

EDUCATING SOMEONE WHO CAN'T OR DOESN'T WANT TO BE EDUCATED: THE SHIFTING FIDUCIARY DUTY CONTINUUM OF BIG-TIME COLLEGE SPORTS

By Richard Salgado*

INTRODUCTION

A reporter asked then-Florida State football star Deion Sanders if he wanted to be in college; Sanders replied, “[n]o, but I have to be.”¹ Sentiments like Sanders’ appears increasingly more often in the modern era of big-time college sports, particularly in football and basketball.² Despite recent improvements and newly implemented NCAA sanctions for teams that fall below a 50% projected graduation rate,³ overall graduation rates of the most prominent⁴ collegiate athletes remain disturbingly low. In fact, only 43% of male NCAA Division I basketball players receive a diploma.⁵ The graduation

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¹ Shannon Brownlee, *The Myth of the Student-Athlete*, U.S NEWS & WORLD REPORT, Jan. 8, 1990, at 50. See also RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* (1996).

² This sentiment is echoed by Michael Ovenduff, the former president of New Mexico State University: “The only reason many of them are in college is to play ball.... There’s no pressure...to keep [athletes] in school, any more than any other student.” See Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 83 (2000).

³ The NCAA has imposed regulations which will take away scholarships from programs where the majority of players are not making satisfactory progress towards graduation, and other proposals have suggested denying post-season participation to any institution that does not have at least a 50% graduation rate among its student-athletes, eliminating exceptions for athletes, reducing coaches salaries, and encouraging the NBA and NFL to develop minor leagues so athletes who do not want to attend college do not have to. See Marc Jenkins, *The United Student-Athletes of America*, 5 VAND. J. ENT. L. & PRAC. 39, 47 (2003).

⁴ In a recent appraisal, critics described the landscape of sports and their prominence on campus as follows: “The landscape is marked by two distinct features: The first is the essentially commercial enterprise associated with the two marquee sports. . . at the roughly 100 largest institutions nationally The second feature . . . is everything else, including the other sports at these large universities and participation in all sports everywhere else.” J. Douglas Toma and Michael E. Cross, *Contesting Values in Higher Education: The Playing Field of Intercollegiate Athletics*, 15 HIGHER EDUC.: HANDBOOK THEORY & RES. 406, 407 (2000).

⁵ Richard Lapchick, *Keeping Score When it Counts: Graduation Rates for 2005 NCAA Men’s and Women’s Division I Basketball Tournament Teams*, UNIVERSITY OF CENTRAL FLORIDA INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT, at

rate for African American basketball players at NCAA Division I schools is only 38%.⁶

In a recent period, a total of thirty-six NCAA Division I schools did not graduate any men's basketball players.⁷

Additionally, academic fraud scandals often challenge the concept of the "student-athlete." Consider several examples: first, a teaching assistant at the University of Minnesota admitted writing more than 400 papers for basketball players during a five year period;⁸ next, a University of Georgia basketball coach taught "Coaching Principles and Strategies," a course that required student-athletes to answer rigorous questions such as "how many points is a three pointer worth?"⁹ Finally, former Ohio-State running back Maurice Clarett claimed, *inter alia*, that he was placed in classes taught by hand-picked teachers who would pass him whether he attended their classes or not.¹⁰ Among the minority of high profile athletes who actually graduate after four years of "college education," many receive degrees in unmarketable academic disciplines.¹¹ In extreme cases, such as Washington Redskins star defensive end Dexter Manley, college athletes remain functionally illiterate.¹² Clearly, concern abounds regarding the education student-athletes receive and whether those "students," after catching the last passes or

<http://www.bus.ucf.edu/sport/public/downloads/media/ides/Release%20FINAL%202005%20NCAA%20Basketball%20Tournament%20Grad%20Rates%20Study.pdf> (last visited March 22, 2006).

⁶ *Id.* at 3.

⁷ Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213 231 (2004).

⁸ See Richard M. Southall, et. al., *The Board of Regents of the Univ. of Minn. v. Haskins: The University of Minnesota Men's Basketball Academic Fraud Scandal—a Case Study*, 13 J. LEGAL ASPECTS SPORT 121, 124 (2003).

⁹ ASSOCIATED PRESS, *Coach Gave Every Student an A*, March 4, 2004, at <http://sports.espn.go.com/espn/print?id=1750279>. &type=story (last visited March 22, 2006). Not surprisingly, every student in the class received an "A." *Id.*

¹⁰ Tom Friend and Ryan Hockensmith, *Clarett Claims Cash, Cars Among Benefits*, ESPN THE MAGAZINE, at <http://sports.espn.go.com/ncf/news/story?id=1919059> (last visited March 22, 2006).

¹¹ Otis B. Grant, *African American College Football Players and the Dilemma of Exploitation, Racism, and Education: A Socio-Economic Analysis of Sports Law*, 24 WHITTIER L. REV. 645, 650 (2003).

¹² Louis Barbash, *Clean Up or Pay Up: Here's the Solution to the College Sports Mess*, WASHINGTON MONTHLY, July-August 1990, at http://www.findarticles.com/p/articles/mi_m1316/is_n6-7_v22/ai_9191217 (last visited March 22, 2006).

grabbing the last rebounds of their collegiate careers, are adequately prepared for post-college life.¹³

Courts have addressed and rejected that concern under theories of contract law and academic malpractice.¹⁴ However, some commentators have recently suggested that fiduciary duty analysis may be appropriate in the university context.¹⁵ Fiduciary duty is “characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill, or expertise and is under a duty to represent the interests of another.”¹⁶ Working through the fiduciary framework reveals that the relationship between the *most* vulnerable student athletes and their universities and coaches is unbalanced, meaning that college athletes are heavily reliant on universities and officials.

