviewed. The procedure for reviewing plans will start with the review of the remaining Division I member institutions outside of the “Power 5 Conferences.” As funding and resources accumulate, the Concussion Safety Protocol Committee’s operation will be able to expand to encapsulate Division II and Division III member institutions. Because the Concussion Safety Protocol Committee currently exists within the NCAA’s CMP, the expansion will be implemented through the NCAA’s legislative process and funded by NCAA revenue. Further information on options for NCAA funding is provided in the next section.

An alternative format to ensure that every member institution’s concussion management plan is reviewed is to have conferences, instead of the NCAA, implement a review process. Each conference in the country would be responsible for establishing

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<sup>204</sup> 2015-2016 NCAA Division I Manual § 3.2.4.17.1, *supra* note 79.

<sup>205</sup> *Id.*

<sup>206</sup> Buckley, EdD et al., *supra* note 80.

<sup>207</sup> NCAA, *Member Institutions*, <http://www.ncaa.org/about/who-we-are/membership> (last visited Nov. 17, 2017).

<sup>208</sup> 2015-2016 NCAA Division I Manual § 3.2.4.17.1, *supra* note 79.



and funding its own committee to review member institution concussion management plans. By having conferences implement the committee, the cost will be more manageable than having the NCAA bear the entire cost of reviewing every concussion management plan. Both frameworks will begin to give student-athletes the protection they deserve. The second step of the solution addresses the NCAA's failure to apply its proper enforcement mechanism when member institutions violate their concussion management plans.

#### *E. Creation of the Concussion Safety Oversight Committee*

The second step will begin to help protect student-athletes from brain injuries in the near future. It is the creation of the Concussion Safety Oversight Council ("CSOC") through the Higher Education Act or state legislatures. The NCAA concussion protocol is not perfect. There is no question about the existence of inherent flaws in the protocol that need to be addressed through future legislation. However, the current protocol has the potential to give protection to student-athletes, but it must be enforced.<sup>209</sup> The CSOC is a distinct regulatory body that will enforce the NCAA Concussion Management Plan and provide teeth to the legislation.

##### *1. Structure of the Concussion Safety Oversight Committee*

The CSOC will function as an enforcement committee that will assure compliance with the NCAA's Concussion Management Plan among member institutions. The purpose of the CSOC is to investigate and penalize member institutions for violating the NCAA's Concussion Management Plan.<sup>210</sup> At its inception, the committee will only investigate member institutions that belong to the "Power 5 Conferences." However, if the committee proves to be successful, an expansion program will be implemented so that the CSOC will be able to encompass all member institutions. The CSOC will exist in one of two forms, a subcommittee within the current NCAA Infractions Program or as a separate enforcement committee outside of the current NCAA Infractions Program.

As a subcommittee within the currently existing Infractions Program, the CSOC would work as a distinct investigative branch with the sole purpose of investigating and discovering violations of the NCAA's CMP. The committee would need to be comprised of 130 members, which accounts for two members for every member institution within one of the "Power 5 Conferences." The job of each committee member is to attend member institution sporting events and practices, document evidence of how the athletic training staff managed a potential concussion, and prepare a report detailing what occurred. The committee member will then review the member

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<sup>209</sup> A majority of the current NCAA CMP inefficiencies exist due to the lack of an enforcement mechanism. If member institutions were disciplined for not having concussion management plans or for violating plans that they have implemented, the inherent flaws would begin to disappear.

<sup>210</sup> The purpose of the NCAA Infractions Program is to "uphold integrity and fair play among the NCAA membership, and to prescribe appropriate and fair penalties if violations occur." 2015-2016 NCAA Division I Manual art. 19.01.1. The purpose of the CSOC is not to promote fairness and uphold the integrity of fair play; the purpose is brain safety for student athletes. Another advantage of the CSOC is that it will allow the committee to compare concussion management plans between member institutions and begin to determine which policies are pragmatically most effective in handling concussions and preventing future brain trauma.

institution's concussion management plan and decide whether or not a violation occurred. If the committee member believes a violation occurred, he or she will present the case to the Committee on Infractions. At this point in time, the case would proceed through the NCAA's Infractions Program as any other case.<sup>211</sup>

