

The Big Hit: NCAA Concussions Policy a Nightmare for Student-Athletes

Angel Gustavo Rivera, J.D., LL.M.

agrivera@central.uh.edu

The dream of every student-athlete who plays a sport at the collegiate level is to excel in their careers, win individual awards, win national championships, sign a professional contract, or even represent their country at the Olympics. All these goals and accomplishments can be overshadowed in a question of months, days, hours, minutes or seconds by concussions and their unpredictable impact on students-athletes. Typically, an athlete will play through concussion symptoms or return to play as soon as he or she feels better. Yet, days and months later, that same athlete could be plagued by headaches, difficulty concentrating and mood swings.¹

It is no secret in sports that concussions are having a huge effect, especially on student-athletes. Concussion, also known as mild traumatic brain injury (mTBI), has been defined as “a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces.”² Although a concussion most commonly occurs after a direct blow to the head, it can occur after a blow elsewhere that is transmitted to the head.³ Sport-related concussions are not limited to specific age ranges, level of athletics, or gender.⁴ Concussions and head injuries can

¹ *Concussion: Determining when the brain has recovered*, MAYO CLINIC,

<http://www.mayoclinic.org/medicalprofs/concussion-nu0805.html>.

² Paul McCrory, et al., *Consensus statement on concussion in sport – The 3rd International Conference on concussion in sport, held in Zurich, November 2008*, 16(6) J. CLIN. NEUROSCIENCE 755, 756 (2009), available at <http://www.sportconcussions.com/html/Zurich%20Statement.pdf>.

³ *2012-13 NCAA Sports Medicine Handbook*, NAT'L COLLEGIATE ATHLETIC ASS'N, 54 (Aug. 2012), <http://www.ncaapublications.com/productdownloads/MD12.pdf>.

⁴ Don Brady & Flo Brady, *Sport-Related Concussions*, 39(8) COMMUNIQUE 38, 38 (2011), <http://www.nasponline.org/publications/cg/39/8/sport-related-concussions.aspx>.

take place in any type of athletic activity, but are more frequent in contact sports like football, hockey and soccer.

In 2011, former National Collegiate Athletic Association (NCAA) student-athletes filed a class action complaint against the NCAA in the United States District Court in the Northern District of Illinois. This article will provide a brief summary of the case, and an analysis of the main conflict on the NCAA Concussion Management Plan Guidelines. Finally, it will discuss the possible consequences of a resolution of the class action case as well how it will impact the 2010 concussion management plan guidelines required for institutions.

Adrian Arrington, Derek Owens, Mark Turner, and Angela Palacios v. NCAA.

This high profile class action complaint combines lawsuits filed by dozens of former NCAA student-athletes who claim the league was negligent in its handling of brain trauma. The issue has moved from science labs to Congress and now to courtrooms, where the financial exposure of the sports' governing bodies may be tested.⁵ On November 21st, 2011, the suit was amended and filed in the United States District Court in the Northern District of Illinois, listing as plaintiffs for the putative class: Adrian Arrington, who played for Eastern Illinois University; Derek Owens, who played in the University of Central Arkansas, Mark Turner, formerly with Fordham University; and Angela Palacios, who played women's soccer for Ouachita Baptist University in Arkansas. The listed defendant is the NCAA; the universities were not included as some of the plaintiffs were still enrolled. The class is not limited to football players, as Palacio

⁵ George Vecsey, *College Athletes Move Concussions Into the Courtroom*, N.Y. TIMES (Nov. 29, 2011), <http://www.nytimes.com/2011/11/30/sports/ncaafootball/college-players-move-concussions-issue-into-the-courtroom.html>.

joining the suit against the NCAA expanded the group of plaintiffs to include collegiate athletes in just about any sport – hockey, lacrosse and soccer players are among those included.⁶

The NCAA Constitution states that: “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.”⁷ The complaint alleges that the NCAA has engaged in a long-established pattern of negligence and inaction with respect to concussions and concussion-related maladies sustained by its student-athletes, all the while profiting immensely from those same student athletes.⁸ The Plaintiffs’ complaint stresses four distinctive allegations: fraudulent concealment, medical monitoring, unjust enrichment, and negligence. According to the lawsuit, the NCAA has failed to: 1) address and/or correct the coaching of tackling, checking or other playing methodologies that cause head injuries; 2) educate coaches, trainer and student-athletes as to the symptoms indicating possible concussions; 3) implement system-wide “return to play” guidelines for student-athletes who have sustained concussions; 4) implement system-wide guidelines for the screening and detection of head injuries 5) implement regulations addressing the treatment and eligibility of student-athletes who have sustained multiple concussion in the course of play; and 6) implement a support system for student-athletes who, after sustaining concussions, are left unable to either play their sport or even lead a normal life.”⁹

The plaintiffs seek to represent two nationwide classes: The first class consists of NCAA students-athletes who sustained concussions or suffered from concussion-like symptoms as result

⁶ Mary Pilon, *Former Soccer Player Joins Lawsuit Against N.C.A.A.*, N.Y. TIMES THE QUAD BLOG (Sept. 24, 2012, 12:08 PM), <http://thequad.blogs.nytimes.com/2012/09/24/former-soccer-player-joins-lawsuit-against-the-n-c-a-a/>.