In fully evaluating that relationship and gauging the potential breach, however, it is beneficial to view the duties along a continuum: student-athletes who genuinely want an education are at one end and those who merely want the opportunity to play sports are at the other. The fiduciary duty that would traditionally exist between school and student-athlete is undermined when the athlete is not legitimately interested in pursuing a college education. In these circumstances, when the education is treated as no more than a prerequisite to be checked off along the student’s road to athletic opportunity, the

¹³ See Prepared Statement of Donald G. McPherson, HEARING BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION, HOUSE OF REPRESENTATIVES at 24, 108th Congress (March 11, 2004) (referencing that fact and referring to transition programs within professional sports as indicating that colleges are not sufficiently preparing athletes for coping with life).

¹⁴ See *Ross v. Creighton University*, 957 F.2d 410 (7th Cir. 1992); *Hendricks v. Clemson Univ.*, 529 S.E. 2d 293 (S.C. Ct. App. 2000).

¹⁵ See Brett G. Scharffs and John W. Welch, *An Analytic Framework for Understanding and Evaluating the Fiduciary Duties of Educators*, 2005 BYU EDUC. & L.J. 159 (2005). See also Kent Weeks and Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002); Michael L. Buckner, *University Liability In Florida When Coaches Refer Student Athletes to Sports Agents*, 73-APR FLA. B.J. 87 (1999).

¹⁶ *Dunham v. Dunham*, 528 A.2d 1123, 1133 (Conn. 1987).

relationship logically shifts to that of employer-employee. However, this situation raises an alternate set of fiduciary duties that a university is unable to satisfy. Paying college athletes as in an employer-employee relationship undermines the very concept of collegiate athletics. Provided most student-athletes genuinely want the education, such a practice would further erode the ability of a university to satisfy its fiduciary duties to less-vulnerable student-athletes and create an inequitable disparity in which some students play for education and others for money.

This article discusses the applicable fiduciary framework in relation to the student-athlete and university and asserts that a fiduciary relationship exists in that context. In other words, the university owes a duty to provide adequate education for student-athletes due to the high degree of reliance of the student athlete and dominance the university exercises in the relationship. Furthermore, thus far universities have been unable to satisfy their fiduciary duty and have also failed to adequately satisfy their role from an employer-employee standpoint. The only logical and effective solution for universities trying to satisfy their fiduciary duties is to limit admissions to only those students who genuinely want an education *and* possess the ability to pursue one.

Part II of this paper establishes the characteristics of the relationship: II(a) discusses the characteristics of the university as the fiduciary, II(b) evaluates the student-athlete as beneficiary, and II(c) discusses the nature of the relationship, arguing a high-magnitude fiduciary relationship of reliance and dominance. Part III discusses whether to treat the relationship as that of a university and student, or employer and employee. Part IV(a) applies the framework to the potential breaches along the university-student side of the continuum, and IV(b) address the breaches in an employer-employee relationship and

the university's inability to satisfy those accompanying duties. Finally, part V sets forth a brief summary of the topics discussed herein.

II. EXTREME CONTRAST: THE CHARACTERISTICS OF THE RELATIONSHIP

Not all fiduciary relationships between a student-athlete and a university are equal. In addressing the many academic fraud scandals and low graduation rates, it is important to acknowledge that this problem is most prevalent in men's football and basketball.¹⁷ In those sports, where the money, competition and pressure to perform are greatest, academics suffer.¹⁸ For those reasons, this article focuses exclusively on collegiate football and basketball where the participating athletes are the most vulnerable.¹⁹

A. CHARACTERISTICS OF THE UNIVERSITY AS A FIDUCIARY:

Many of the school's characteristics in the sports context suggest that a duty exists between the student-athletes and the school. Though lacking some formalities found in traditional corporate-style fiduciary contexts, a clear exacting hierarchy characterizes the relationship between an athletic program and its students. Many different university officials shape an athlete's experience during his collegiate career. Officials range from coaches to administrators and professors, each of whom the athlete is subordinate to. These officials will be viewed as a single, collective fiduciary led by the head coach for the given sport, often referred to throughout this article as the

¹⁷ See *Athlete Graduation Rate: On and Off the Field*, U.S. NEWS & WORLD REP., March 18, 2002, at <http://www.usnews.com/usnews/edu/college/sports/rankings/gradrate.htm> (last visited March 22, 2006) (the graduation rate among athletes at some schools, such as Long Island University is actually significantly higher than non-athletes. As seen by the NCAA's most recent data, the overall graduation rate for all Division I athletes is 62%, compared to 60% for all students); see also 2004 NCAA Graduation Rates Report, NCAA, at http://www.ncaa.org/grad_rates/2004/d1/index.html (last visited March 22, 2006).

¹⁸ See Toma & Cross, *supra* note 4, at 407.

¹⁹ Cf. Weeks & Haglund, *supra* note 15, at 171.

“program” or “school.” Coaches and other officials are endowed with a great deal of experience, sophistication and power. Most major NCAA Division I football head coaches ascend to that position only after many years as assistant coaches in other Division I programs, as head coaches in lower-profile Division I-AA or Division II programs, or as high school coaches.²⁰ In addition to athletic credentials, most Division I coaches possess graduate degrees.²¹ In Division I programs, head coaches are considered experts in the area of athletics that they coach.

Though the NCAA directly dictates many regulations²² in college athletics, such as prohibiting athletes from making a profit from their status, restricting transfers to other programs, and limiting practice length and off-season workouts for example, coaches enjoy a great deal of power over athletes.²³ In addition to the obvious power in allocating playing time, determining starting lineups, positions played, and player rotations, college coaches and other associates of the program wield considerable control over many other aspects of athletes’ lives. Using academic advisors as proxies, coaches indirectly dictate athletes’ course schedules during the semester and even play a part in selecting their

²⁰ See JAMES ATIGO, *GUIDE TO A COACHING CAREER* 17-19 (2000). Head coach is not a position usually attained by a recent graduate. For example, newly-appointed BYU head football coach Bronco Mendenhall is the second youngest NCAA Division I-A head coach in the country at age thirty-eight. BYU ATHLETICS, *Bronco Mendenhall, Head Coach*, at http://www.byucougars.com/football/mendenhall_b.html (last visited March 29, 2006).

²¹ *Career Prospects: Coaching*, at http://www3.ccps.virginia.edu/career_prospects/briefs/A-D/Coaches.shtml (last visited March 30, 2006).

