A. NCAA ELIGIBILITY RULES[1]

1. PAY OUTSIDE COLLEGE

A key "general principle" (stated at the outset of Article 12) of the NCAA Manual that underlies much NCAA regulation is that "only an *amateur* student-athlete is eligible for intercollegiate participation in a particular sport," so as to "maintain a clear line of demarcation between college athletics and professional sports." Article 12 goes on to provide that an athlete "loses amateur status and thus shall not be eligible for intercollegiate competition" in a number of specified ways. For example, athletes lose their eligibility not just by payment "in any form for the sport" (other than in the form of compensation permitted by the NCAA's rules, like tuition and fee remission, books, room and board while attending the institution), but also by "a promise of pay even if such pay is to be received following completion of intercollegiate athletic competition."

A perennial problem faced by the NCAA concerns hockey players from Canada, many of whom play major Junior A hockey under Canadian Amateur Hockey Association (CAHA) auspices, which permit teams to pay room and board and educational expenses for their players (who often live away from home). Until the early 1970s, NCAA by-laws simply made any Canadian Junior A hockey player ineligible for U.S. college hockey. That "official interpretation" by the NCAA of its rules was struck down by a district judge in *Buckton v. NCAA*, 366 F.Supp. 1152 (D.Mass.1973), as an unconstitutional discrimination against aliens. In 1974, the NCAA substituted a new interpretation of the term "pay" to include "educational expenses not permitted by governing legislation of this Association . . . [and any] expenses received from an outside amateur sports team . . . in excess of actual and necessary travel and meal expenses and apparel or equipment . . . for practice and game competition . . ." (Article 12.1.2(e)). Once again, this rendered Junior A players ineligible.[2] This new formula produced a struggle between the NCAA and Denver University, which culminated in the following case.

COLORADO SEMINARY (UNIV. OF DENVER) V. NCAA

United States District Court, District of Colorado, 1976.
417 F.Supp. 885, aff'd, 570 F.2d 320 (10th Cir.1978).

ARRAJ, CHIEF JUDGE.

[In 1973, Denver U. had won the NCAA hockey championship with a team led by several Canadian players. Both the University Chancellor and Coach Murray Armstrong refused to characterize these star players as "professionals" who were ineligible to play for the university simply because they had received the same room and board for playing for a Canadian amateur team before college as they were receiving from Denver U. while playing at college. As a result, the NCAA imposed sanctions on Denver U. which not only barred the school from future television and post-season appearances, but demanded return of the 1973 championship trophy and revenues. Denver U. and the players went to court, asserting that their constitutional rights had been violated. As in *Buckton*, the district court in this pre-*Tarkanian* era believed that the NCAA was a "state actor" governed by the constitution. However, citing *Parish v. NCAA*, 506 F.2d 1028 (5th Cir.1975), the judge dismissed the due process claim, because he found no independent

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[1] See Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 Rutgers L. J. 269 (1994).

[2] Marc Bianchi, Comment, *Guardian of Amateurism or Legal Defiant? The Dichotomous Nature of NCAA Men's Ice Hockey Regulation*, 20 Seton Hall J. Sports & Ent. L. 165 (2010) (arguing the NCAA should reclassify major junior hockey as amateur).

constitutional right to play sports as part of one's college education, even as training for a possible professional career. The court then addressed a novel equal protection claim advanced by the players.]

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It is first asserted that the prohibition on receipt of compensation for expenses other than travel and one meal from an outside source discriminates between various classes of student-athletes, Canadian and American, poor and rich, rural and city. The gist of the claims of discrimination against these shifting and sometime vague classes is that poor rural students, most commonly Canadian, must move to cities where amateur hockey is being played to be able to participate and, to be able to live, must accept compensation from the teams for such expenses as room and board.

It is now well established that the right to an education, though important, is not so fundamental as to require strict scrutiny of classifications allegedly affecting that right, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). . . .