⁷ NCAA Constitution, Article 2, at 2.23 (Adopted: 1/10/95), available at <http://www.ncaapublications.com/productdownloads/D112.pdf>.

⁸ Adrian Arrington, Derek Owns, Mark Turner, and Angela Palacios, et al. v. NCAA. No. 1:2011cv06356, Northern Illinois District (Chicago), available at <http://www.scribd.com/doc/78428992/NCAA-Complaint>.

⁹ *Id.* at 1.

of playing sports and are still experiencing the effects of those head injuries. The second class participating in the suit is a nationwide medical monitoring class, consisting of former NCAA students who sustained concussions or suffered concussion-like symptoms while playing sports, but who do not at least yet appear to be still experiencing symptoms or have not have their lives fundamentally disrupted by the head injuries.¹⁰

According to their website, the NCAA oversees 89 championships in 23 sports each year. There are more than 400,000 student-athletes competing in three divisions at over 1,000 colleges and universities within the NCAA.¹¹ The NCAA establishes a leading role in ensuring that athletes are properly protected from and treated for concussions. Moreover, the NCAA passed regulations' in 2010 that became effective on August 16, 2010, requiring that "An active member institution shall have a concussion management plan for its student-athletes."¹² With regard to the NCAA regulation, plaintiffs argue that the reporting responsibility for concussion is placed entirely on the students. For its part, the NCAA is fighting class certification by asserting that a fact-intensive analysis of all named players would need to take place in order to certify that student athletes belong to one plaintiff class or the other. The fact-intensive analysis would require determination about each alleged injury, the knowledge each student athlete holds with regard to concussion risks, and – importantly – would depend on each plaintiff's assertion that he or she relied on alleged fraudulently concealed information while playing NCAA sports.

NCAA Concussion Management Plan Legislation

¹⁰ *Id.* at 29.

¹¹ *Who We Are*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page>.

¹² *2012-13 NCAA Sports Medicine Handbook*, NAT'L COLLEGIATE ATHLETIC ASS'N, 56 (Aug. 2012), <http://www.ncaapublications.com/productdownloads/MD12.pdf>.

In April, 2010 the NCAA adopted stricter concussion-reduction guidelines. The adoption of new guidelines was an act that acknowledges the NCAA'S role in the prevention, identification, evaluation, and management of concussions. Furthermore, it now advises colleges not to let athletes with head injuries return to play until cleared by a physician, and requires every athletics department to have a written protocol for handling concussions.¹³ Finally the student-athletes must sign a statement in which they accept the responsibility for reporting their injuries and illnesses to the institutional medical staff, including signs and symptoms of concussions. During the review and signing process, student-athletes should be presented with educational material on concussions.¹⁴

The guideline reject any measure of responsibility for the NCAA, its member schools, and the coaching staff or individual teams and, instead puts the burden on the shoulders of student-athletes who have just sustained fresh head trauma to not just seek out medical attention, but decide whether to seek it in the first place. Researchers have noted that concussion diagnosis is largely based on athletes reported symptoms, which can vary greatly and may not be the best way to determine who is at risk for future concussion related neurological and psychiatric problems. Special worry goes for the student athlete struggling with symptoms of concussion reporting their conditions the next day of she or he did not report problems when the hit occurred.¹⁵ This model should focus on appropriate access to healthcare providers with the

¹³ Libby Sander, *Colleges Struggle to Protect Athletes From Concussion and Its Aftermath*, CHRON.HIGHER EDU. (Sept. 22, 2012), <http://chronicle.com/article/Colleges-Struggle-to-Protect/124576/>..

¹⁴ *2012-13 NCAA Sports Medicine Handbook*, NAT'L COLLEGIATE ATHLETIC ASS'N, 56 (Aug. 2012), <http://www.ncaapublications.com/productdownloads/MD12.pdf>.

¹⁵ *Id.* supra note 1.

unchallengeable authority to determine management and return to play following a concussion.¹⁶

The plan shall include, but is not limited to, the following:

(a) An annual process that ensures student-athletes are educated about the signs and symptoms of concussions. Student-athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member;

It is unrealistic to expect athletes to monitor their own injuries particularly involving concussions.¹⁷ For athletes, quitting is not an option, and without institutional oversight this stubborn mentality could be fatal. Concussions can be difficult to identify at the onset and may go unrecognized, which places individuals at risk for future and more complicated injury. Most of student-athletes evade and hide their head related symptoms generating a lack of report of previous injuries that may lead to an unknown number of concussions for individuals and adds to the complexity of the return-to-play decision.¹⁸ For this reason, subsection (a) needs to ensure that student-athletes, coaches, team physicians, trainers, athletic directors and officials are included in the education of concussions before a season starts.