²² NCAA CONST. art. 12, reprinted in *NCAA DIVISION I MANUAL* (2004-2005), available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (last visited March 30, 2006).

²³ See, e.g., D. Stanley Eitzen, *Slaves of Big Time College Sports*, *USA TODAY MAGAZINE*, September 1, 2001. Robert Smith, a running back for the Minnesota Vikings, was a pre-med student and star athlete at Ohio State University. To meet his pre-med requirements, Smith needed a laboratory course that conflicted with football practices twice a week. The coaches insisted that football take precedence and that he must drop the course.

majors.²⁴ Athletes tend to lose personal autonomy, and coaches subject them to mandatory drug testing, and monitor them for deviant behavior while on campus.²⁵ In some programs they have even lost the ability to make decisions regarding red-shirting or their physical body weight during the season.²⁶ Some coaches even insist that their athletes avoid political protests²⁷ and others organize mandatory leisure activities which have been known to include prison tours, church services, and early morning practices.²⁸ In short, coaches possess vast control over the lives of athletes on the field, in class, and away from school. Regular students attend scheduled classes but are otherwise free to set their own schedules; student-athletes are given a schedule to follow which accounts for most of their time. This extensive power and control denotes a higher magnitude of duty.

Besides control, the reader should consider compensation as another factor in the fiduciary context. College sports generate an incredible amount of revenue, meaning generous pay for athletic department officials. The major football conferences are finishing an eight-year contract worth nearly \$1 billion to televise the Bowl Championship Series.²⁹ The NCAA has signed a \$6.2 billion, eleven-year deal granting CBS the exclusive rights to broadcast the men's basketball tournament each March.³⁰ An estimated \$2.5 billion worth of college sports merchandise is sold annually.³¹ This money translates into large paychecks for athletic personnel, particularly head coaches.

²⁴ See Weeks & Haglund, *supra* note 15, at 171 (discussing the uses of academic advisors in manipulating major choice for maintaining eligibility).

²⁵ Eitzen, *supra* note 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Sarah Lemons, "Voluntary" Practices: The Last Gasp of Big-Time College Football and the NCAA, 5 VAND. J. ENT. L. & PRAC. 12 (2002).

²⁹ Eitzen, *supra* note 23.

³⁰ *Id.*

In fact, top NCAA Division I football coaches' salaries easily top \$2 million per year.³²

In addition to their salaries, universities permit coaches to sign lucrative endorsement deals. For example, Duke basketball coach Mike Krzyzewski accepts \$375,000 annually from Nike in exchange for requiring his players to wear Nike shoes during games.³³

In short, there is a great deal of money generated and spent in compensation to coaches and other athletic administrators. College athletes are the generators of this money. In the fiduciary framework, this high level of compensation denotes a correspondingly higher degree of fiduciary duty.³⁴

B. CHARACTERISTICS OF THE STUDENT-ATHLETE AS BENEFICIARY:

Many athletes in basketball and football are unsophisticated and vulnerable, which makes them reliant on more experienced, more powerful, and highly compensated coaches and officials. However, courts have been hesitant to hold that "college students" constitute a particularly vulnerable class³⁵ even though lower admissions standards distinguish student-athletes from the general college population. At Duke, a school that prides itself on high academic standards for its athletes, scholarship athletes nevertheless maintain an average SAT score 400 points below regular students.³⁶ The NCAA imposes only minimal freshman eligibility requirements, permitting athletic participation for

³² Thom Park, *Are Football Coaches Overpaid?*, AMERICAN FOOTBALL MONTHLY, August 2002, available at <http://americanfootballmonthly.com/Subaccess/login.php?d=index.php&P=Magazine/2002/aug02/spotlight03.html> (last visited March 30, 2006).

³³ R. Hurst and J. Grief Pressley III, *Payment of Student-Athletes: Legal and Practical Obstacles*, 7 VILL. SPORTS & ENT. L. FORUM 55, 56 (2000).

³⁴ *See In re Estate of Maurice*, 249 A.2d 334, 336 (Pa. 1969) ("It is only reasonable and logical to expect services so well compensated for should have been performed in a careful and skillful manner.")

³⁵ *See, e.g., Andre v. Pace University*, 655 N.Y.S.2d (N.Y. App. Div. 1996) (holding college students are viewed as independent adults).

³⁶ *See Toma & Cross, supra* note 4, at 407.

students who place in the bottom one percentile on standardized tests.³⁷ The sliding scale of eligibility incorporates both GPA and standardized test scores so that an athlete with a 2.8 high school GPA would need to score only a combined 700 out of a possible 1600 on the SAT to be eligible; an athlete with a better, but not spectacular, GPA of 3.1 would need to score only 580.³⁸ In 2005, the average SAT score for a college-bound high school senior is 1028.³⁹ Many big-time collegiate athletes, sadly, are simply not on par intellectually with their student peers. In spite of this they are thrust into the college environment because of their physical abilities, rendering them especially vulnerable.

In addition to intellectual and academic deficiencies, the socio-economic profile of many Division I football and basketball athletes heightens their vulnerability. Although black students constitute just 6.6% of all undergraduates at Division I institutions, they make up 46% of the Division I football teams and 60% of the Division I basketball teams.⁴⁰ One in nine black male students at Division I schools is a scholarship-athlete, compared to just one in fifty white male students.⁴¹ Consequently, African-American student-athletes are often a distinct minority on university campuses.

³⁷ According to the NCAA's eligibility requirements which rely on a sliding scale that incorporates both GPA and standardized test scores, an athlete with a 2.8 high school GPA would need to score a combined 700—out of 1600 possible—on the SAT to be eligible; an athlete with a better but not spectacular GPA of 3.1 would need to score only 580 on the SAT. See *NCAA Freshman Eligibility Standards: Quick Reference Sheet*, at http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/ie_quick_ref.pdf (last visited March 29, 2006). To provide a context for these numbers, the average SAT score for a college-bound high school senior is 1026, and the lowest score technically possible is 400. See *Average Mean Scores, College Board*, available at <http://www.collegeboard.com/student/testing/sat/scores/understanding/average.html>. A score of 700 would locate the student in the bottom six percentile, meaning that 94% of all students scored better. *Id.* The student registering the aforementioned 580 combined score would place in the bottom one percentile. See *SAT I Test Performance, Grid*, available at http://usfweb2.usf.edu/UGRADS/EANDT/sat_percentiles.htm (last visited March 30, 2006).