If the committee is created as a completely distinct entity to the currently existing enforcement program, it will take a different form; it can be governed by the NCAA or an independent third party organization such as the Department of Defense or Lead I Association—the DOD is currently partnered with the NCAA in concussion research.<sup>212</sup> The committee will be comprised of two members per member institution (130 total for the "Power 5 Conferences"), a five-member review board, and a three-member appeals board. Just as if the committee was a subcommittee, the 130 members will account for two committee members to be designated to each member institution of the "Power 5 Conferences." Again, the job of each committee member is to attend member institution sporting events and practices, document evidence of how the athletic training staff managed a potential concussion, and prepare a report detailing what occurred and his or her conclusion as to whether the member institution violated the concussion management plan or not. The report and conclusion will be sent to the five-member review board. The five-member review board will review the evidence and either confirm or overturn the committee member's conclusion and impose a penalty if one is necessary. If the member institution does not agree with the result or the penalty prescribed by the CSOC, it may appeal the decision to the three-member appeals committee. The concept of a third-party organization enforcing NCAA bylaws was discussed by the commissioner of the Big Ten conference Jim Delaney.<sup>213</sup> Delaney expressed that the tensions and partiality that currently exist in the system could be diminished by outsourcing NCAA enforcement.<sup>214</sup>

As mentioned previously, violations can arise in different forms, but the two most prevalent violations occur when a member institution either does not implement a concussion management plan or does not abide by the plan that it has implemented.<sup>215</sup> A violation structure will be created in order to penalize member institutions. Similar to the current NCAA infractions program, the violation structure will contain a tier system that distinguishes violations based on the severity of the violation.<sup>216</sup> The four

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<sup>211</sup> NCAA, *Division I Infractions Process*, <http://www.ncaa.org/enforcement/division-i-infractions-process> (last visited Jan. 12, 2017).

<sup>212</sup> If the CSOC was to be managed by a third-party organization, it would be ideal for the organization to have an interest and a background in the area. Because of the existing relationship between the NCAA and the DOD through the CARE Consortium, the DOD would be a perfect entity to oversee the CSOC.

<sup>213</sup> John Solomon, *NCAA enforcement: What's working, what's not as Ole Miss, UNC cases near conclusions*, CBS (Oct. 5, 2016), <https://www.cbssports.com/college-football/news/ncaa-enforcement-whats-working-whats-not-as-ole-miss-unc-cases-near-conclusions/>.

<sup>214</sup> *Id.*

<sup>215</sup> Ganim, *supra* note 22; *see also* Johnson, *supra* note 22, at 1058; *see also* Keating, *supra* note 1.

<sup>216</sup> *See* 2015-2016 NCAA Division I Manual § 19.01.4.

The infractions program shall address the varying levels of infractions and, for the most serious infractions, include guidelines for a range of penalties, which the Committee on Infractions may prescribe, subject to review by the Infractions Appeals Committee. Penalties

tiers of the violation structure will be (1) Severe Breach of Conduct; (2) Significant Breach of Conduct; (3) Breach of Conduct; and (4) Incidental Infraction. The actual penalty will depend on the severity of the breach. The penalties will include, but are not limited to, sanctions, fines, recruitment penalties, scholarship penalties, and suspensions. The penalties need to be severe enough to deter member institutions from violating their concussion management plans.

The question of funding will be raised when asked how the CSOC will be established and operate efficiently. There are revenue streams that will allow the CSOC to protect student-athletes. The NCAA just exceeded the one-billion-dollar mark in revenue for 2017.<sup>217</sup> The majority of the revenue comes from the Division I Men's Basketball Championship television and marketing rights and the ticket sales from championship games.<sup>218</sup> Other smaller funds contribute to NCAA revenue including membership fees from member institutions.<sup>219</sup> The NCAA would be able to allocate money to the CSOC through the partial appropriation of funds from the Division I Men's Basketball Championship television and marketing rights, the ticket sales from championship games, and an increase in member institution fees.<sup>220</sup> In addition to NCAA funding, if an independent organization were to manage the CSOC, such as the DOD or Lead1 Association, partial funding for the CSOC could be allocated from such entity. The second form of revenue configuration would request that the NCAA apportion money to the CSOC that it currently saves due to its tax-exempt status.

The NCAA is granted tax-exempt status under section 501(c)(3) of the Internal Revenue Code.<sup>221</sup> Section 501(c)(3) exempts charitable organizations, including educational organizations.<sup>222</sup> Two requirements need to be met in order to qualify for section 501(c)(3) tax-exempt status.<sup>223</sup> The first requirement is that the entity must be structured as an organization.<sup>224</sup> The second requirement is the "operational test."<sup>225</sup> This test requires that an entity in question must engage primarily in charitable

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shall depend on the relative severity of the infraction(s), the presence of aggravating or mitigating factors and, in some cases, the existence of extenuating circumstances.