The same court which struck down the previous official interpretations in *Buckton* while utilizing strict scrutiny has subsequently found, and we believe correctly, that the present classifications in the interpretations apply to all hockey players of all nationalities and are not based on alienage or any other basis requiring strict scrutiny. Indeed, [one of the student-plaintiffs here, Falcone,] is an American whose eligibility was lost for having accepted compensation for room and board expenses from an American amateur team. Accordingly, the plaintiff[s][are] entitled to have the NCAA's eligibility regulations invalidated only if they bear no rational relationship to that organization's legitimate objectives.

The objectives of the NCAA have been previously stated. They include maintaining intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body. In furtherance of these objectives Article 3, § 1 of the NCAA constitution requires in substance that any aid received with minor exceptions be administered by the student-athlete's educational institution. . . .

There is some merit to the argument that those student-athletes who received aid from an outside team while in school were in a substantially similar position to those receiving aid from their school for the same expenses. But this is not to say that the restrictions have no "fair and substantial relation to the object of the legislation." Although explanations for the restrictions have not been presented, an obvious reason would be to avoid the practical difficulties of monitoring and controlling aid received from a nonmember, over which the Association could exercise no authority. It might also be pointed out that it was these student-athletes the NCAA determined to immediately reinstate.

The situation of those student-athletes receiving aid from outside sources while not in school is entirely different. The court in *Jones v. National Collegiate Athletic Association* [392 F.Supp. 295 (D.Mass.1975)] observed that play during the periods while not in school cannot be considered as coincidental to or in conjunction with obtaining an education.

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We concur in the holding of the court in *Jones* that the present regulations do not unconstitutionally discriminate against those in any of the classes suggested by plaintiffs, particularly not against those plaintiffs receiving compensation for room and board while not in school.

The court is not oblivious to the less advantageous position in which a student-athlete without means may be placed by the effect of the NCAA regulations. But neither the Equal Protection Clause of the Fourteenth Amendment, nor the counterpart equal protection

requirement embodied in the Fifth Amendment, guarantees "absolute equality or precisely equal advantages." This Court cannot use the Constitution as a vehicle to alleviate the consequences of differences in economic circumstances that exist wholly apart from any NCAA action.

[The court then turned to the University's claim that the level of sanctions imposed by the NCAA on Denver U. "irrationally discriminated" against it when compared with milder penalties imposed on schools like Michigan and Minnesota for more serious incidents. After reviewing the specifics of Denver's charge, the opinion continued.]

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This court is one of expressly limited jurisdiction whose statutory duties do not include sitting as a final arbiter of disputes between an association and its membership. A disturbing aspect of this litigation is the attempt to rely upon the federal judiciary to resolve essentially private disputes because of the refusal of the Association and member institution to deal with each other on a reasoning and where necessary compromising basis.

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Most importantly, because of the refusal of Association and member institutions to cooperate, student-athletes in all sports must suffer the consequences. We cannot constitutionalize amateur sports to protect their interests. The result may well be to develop new levels of cynicism in young students who are so often the pawns in the games of power between associations, and associations and member institutions. But if nothing else, this case may well demonstrate that defiance in the name of principle can prove to be inflexibility disguised as a virtue.

Case dismissed.

QUESTIONS FOR DISCUSSION

1. Although the number of college-trained NHL players has significantly increased in recent years, traditionally the best training ground was the Canadian major juniors, and the only real option for working-class players. Do you think it makes sense to tell a factory worker's son from Toronto that he loses his amateur status if a major junior team pays for his room and board to live away from home, while an affluent prepster can receive a free ride to an elite private New England prep school and still participate in NCAA athletics?

2. What should the legal basis and standard be for claims that NCAA rules are substantively unfair?

3. Given the stringency of the NCAA's definition of an "amateur" student-athlete as applied to Canadian hockey players wanting to play U.S. college hockey, should NCAA rules have permitted Danny Ainge to play basketball for Brigham Young University while he was also playing third base for the Toronto Blue Jays (as we saw in Chapter Two)? What are the policy reasons that would justify the NCAA labeling as a "professional" only those student-athletes who have been paid to play in the same sport rather than a different sport than they are now playing at college?