³⁸ *Freshman Eligibility Standards*, *supra* note 37.

³⁹ See Claudette Riley, *SAT Scores for State's Seniors Outpace National Average*, at <http://www.tennessean.com/apps/pbcs.dll/article?AID=/20050831/NEWS04/508310402> (last visited March 29, 2006).

⁴⁰ Wheeler, *supra* note 7, at 230-31.

⁴¹ *Id.*

Further, many African-American student-athletes come from very financially disadvantaged backgrounds and are often much poorer than the general African-American college population.⁴² Many student-athletes have the mindset that sports is a means of escaping poverty.⁴³ In fact, 44% of black college athletes expect to play professionally.⁴⁴ However, less than 2%, or 150 of the nearly 18,000 NCAA Division I men's football and basketball players actually play professionally.⁴⁵ These factors produce a particularly vulnerable student-athlete uniquely reliant upon the program.

Major league baseball develops talent in a minor league system, but collegiate athletics are the primary transmission conduit between high schools and the NFL and NBA.⁴⁶ The NFL already employs a minimum age requirement, made infamous by the Maurice Clarett debacle, which limits players from bypassing college to play professionally.⁴⁷ NBA Commissioner David Stern has recently considered instituting a twenty year age minimum in the league's collective bargaining contract⁴⁸ which, in addition to preventing players from turning pro straight out of high school, would exacerbate the role of colleges as a minor league system for the NBA. These policies translate into enormous determinative power for coaches in influencing which players get

⁴² R. Sellers, et. al., *Life Experiences of African-American Student-Athletes in Revenue Producing Sports: A Descriptive Empirical Analysis*, ACADEMIC ATHLETIC JOURNAL 21 (Fall 1991); see also Christopher M. Parent, *Forward Progress? An Analysis of whether Student-Athletes should be Paid*, 3 VA. SPORTS AND ENT. L.J. 226, 227-228 (2004).

⁴³ Shannon Brownlee, *supra* note 1.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Wheeler, *supra* note 7, at 229. Recently, NBA Commissioner David Stern suggested including a provision in the NBA collective bargaining agreement that would require NBA prospects to be twenty years of age before declaring for the NBA draft. See ESPN.COM, *Stern Wants Age Limit Raises to 20*, ESPN.com, April 12, 2005, at <http://sports.espn.go.com/nba/news/story?id=2035132> (last visited March 30, 2006).

⁴⁷ See Robert A. McCormick, *Open Letter to Maurice Clarett: Why You May Turn Professional Now*, N.Y. TIMES, Aug. 17, 2003, at 11.

⁴⁸ ESPN.COM, *Stern Wants Age Limit Raises to 20*, ESPN.com, April 12, 2005, at <http://sports.espn.go.com/nba/news/story?id=2035132> (last visited March 30, 2006).

exposure and the opportunity to showcase their abilities. Coaches may revoke scholarships, compel red-shirt seasons, or limit playing time as they see fit, all of which makes student-athletes dependent on them.

Whatever small chance these athletes have of making the NFL or NBA is contingent on the support of their collegiate athletic programs and coaches. Thus, for those athletes that do not receive highly coveted playing time, reliance is on their universities to guide them to a degree in something other than sports. In other words, for purposes of the fiduciary analysis, the student-athlete's reliance upon his coach and program is tremendous and foreseeable.

C. THE CHARACTERISTICS OF THE RELATIONSHIP:

The relationship between the program and the student-athlete is difficult to characterize because not all student-athletes want or expect the same things. Some only play college sports in the hopes of one day turning pro, while others genuinely want an education. Regardless, certain core characteristics appear universal in the relationship between the universities and the student-athletes.

Despite what initially appears to be a lack of traditional formality, the expectations of all parties are well defined. Coaches expect student-athletes to retain eligibility, academic or otherwise, and submit to all coaching demands. This expectation is contractual in nature and, if it is not met, means athletes will not play—because he is ineligible or because the coach benches him. Athletes' expectations from the program, however, are likely to be very different, due in part because coaches persuading players to attend their schools are notorious for “promising the world.”⁴⁹ As previously discussed, 44% of black athletes believe they will play at the professional level even

⁴⁹ See David Davis, *Pay to Play?*, LOS ANGELES MAGAZINE 46 (May 2003).

though the vast majority will not.⁵⁰ Despite the long odds, coaches often emphasize and encourage such dreams by promising starting positions and playing time, a practice former Nebraska football coach Tom Osborne acknowledged before a congressional subcommittee hearing entitled “College Recruiting: Are Student Athletes Being Protected?”⁵¹ Osborne added that “[t]here is going to be a certain percentage that are going to cheat...that are going to cheat in recruiting. That’s just the way it is.”⁵²

Coaches may even tailor their recruiting messages to specific athletes: students who want an education are promised one, even if they are at a severe academic disadvantage compared to future classmates and will be required to give football priority over studies. “The disconnect between coaches’ recruiting promises and the reality of expectations that turn them into athlete-students far more often than student-athletes” is a frequent complaint among many student-athletes.⁵³

Technically, the relationship between a student-athlete and the program is voluntary. Athletes choose where to attend school and can quit and walk away at any time. However, various social and economic realities weigh into the equation and render the relationship considerably less voluntary than it initially appears. Many student-athletes perceive sports as their only legitimate option. This is true regardless of how athletes view education, whether it be as a gateway to playing professionally or a legitimate means to better themselves and open doors to future jobs. Consequently, while student-athletes can, in theory, walk away at any time, what they have to walk back to is

⁵⁰ Shannon Brownlee, *supra* note 1, at 50.