<sup>217</sup> Ebony Novy-Williams, *NCAA Revenue Surpasses \$1 Billion Milestone*, BLOOMBERG (Mar. 7, 2018), <https://www.bloomberg.com/news/articles/2018-03-07/ncaa-revenue-surpasses-1-billion-milestone-as-scrutiny-mounts>.

<sup>218</sup> See NCAA, *Where does the Money Go?*, <http://www.ncaa.org/about/where-does-money-go> (last visited Feb. 4, 2018).

<sup>219</sup> *Id.*

<sup>220</sup> See Johnson, *supra* note 22, at 1091; see also Pretty, *supra* note 43, at 2371.

<sup>221</sup> 26 U.S.C.A. §501 (West 2018); see also John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109 (2010).

<sup>222</sup> 26 U.S.C.A. §501 (West 2018).

<sup>223</sup> Mike Parker, *Parker: NCAA and ACC should lose tax-exempt status*, STARNEWS (Sept. 19, 2016), <http://www.starnewsonline.com/news/20160919/parker-ncaa-and-acc-should-lose-tax-exempt-status>.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

activities, such as educational activities.<sup>226</sup> In addition to the two requirements, there are limitations on 501(c)(3) organizations that prohibit them from engaging in certain activities, and if engaged in, they will lose their tax-exempt status.<sup>227</sup> Some argue that some of these limitations apply to the NCAA, and therefore, it should have its tax-exempt status stripped. The limitations claimed to apply to the NCAA are the private inurement, private benefit, commercial activity, or even the legislative lobbying limitation.<sup>228</sup> The rationale behind these arguments is that NCAA sports are “imbued with a commercial hue” in that they compete for entertainment dollars, tickets are priced to earn a profit, and they engage in extensive advertising and commercial methods.<sup>229</sup> Another basis for the argument is that the NCAA programs are not functionally related to the educational missions of the universities because certain sports are essentially minor leagues for professional sports, they benefit only a miniscule portion of the student body, and they are detrimental to the education of the student-athlete because of the amount of time they consume.<sup>230</sup> A third reason for revoking 501(c)(3) tax-exempt status is that certain NCAA sports provide excessive private benefit to television networks and professional sports leagues in comparison to the educational benefits provided to the participating student-athletes.<sup>231</sup> The last reason is that the unreasonable compensation of head coaches would violate the private inurement limitation.<sup>232</sup> These arguments can risk the preservation of the NCAA’s tax-exempt status. Instead of threatening the revocation of its tax-exempt status, the NCAA should allocate part of the money it is saving because of its tax-exempt status to fund the CSOC.

People may argue that the NCAA already has an enforcement body known as the Committee on Infractions; therefore, the CSOC is superfluous because the current enforcement procedure used by the NCAA that results in penalties for violations of the principle of amateurism, impermissible benefits, procuring an agent before college, etc. is sufficient. This system may be working for certain violations of NCAA rules, such as the ones listed above, but not for concussions. Clear violations are happening right before the NCAA’s eyes and it chooses not to pay attention. It is as if an assault is occurring right before a police officer who chooses to ignore it, except in this case, the assault occurs on student-athletes’ brains for a two to three-hour period during athletic activities and the NCAA is the one to turn a blind eye. The creation of a specific committee will streamline the enforcement of a policy that will protect the brains and lives of student-athletes. The CSOC will make the concussion enforcement process more efficient because the burden of reporting violations will shift from member institutions to the impartial CSOC, and it will transfer the enforcement process to a more concentrated and specialized group. This type of league legislation is not unprecedented. The National Football League and the National Football League

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<sup>226</sup> Colombo, *supra* note 221, at 114.

<sup>227</sup> *Id.* at 115.

<sup>228</sup> *See id.*

<sup>229</sup> *Id.* at 131.

<sup>230</sup> *Id.* at 132.

<sup>231</sup> *Id.* at 125.

<sup>232</sup> *Id.* at 121.