The NCAA should look to Texas Natasha's Law as a model, it requires mandatory training courses for student athletes as well coaches of an interscholastic athletic activity, a licensed health care professional who serves as a member of a concussion oversight team and is an employee representative, and a health care professional who serve on a volunteer basis as a member of a concussion oversight team, at least once every two years for not less than two hours

¹⁶ Memorandum from Kathleen Brasfield, Chair, Division II Management Council to NCAA Division II Directors of Athletics (Aug. 13, 2010),

http://fs.ncaa.org/Docs/DII_MC_PC/Miscellaneous/Concussion%20Management%20Memorandum.pdf.

¹⁷ George Vecsey, *College Athletes Move Concussions Into the Courtroom*, N.Y. TIMES (Nov. 29, 2011),

<http://www.nytimes.com/2011/11/30/sports/ncaafootball/college-players-move-concussions-issue-into-the-courtroom.html>.

¹⁸ Robert C. Cantu & Johna K. Register-Mihalik, , *Considerations for return-to-play and retirement decisions after concussion*, 3(10) PM&R S440 (2011), <http://dx.doi.org/10.1016/j.pmrj.2011.07.013>.

by an authorized training provider authorized by the league to provide training in the subject matter of concussions, including evaluation, prevention, symptoms, risks, and long-term effects.¹⁹

CONCLUSION

There are basically no established procedures for addressing negligence in concussion management. Among college athletes, the NCAA estimates that concussions represent 5 to 18 percent of injuries, depending on the sport. The NCAA concussion management plan was issued after La Salle University settled a negligence lawsuit dealing with the return to play of a former football player severely debilitated after suffering repeated concussion for approximately \$7.5 million. This class action lawsuit serves as a sharp reminder that colleges or universities with athletic programs, whether NCAA or not should maintain and implement a clear concussion management plan to help ensure the safety of athletes and minimize exposure to the organization. Even if a concussion management plan is in place it is important to monitor whether or not the plan is effective and if your organization is following the plan as drafted.²⁰

The actual high profile class action case against the NCAA outcome will determine the path and will create precedent on the need of safety and awareness on student-athletes. In the event that Arrington and his class members were to win, colleges working in concert with the NCAA would almost certainly exercise more caution to ensure athletes against concussion types injuries.²¹ Several states have recently passed laws that require minimum standards for concussion safety in elementary and secondary schools. Out of 50 states, 42 have legislation

¹⁹ Natasha's Law, H.B. 2038, Tex. H.R. 82(R) (Tex. 2011) (enacted), <http://www.legis.state.tx.us/tlodocs/82R/billtext/html/HB02038F.htm>.

²⁰ Nikki Wilson Cary, *NCAA Hit with Class Action Concussion Lawsuit*, COLLEGIATE & PROF'L SPORTS L. BLOG (Sept. 15, 2011), <http://www.collegeprosportslaw.com/collegiate-sports/ncaa-hit-with-class-action-concussion-lawsuit/>.

²¹ Marlon R. McPhatter & Ryan M. Rodenberg, *Arrington v. NCAA: Overview and Potential Implications*, SPORTS LITIG. ALERT NEWSLETTER (2011), <http://www.sportslitigationalert.com/sample.html#a2>.

regarding child concussions and three other states are pending legislation.²² Federal lawmakers have introduced similar measures.²³ The court may push both sides to try to set a settlement requiring the NCAA to adopt a minimum standards for concussion policy that supports student-athletes in all NCAA Divisions (I, II, III) and conferences building a foundation for institutions. The plan itself isn't going to be the thin that fixes all the concussion scenarios, because really the only way you can solve it and decrease the numbers is to stop playing contact sports.²⁴

Health Law Perspectives (March 2013)

Health Law & Policy Institute

University of Houston Law Center

<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

The opinions, beliefs and viewpoints expressed by the various Health Law Perspectives authors on this web site do not necessarily reflect the opinions, beliefs, viewpoints, or official policies of the Health Law & Policy Institute and do not constitute legal advice. The Health Law & Policy Institute is part of the University of Houston Law Center. It is guided by an advisory board consisting of leading academicians, health law practitioners, representatives of area institutions, and public officials. A primary mission of the Institute is to provide policy analysis for members of the Texas Legislature and health and human service agencies in state government.

²² *State-by-state concussion legislation stance*, TENNESSEAN (Oct. 21, 2012), <http://www.tennessean.com/interactive/article/99999999/PROMO/121008025/State-by-state-concussion-legislation-stance>.

²³ Marlon R. McPhatter & Ryan M. Rodenberg, *Arrington v. NCAA: Overview and Potential Implications*, SPORTS LITIG. ALERT NEWSLETTER (2011), <http://www.sportslitigationalert.com/sample.html#a2>.

²⁴ Allie Grasgreen, *One Step at a Time*, INSIDE HIGHER ED (Oct. 15, 2012), <http://www.insidehighered.com/news/2012/10/15/action-concussions-comes-all-sides-lack-uniformity>.