⁵¹ *College Recruiting: Are Athletes Being Protected?, Before the House Subcomm. on Commerce, Trade, and Consumer Protection*, 108th Cong. 16 (March 11 2004) (statement of Nebraska Rep. Tom Osborne).

⁵² *Id.*

⁵³ *The Will to Act Project: Student-Athlete Issues*, THE NCAA NEWS, Sept. 16, 2002, at <http://www.ncaa.org/news/2002/20020916/active/3919n07.html> (last visited 29 March 2006).

not very enticing – minimum wage jobs, unemployment, perhaps even poverty. Given humble origins and lack of other marketable skills, the only real option for many student-athletes is to continue in a program in the hopes of enjoying whatever proverbial pot of gold has been promised, whether in the form of a professional contract or a four-year degree. Perhaps more importantly, NCAA regulations severely limit the ability of student-athletes to leave a particular program and join a different one offering greater opportunity. A Division I athlete who transfers to another program is required to sit out an entire year, losing that year of eligibility.⁵⁴ Given this lack of mobility, together with the other external socio-economic pressures, it is appropriate to characterize a student-athlete's *continuing* relationship with a program as less than wholly voluntary. Further underscoring the disparate power dynamic in the relationship, a program can cut a player from a team at its discretion, is not subject to due process requirements,⁵⁵ and is liable to fulfill only the remainder of the scholarship for that particular academic year.⁵⁶

Beyond these preliminary and universally applicable characteristics of the athlete-school relationship, the nature of the fiduciary relationship varies dramatically between students genuinely pursuing an education and students purely pursuing athletics. As will be seen in Section III, discerning the actual fiduciary role of the school in this regard, particularly which students are there for an education and which are there purely to play sports, is a difficult task.

III. EDUCATOR-STUDENT, OR EMPLOYER-EMPLOYEE? A DIFFICULT DISTINCTION

⁵⁴ NCAA CONST., *supra* note 22.

⁵⁵ See NCAA v. Tarkanian, 488 U.S. 179 (1988).

⁵⁶ See, e.g., Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS AND ENT. L.J. 226, 252 (2004).

When contemplating the initial shift in the 1950s from purely need-based financial aid to a system awarding aid based on athletic talent, members of the NCAA governing body expressed concern about preserving the amateur status of the athletes.⁵⁷ They feared that NCAA athletes would be identified as employees by state industrial commissions and courts.⁵⁸ In response, according to longtime NCAA head Wally Byers state that “[w]e crafted the term student athlete and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.”⁵⁹ Now, a half decade after its invention, the term “student-athlete” signifies the dichotomy that a university faces in interpreting the duty it owes to the players; in other words, whether it is the educator or the employer.

The question becomes whether the student-athlete attending the university is there to learn and acquire a degree, or to play sports? Notwithstanding the student-athlete’s own goals and intent, defining a relationship is at least as much the responsibility of the fiduciary as of the beneficiary. Granted, these interests are not necessarily mutually exclusive. All too often, however, the latter purpose, sports, is the controlling one and fully supplants academics. Consequently, the university and student need to clearly set out the core interests of the relationship and ascertain what duties the university owes. There are three principal junctures when the university and student can establish and define the nature of the relationship: recruitment, admission, and through the relative emphasis given to athletics and academics during the student-athlete’s time in college. A closer examination of these three junctures reveals the ambiguity existing in this relationship.

⁵⁷ Wheeler, *supra* note 7, at 215.

⁵⁸ *Id.*

In many ways, recruitment provides the opportunity for a university to establish its expectations for a student-athlete, including the university's academic expectations. During the recruitment visit to campus, a university can fix itself in the mind of the recruit as not only a great place to play sports, but also a great place to learn. Unfortunately, recruitment visits often fail to emphasize academics in lieu of athletics and other, less scholastic attributes.⁶⁰

In testimony before Congress, David Williams, the vice chancellor for Vanderbilt University, shared insightful comments regarding recruitment. He questioned whether it explores the university's educational qualities and a recruit's desire for an education:

Of course, if the prospect demands to see the biology labs or the library that will happen, but what if they don't ask those questions? How much time is spent with professors, academic support and tutoring, or seeing a classroom? We will certainly make sure that you see the weight room and hear how the strength coach will build you up. . . . All fine, but aren't you coming to college? Or maybe this is just about your athletic ability. We need to redesign our recruiting to more clearly focus on the educational aspect of college life.⁶¹

Instead of emphasizing academics, recruitment often emphasizes everything else: athletics, social aspects, and even illicit pursuits such as prostitution.⁶² As Williams asserts, "a one or two hour period on education over a forty-eight hour visit is not enough

⁶⁰ See, e.g., Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 664-65 (1995); see also Barbash, *supra* note 12 (former University of North Carolina football scholarship athlete Gary Rubie's testified before a Congressional Committee that he was promised stardom, but ultimately the coaching staff asked him to consider transferring or dropping out).

⁶¹ *College Recruiting: Are Student Athletes Being Protected?: Hearing before Subcomm. on Commerce, Trade, and Consumer Protection, H. Energy and Commerce*, 108th Cong. (2004) (statement of David Williams II, Vice Chancellor for Student Life and University Affairs, General Counsel, Professor of Law Vanderbilt University).

⁶² See *NCAA May Clamp Down on Recruiting*, CBS NEWS.COM, <http://www.cbsnews.com/stories/2004/02/18/national/main600863.shtml> (last visited 29 March, 2006). This of course, is in addition to other controversial perks such as flights on private jets and other perks from boosters who are trying to entice a particular recruit.

time.”⁶³ Given the chance to make a first impression, the recruitment process instills non-academic concepts. In many ways, in fact, the recruitment resembles that by a potential employer, rather than potential educator. Consequently, student-athletes are less likely to develop a legitimate interest in attaining an education.⁶⁴

The university’s second opportunity to emphasize academics is during the admissions process. By only admitting student-athletes who possess the requisite skills to succeed in college, a university can assert that academics are not subordinate to athletics. Again, however, schools fumble the proverbial ball at this important juncture. Many student-athletes enter school at a severe disadvantage in comparison to their non-athlete classmates.⁶⁵ Further, many of them have not demonstrated any desire to perform in an academic context.⁶⁶ Given the obvious admissions discrepancy, the apparent message for athletes is that they are at college for sports, not education.⁶⁷ By admitting athletes who fall far below the normal admissions standards, colleges endorse their lack of scholastic effort, and discourage the importance of academics.