Players Association implemented a process in July of 2016 that helps enforce game day concussion protocol by investigating certain instances of alleged misconduct and rendering penalties for violations of the protocol.<sup>233</sup>

## 2. The Concussion Safety Oversight Council under the Higher Education Act

While the CSOC will help prevent brain injuries to student-athletes, it will be absolutely useless if it cannot be implemented.<sup>234</sup> The authority to create the CSOC lies within a few different entities, and the process for creating the CSOC differs depending on the entity that creates it. The United States Congress or state legislatures are the entities that will allow for the creation of the CSOC.

One authority comes in the form of federal legislation under the Higher Education Act of 1965 (“HEA”).<sup>235</sup> Because the NCAA has failed to enforce its current legislation, the United States Congress can step in and force the NCAA or a third party to effectively manage concussions. By no means is this an easy task, but if it is successful, it will change how concussions are managed in collegiate athletics. The HEA is the federal sweeping law and backbone governing higher education programs in the United States.<sup>236</sup> It authorizes a breadth of federal student aid programs that

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<sup>233</sup> National Football League, *NFL, NFLPA announce policy to enforce concussion protocol* (July 25, 2016), <http://www.nfl.com/news/story/0ap3000000676669/article/nfl-nflpa-announce-policy-to-enforce-concussion-protocol>.

<sup>234</sup> A brief summary is in order before I discuss the authority under which the CSOC will be implemented. The CSOC can either be created as a subcommittee within the current NCAA Infractions Program or as a separate enforcement committee outside of the current NCAA Infractions program. As a subcommittee of the current NCAA enforcement program, the subcommittee would act as an investigative branch with the sole purpose of uncovering violations of the NCAA’s CMP. After a member of the CSOC discovers a violation of the CMP, the information would be sent to the Committee on Infractions currently established by the NCAA. Then the case would proceed through the NCAA’s infractions program as any other case. If the CSOC is created outside of the current NCAA Infractions Program, the path of the case would be different, which is detailed above. Also, if the CSOC is created independently from the NCAA’s Committee on Infractions, it can be governed by either the NCAA or a third-party organization. We will get to the legal authority to establish the CSOC in either instance, but the structure remains as detailed above.

<sup>235</sup> Cindy Boren, *Obama uncertain if he’d let a son play football*, THE WASH. POST (Jan. 28, 2013), [https://www.washingtonpost.com/news/early-lead/wp/2013/01/28/obama-uncertain-if-hed-let-a-son-play-football/?utm\\_term=.7f2db65b64e6](https://www.washingtonpost.com/news/early-lead/wp/2013/01/28/obama-uncertain-if-hed-let-a-son-play-football/?utm_term=.7f2db65b64e6). (Some may think that the federal government is not concerned with the issues of collegiate athletics but former president Barack Obama had the following to say on the issue):

I tend to be more worried about college players than NFL players in the sense that the NFL players have a union, they’re grown men, they can make some of these decisions on their own, and most of them are well-compensated for the violence they do to their bodies. You read some of these stories about college players who undergo some of these same problems with concussions and so forth and then have nothing to fall back on. That’s something that I’d like to see the NCAA think about.

<sup>236</sup> American Council on Education, *Higher Education Act*, <http://www.acenet.edu/advocacy/Pages/Higher-Education-Act.aspx> (last visited Jan. 5, 2018); see also John Infante, *Higher Education Act Changes Could Have Big Impact on Athletics*, ATHNET, <https://www.athleticscholarships.net/2013/10/07/higher-education-act-changes-could-have-big-impact-on-athletics.htm> (last visited Jan. 18, 2018).

assist students and their families pursue a secondary education.<sup>237</sup> Some of the programs include: supporting students in financing their education, providing support to less-advantaged students, providing support to students pursuing an international education and certain professional degrees, and supporting certain institutions to improve their ability to offer postsecondary education programs.<sup>238</sup> In order to enact the CSOC, Congress would need to pass a bill to amend to the HEA. The bill would amend Title IV of the HEA, which relates to federal funding to member institutions.<sup>239</sup> The bill would state that a member institution with an intercollegiate athletic program is prohibited from membership in a nonprofit athletic association unless such association creates and maintains or allows a third party to create and maintain the CSOC.<sup>240</sup> Under the bill, member institutions will be prohibited from receiving Title IV funds if they participate in a collegiate athletic association [like the NCAA] that does not abide by the provision stated above.<sup>241</sup> Member institutions will not risk losing Title IV funding in order to maintain membership in an intercollegiate athletic association. This forces the NCAA to implement the CSOC on its own or through a third party because if it does not, the number of member institutions comprising the NCAA will be decimated, rendering the NCAA a shred of a functioning organization. One advantage of the current political climate in terms of getting the amendment passed is that the HEA has not been reauthorized since 2008.<sup>242</sup> Because the HEA has not been reauthorized since 2008, Congress will most likely try to pass a reauthorization soon. The prospect of reauthorizing the HEA will increase the chances that legislators will consider the proposed amendment of the HEA.<sup>243</sup> Congress has tried to pass legislation in regard to collegiate athletics in recent years, so the interest in passing legislation does exist.<sup>244</sup>