⁶³ *College Recruiting: Are Student Athletes Being Protected: Hearing before Subcomm. On Commerce, Trade, and Consumer Protection, H. Energy and Commerce, 108th Cong. (2004)* (statements of David Williams II, Vice Chancellor for Student Life and University Affairs, General Counsel, Professor of Law Vanderbilt University).

I am sorry to state that most recruits will spend more time in the downtown club than they will on the educational aspects during their official visit. This must be changed. When undergraduates approach me about going to law school, I do not tell them to find some law students and go party with them. I strongly suggest that they talk to some law professors, talk to some lawyers, and by all means read something about the law and visit at least one of my law classes. Why do we purposely separate or downplay the educational part of college in the recruiting process? Are we scared it will chase the prospect away? *Id.*

⁶⁴ See Dan Subotnik, *Goodbye to the SAT, LSAT? Hello to Equity by Lottery? Evaluating Lani Guinier’s Plan for Ending Race Consciousness*, 43 HOW. L.J. 141 (2000) (for a general discussion of what impacts the desire to learn).

⁶⁵ See discussion *supra* § II.B.

⁶⁶ See Grant, *supra* note 11, at 649 (discussing the lack of academic ambition exhibited by some African American student-athletes).

⁶⁷ Eitzen, *supra* note 23.

More significantly, this practice virtually guarantees that schools will have many student-athletes who either cannot do the academic work, or simply do not want to. Compelling students to attend classes and earn a degree, when they are ill equipped to do so, is just the current system's way of imposing society's values on unwitting athletes. Athletes must *pretend* to pursue an education in order to perform on the athletic stage.⁶⁸ This approach results in the attitude exhibited by Deion Sanders and others: school is a charade they must participate in to play sports. University of Iowa running back Ronnie Harmon's circumstances strengthens that point. A computer science major, Harmon took only one computer course in three years of college.⁶⁹ Another Iowa football player also majored in computer science, but in his senior year took only courses in billiards, bowling, and football; he followed up by getting a D in a summer school watercolor class.⁷⁰ Transcripts of the members of the basketball team at Ohio University list credit for class titled, "International Studies 69B" – a course composed of a 14-day/10-game trip to Europe.⁷¹

Once a student-athlete is successfully recruited and admitted, the university has a third opportunity to emphasize academics and its primary role as an educator. Instead of emphasizing academics, however, athletics dominate the student-athlete's time. Universities assure minimum eligibility requirements are met, but beyond that the athlete's class performance is of minimal concern. Players often struggle to focus on school given the importance placed on athletic performance.⁷²

⁶⁸ Parent, *supra* note 56, at 252.

⁶⁹ Barbash, *supra* note 12.

⁷⁰ *Id.*

⁷¹ *Id.*

As previously asserted, many student-athletes attend school purely to play sports. In such instances, an employer-employee relationship is more evident than an educator-student relationship. However, *some* students do genuinely want an education, and attend the university hoping to achieve that goal. As a consequence of this variance among student-athletes, it is impossible to ascertain the magnitude of the breach in a single analysis. Universities do not owe the same duties to all student-athletes. Instead, it is necessary to bifurcate the analysis, separately addressing the university's duty and breach of that duty in the educator-student context, and the university's duty and breach in the employer-employee context, depending on where the student-athlete falls along the continuum.

Determining where along the continuum a student lands will ultimately be a factual determination. Certain criteria are particularly relevant: the promises made by coaches both to the student and to the student's parent(s), how the program is portrayed during the recruitment and campus visits, and other external factors suggesting the student's real motivation and purpose. Ultimately, the university is in the best position to insure that the student-athlete genuinely wants an education. This can be accomplished during the recruitment and admission's process. By screening out student-athletes who are instead interested in participating in an elaborate charade of quasi-professional athletics, the school can protect the integrity of its program. A potential concern of this approach is that universities may intentionally pursue those students not interested in pursuing an education, thus minimizing their fiduciary duties to educate and exacerbating an existing problem. However, as seen below, the fiduciary duties likely implicated in an employer-employee context are more difficult to satisfy and consequently provide a

disincentive for this practice. Instead, the incentive will be for colleges to pursue those students most interested in genuinely being educated.

IV. CONTRASTING DUTIES ALONG THE CONTINUUM: STUDENTS OR EMPLOYEES?

A. TRYING BUT FAILING: THE VULNERABLE STUDENT-ATHLETE WHO GENUINELY WANTS AN EDUCATION

For student-athletes who truly want an education,⁷³ universities have something valuable to offer: a free education. Coaches committed to successfully recruiting top athletes recognize this desire and adapt their pitches to promise a quality college education.⁷⁴ They boast of progress in graduation rates and emphasize a “personal philosophy” that a student-athletes are students first and an athlete second.⁷⁵ Coaches might promise students access to top-flight academic advisement, tutors, and other tools necessary to succeed.⁷⁶ The University of North Carolina made such promises to Gary Ruble, a former scholarship athlete.⁷⁷ By Ruble’s own account he was promised “the world,” and guaranteed he would become a star and graduate.⁷⁸ Once he joined the team that rhetoric changed: Ruble found himself riding the bench as the team made clear to him he would not start and even suggested he transfer or drop out “gracefully.”⁷⁹ When these promises are broken, it potentially implicates breaches ranging from fraud and conflict of interest to lack of diligence and care.

⁷³ See Davis, *supra* note 60 (arguing many student-athletes do genuinely want the education offered).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Barbash, *supra* note 12.

⁷⁸ *Id.*

⁷⁹ *Id.*

Studies suggest that some benefits students receive from attending more selective colleges are diminished by lower academic performance.⁸⁰ Students who attend the most selective colleges likely could have achieved higher earnings by attending a school with lower admissions standards and less academic competition and maintaining a higher GPA.⁸¹ In short, by recruiting athletes who lack the ability to succeed in a competitive college while enticing them with the promise of a valuable education, coaches may be knowingly perpetrating a fraud against those students and damaging their future earning abilities. Students are eligible to play sports for four years, while at the same time subjecting themselves to the rigors and demands of a Division I program – all in exchange for promised degrees they are unable to achieve. This is one of several breaches that occur in the university-student relationship.

Coaches and student-athletes do not necessarily have the same goals. Coaches at major universities retain job security by winning, not guiding student-athletes to graduation. This often leads to instability in the coaching ranks and quick exits for coaches who do not measure up to university expectations.⁸² Unfortunately, coaches and students goals and priorities do not always end up being the same when it comes to academic progress. This priority divergence produces conflicts of interest and the potential for breaching fiduciary duties. Coaches promise students an education in order to win games. However, after the athletes enroll the coaches emphasize winning rather than education. There is a similar problem when schools and conferences, eager to capitalize on the popularity and profitability of marquee sports, lengthen athletic seasons

⁸⁰ Robert W. Brown, *The Revenues Associated with Relaxing Admission Standards at Division I-A Colleges*, 28 APPLIED ECON. 807, 814 (1996).

⁸¹ *Id.*

⁸² ESPN.COM, *AD Cites Lack of On Field Progress*, ESPN.COM NEWS SERVICES, December 1, 2004, at <http://sports.espn.go.com/ncf/news/story?id=1935138> (last visited March 31, 2006).

and schedule pre-season and playoff games on school nights.⁸³ NCAA rules allow member schools to schedule midweek road games despite the players' conflicting classroom obligations.⁸⁴ By advancing their own interests of winning and generating revenue, schools and coaches marginalize the student-athlete's academic performance.

NCAA men's football and basketball players dedicate between thirty-five and forty hours a week to their respective sports.⁸⁵ In addition to working the equivalent of a full-time job, these players must also maintain full-time student status to retain their eligibility.⁸⁶ Juggling classes and athletics is a difficult task for even the most capable student-athletes; it is nearly impossible for the ones whose lack of academic success would have kept them out of college if not for their athletic abilities. Coaches trying to win football games want longer, more frequent practices and complete player dedication. The price paid for that attitude is lower academic performance.

Coaches who recruit the athletes and shepherd them through the admissions process are aware of their academic deficiencies. Consequently, when those same coaches – who promised the student-athletes that they will have a legitimate opportunity to receive a college education and degree – impose athletic requirements seriously compromising that opportunity, they breach important promises out of self-interest. Further, early awareness of their athletes' academic deficiencies suggests a duty of care and diligence in assisting the athletes academic success. Additionally, student-athletes who genuinely want an education are often steered away by athletic eligibility-conscious

⁸³ Wheeler, *supra* note 7, at 231.

⁸⁴ Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, U. MICH. J.L. REFORM 861, 873 (2002).

⁸⁵ Barbash, *supra* note 12.

⁸⁶ NCAA CONST. art. 14, *supra* note 22.

advisers.⁸⁷ A former University of Georgia academic adviser for athletes, recalled how an athlete was always placed in “dummy” classes despite his efforts to take “real” ones: “There’s nothing wrong with his mind, but the situation is magnified for athletes because there is so much money involved. There is too much control over who gets in and who takes what courses.”⁸⁸

The argument that schools owe a fiduciary duty to educate unprepared student-athletes seems facially unreasonable. However, closer examination reveals coaching staff promises are often the only reasons student-athletes attend a particular school. When those promises implicate the student’s education and post-athletic prospects, coaches create a fiduciary duty. If schools deny admission to student-athletes woefully unprepared for college, those students can pursue other options: junior college, a less rigorous four-year program where they have a better chance for success, or even bypassing college in favor of immediate employment. On the other hand, by admitting student-athletes and letting them fail academically, universities may leave athletes significantly worse off than if they had initially pursued other options.⁸⁹ While universities have no general fiduciary duty to prevent students from failing,⁹⁰ a powerful argument remains that the vulnerability and reliance exhibited by student-athletes as a sub-class of the general student population warrants imposing a duty on them. Thus, by recruiting and admitting students unprepared for the academic curriculum but who genuinely *want* an education, schools breach their fiduciary duties by placing additional obstacles in their path to graduation.

⁸⁷ See Barbash, *supra* note 12.

⁸⁸ *Id.*

⁸⁹ See Brown, *supra* note 80, at 814 (1996).

⁹⁰ See *Mass v. Corp. of Gonzaga Univ.*, 618 P.2d 106 (1980).

The simplest and most effective solution to that breach is for universities to adhere to stricter admissions criteria. The idea that everyone who wants an education should be able to attain one is a noble concept, but the cruel reality is that while student-athletes may be able to compete well on the field of play, they often lack the requisite abilities to compete academically.⁹¹ Most students admitted solely on the basis of their athletic abilities actually “underperform,” doing even worse academically than their high school grades and test scores predict.⁹² In an attempt to prevent such problems, Ivy League schools adopted a technique called “banding” to ensure that athletic recruits have academic credentials that, on average, are not more than one standard deviation below that school’s average for all students.⁹³ By comparison, current NCAA requirements for incoming freshmen only deny eligibility to athletes “whose academic preparedness borders on functional illiteracy.”⁹⁴

If all Division I schools adopted a system similar to the Ivy League schools practicing “banding,” the fiduciary breaches inherent in the current system would be less frequent. The basis for much of the fiduciary relationship is the vulnerability of student-athletes, and by admitting only those students prepared for college, schools can reduce that factor significantly. Students would be more likely to perform well academically, receive legitimate degrees in marketable majors, and would be less reliant upon their universities. Ultimately this is only possible when a student-athlete genuinely *wants* an

⁹¹ See WILLIAM BOWEN & SARAH LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 200 (2003).

⁹² *Id.*

⁹³ Wheeler, *supra* note 7, at 231 (citing BOWEN & LEVIN, *supra* note 91, at 267).

⁹⁴ ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH 99 (1998).

education. As seen below, a different analysis is appropriate when student-athletes are only interested in college as a means to playing sports.