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<sup>237</sup> Alexandra Hegji, *The Higher Education Act (HEA): A Primer*, CONGRESSIONAL RESEARCH SERVICE (Aug. 25, 2017), <https://fas.org/sgp/crs/misc/R43351.pdf>.

<sup>238</sup> *Id.*

<sup>239</sup> NCAA Act, H.R. 2903, 113<sup>th</sup> Cong. (2013-2014).

<sup>240</sup> NCAA Act, H.R. 2731, 114<sup>th</sup> Cong. (2015).

<sup>241</sup> If the bill is passed, member institutions must comply with the federal law or else they can be prohibited from receiving federal student loan grants and federal student loans, which can cripple an institution; *see also* Infante, *supra* note 236.

<sup>242</sup> Hegji, *supra* note 237. The reauthorization of a bill either creates, extends, or makes changes to a federal program and specifies the amount of money the amount of money the government may allocate to the program. Aaron Lacey & Chris Murray, *The Nuts and Bolts of Reauthorization*, Thompson Coburn LLP, <https://www.thompsoncoburn.com/docs/default-source/publication-documents/the-nuts-and-bolts-of-reauthorization.pdf?sfvrsn=0&sfvrsn=0> (last visited Feb. 3, 2018). Failure to reauthorize does not mean that current programs created by the HEA are not in effect. *Id.* HEA programs can be reauthorized through the Section 422 of the General Education Provisions Act, temporary legislation by Congress, or implied reauthorization if funds continue to be allocated to the program. *Id.*

<sup>243</sup> SI Wire, *Amendment to Higher Education Act proposes NCAA oversight commission*, SPORTS ILLUSTRATED (June 11, 2015), <https://www.si.com/college-football/2015/06/11/ncaa-concussion-settlement-four-year-scholarship-players-mark-emmert-congressional-amendment>.

<sup>244</sup> H.R. 2903, *supra* note 239; *see also* H.R. 2731, *supra* note 240.

In 2013, two members of the United States House of Representatives, Charles Dent (R-PA.) and Joyce Beatty (D-OH.), introduced H.R. 2903- the National Collegiate Athletics Accountability (“NCAA”) Act in order to improve the health of student-athletes and increase the accountability of the NCAA.<sup>245</sup> This bill also intended to amend Title IV of the HEA. It included provisions such as: annual baseline concussion testing before participation in activities, the suspension of penalties for NCAA violations until the subject of those penalties was provided certain due process procedures, four-year scholarships for contact-sport athletes, and the ability for schools to pay stipends to student-athletes.<sup>246</sup> This bill did not make it out of the Subcommittee on Higher Education and Workforce Training.<sup>247</sup> The NCAA Act was reintroduced in June of 2015 with the support of John Katko (R-NY) and Bobby Rush (D-IL.).<sup>248</sup> The bill was once again assigned to the Subcommittee on Higher Education and Workforce Training.<sup>249</sup> With collegiate athletics being scrutinized and the realization of a need for change in terms of brain injuries, Congress may be able to use its power to right the wrong that is concussion management in the NCAA.

### 3. The Concussion Safety Oversight Council Implemented by State Legislatures

The second form of authority for the establishment of the CSOC comes from state legislatures. Currently, all fifty states have passed and enacted Return to Play laws for concussions.<sup>250</sup> These statutes provide guidelines that must be followed before an athlete who has suffered a concussion can return to play. The existence of these laws illustrates the fact that states have the ability and a history of passing laws that apply to the management of concussions in athletes. Return to Play statutes primarily apply to high school and youth sports, not collegiate athletics.<sup>251</sup> Because current state laws do not apply to collegiate student-athletes, individual states must pass a law that would create a CSOC to oversee member institutions within the state and provide collegiate student-athletes with the protection they deserve. In order for the CSOC to have as

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<sup>245</sup> Press Release, *Representatives Dent and Beatty Demand Greater Accountability from the NCAA* (Aug. 1, 2013), <https://dent.house.gov/2013/8/representatives-dent-and-beatty-demand-greater-accountability-from-the-ncaa>; see also H.R. 2903, *supra* note 239.

<sup>246</sup> H.R. 2903, *supra* note 239.

<sup>247</sup> Congress.gov, *Actions Overview H.R.2903 — 113th Congress (2013-2014)*, <https://www.congress.gov/bill/113th-congress/house-bill/2903/actions> (last visited Feb. 24, 2018).

<sup>248</sup> Press Release, *Dent and Beatty Reintroduce Bill to Make NCAA Accountable* (June 11, 2015), <https://beatty.house.gov/media-center/press-releases/dent-and-beatty-reintroduce-bill-to-make-ncaa-accountable>. Representative Dent made the following comment about the NCAA, “The NCAA will tell you that its goal is to protect the welfare of the student-athlete, but anyone who has been following the actions of the Association over recent years knows their rhetoric fall far from the reality of their actions.” *Id.*

<sup>249</sup> Congress.gov, *Actions Overview: H.R.2731 — 114th Congress (2015-2016)*, <https://www.congress.gov/bill/114th-congress/house-bill/2731/actions> (last visited Feb. 24, 2018).

<sup>250</sup> Center for Disease Control and Prevention, *Sports Concussion Policies and Laws*, <https://www.cdc.gov/headsup/policy/index.html> (last visited Mar. 12, 2018).

<sup>251</sup> Baugh & Kroshus, *supra* note 171.

much weight as it would if it was passed as a federal bill, each state would need to pass a bill that would create a CSOC for said state. Due to the growing emphasis placed on concussions in today's society, it is very possible that states would pass collegiate athletic concussion management statutes. The state of Connecticut has already introduced a bill of this nature.<sup>252</sup> The bill states that it will help "protect the health and safety of college athletes participating in an interscholastic athletic program by developing guidelines, gathering best practices, investigating complaints, and issuing penalties."<sup>253</sup> The bill was introduced in February of 2017 by state representative Patricia Dillon.<sup>254</sup> While the bill still remains vague, the main provision would create an "athletic protection commission" that would monitor the safety of NCAA athletes for member institutions within the state of Connecticut.<sup>255</sup> While this legislation would not be as sweeping as an amendment to the HEA, individual state bills may be passed faster and protect students before a federal law would.

### III. CONCLUSION

Brain injuries in student-athletes are a serious problem within collegiate athletics, and the NCAA has failed time and time again to put the best interest of student-athletes first. The NCAA has stated that one of its pillars is protecting and enhancing the physical well-being of student-athletes, but its disregard of this principle has been astonishing.<sup>256</sup> Despite the NCAA's development and evolution of a Concussion Management Plan, without enforcement, the plan cannot protect student-athletes to the extent that they deserve. The failure to ensure that schools implement a concussion management plan and its failure to apply appropriate enforcement procedures when member institutions violate their concussion management plans has created a pattern of neglect in which student-athletes suffer brain injuries and long-term effects of those injuries as a result. Action outside of the NCAA needs to be taken due to the NCAA's failure to commit to the health of its student-athletes. Intervention on behalf of the judicial system, United States Congress, or state legislatures will compel the NCAA to obey its commitment when it comes to concussion management. This can be achieved through a breach of contract lawsuit filed against the NCAA claiming specific performance as the remedy in order to require the NCAA to fulfill its obligations to student-athletes. This can also be accomplished through the passage of an amendment to the Higher Education Act or state statutes which will implement an independent investigation and enforcement body known as the Concussion Safety Oversight Committee. Without compulsion on behalf of an outside entity, the NCAA will continue to "protect" its student-athletes, which unfortunately results in concussions, long-term brain effects, and the destruction of student-athletes' lives.

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<sup>252</sup> John Solomon, *Connecticut Considers Law to Protect Health and Safety of NCAA Athletes*, CBS (Feb. 7, 2017), <https://www.cbssports.com/college-football/news/connecticut-considers-law-to-protect-health-and-safety-of-ncaa-athletes/>.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> 2015-2016 NCAA Division I Manual art. 2.2, *supra* note 64.