B. MINIMUM WAGE EMPLOYEES: THE ATHLETE WHO ONLY WANTS TO PLAY SPORTS

If an athlete attends school solely to play sports, the value of the “education” becomes nominal. In these cases, there is often a mutual understanding about expectations between student-athletes and their programs. Reports of sham classes as well as other instances of academic fraud evidence those mutual expectations.⁹⁵ Iowa State football coach Jim Walden believes the situation is so bad that only 20% of college football players attend school to receive an education.⁹⁶ Where universities and student-athletes mutually purge the educational element of college, the result is a legion of athletically gifted young men dedicating time and effort to propel a multi-billion dollar industry. Under these circumstances, an employer-employee analysis is more appropriate than an educator-student fiduciary analysis.

As discussed in Part III, one of the principle motives in coining the term “student-athlete” was immunization against courts classifying scholarship athletes as employees. In the worker’s compensation context, the NCAA has prevailed in this endeavor because courts have refused to recognize an employer-employee relationship between universities and their student-athletes.⁹⁷ Consequently, players have been unsuccessful in equating their scholarship agreements with employment contracts and are not entitled to benefits

⁹⁵ See discussion *supra*, at Introduction.

⁹⁶ Eitzen, *supra* note 23.

⁹⁷ Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW J. 25, 37 (1995).

under the Workers' Compensation Act.⁹⁸ Some critics believe that courts just refuse to professionalize amateur college athletics by deciding the other way.⁹⁹

Arrival at an employer-employee relationship may still be possible through analysis of applicable fiduciary duties. While the duties owed in an employer-employee relationship are typically set forth in contracts,¹⁰⁰ a fiduciary duty analysis is appropriate if the employer is disproportionately powerful, the employee disproportionately vulnerable, and where exploitation occurs. Exploitation in that regard gives rise to breaches such as disloyalty, failure to exercise due care and prudence, and even fraud. Remove the educational pretenses and the relationship is apparent: schools pay athletes by giving them scholarships in exchange for athletic performance which generates school revenue. The nature of this relationship is consistent with the Fair Labor Standards Act definitions of "employer" and "employee." Under FLSA, an employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee."¹⁰¹ The FLSA defines "employee" as "any individual employed by an employer."¹⁰² The Act also notes that "employ" means "to suffer or permit to work."¹⁰³ According to that broad definition, an employer-employee relationship between universities and scholarship athletes is a logical conclusion.

It is not unusual for employers to treat workers as non-employees to avoid compliance with mandatory labor standards. Such behavior is actually commonplace in

⁹⁸ Coleman v. W. Michigan Univ., 336 N.W.2d 224, 225 (Mich. Ct. App. 1983).

⁹⁹ Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW J. 25, 37 (1995).

¹⁰⁰ Thomas O. Wells, *Sale of Personal Goodwill: The Executive's Parachute*, 79-MAR FLA. B.J. 31 (2005).

¹⁰¹ 29 U.S.C.A. § 203 (West 1999).

¹⁰² *Id.*

¹⁰³ *Id.*

garment and agriculture industries.¹⁰⁴ When employers engage in this practice, denying employees rights they would otherwise be entitled to, a fiduciary duty is exists.¹⁰⁵

Though migrant farm workers and sweat-shop employees are substantially more vulnerable than collegiate athletes, themes present for those workers and their industries are analogous to big-time college sports.

The median “hourly wage” of college football and basketball players at big-time schools is \$6.82, assuming a 1000-hour workload.¹⁰⁶ That calculation takes into consideration that student-athletes who acquire no legitimate education or degree have not benefited from the free tuition and have essentially played only for room and board.¹⁰⁷ The wage discrepancy is severe when compared to the salaries of coaches and administrators as well as the tremendous amount of money college sports generate.¹⁰⁸ These low wages factor in the suggested value of the education where the students actually graduate. The compensation that athletes receive costs the university essentially nothing.¹⁰⁹ Even if athletes take up seats that could have been sold to other students, universities offer classes regardless of whether student-athletes are there or not.¹¹⁰ This is somewhat akin to paying a migrant farm worker with a basket of the vegetation he just picked from the field instead of cash.¹¹¹ Farms have plenty of crops and universities have

¹⁰⁴ See Bruce Goldstein, et. al., *Enforcing Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

¹⁰⁵ *Id.*

¹⁰⁶ RICHARD SHEEHAN, *KEEPING SCORE: THE ECONOMICS OF BIG-TIME SPORTS* (1996).

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* notes 27-31 and accompanying text.

¹⁰⁹ Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 84 (2000).

¹¹⁰ *Id.*

¹¹¹ RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* 69-70 (1996). See also, I.R.C. § 132(b)(1)-(2) (1999) (allowing employees to exclude from gross income value of fringe benefits which are offered for sale to customers in the ordinary course of the line of business of the employer and where the employer incurs no substantial additional cost (including foregone revenue) in providing such service to the employee).

plenty of “books, lectures, and midterms” to dole out to student-athletes even if they would rather receive cash than an education.¹¹²

Schools may justify the disproportionate compensation of college athletes with the argument that student-athletes are willing participants. Athletes are aware of the terms of their participation, and acquiescence to those terms means that no breach occurs. However, the breach is a product of universities’ disproportionate bargaining power coupled with the unique vulnerability of student-athletes. As discussed above, many athletes come from disadvantaged socio-economic backgrounds and have few other marketable skills.¹¹³ Much like migrant farm workers unable to procure other work, student athletes are likely to accept whatever terms the school presents to them.¹¹⁴

A poorer background and a lack of other marketable skills create a duty on the part of the more powerful party to not take advantage or exploit the more vulnerable party. Potential college athletes may be more willing to accept the “terms of employment” because of false expectations that playing sports in college will guarantee the chance to play professionally. If this were a realistic possibility, colleges could persuasively argue that the monetary benefits given to the athletes in room and board are augmented by the opportunity to showcase their abilities and potentially earn millions professionally. However, few athletes will play at that level.¹¹⁵ The odds of reaching the NBA from NCAA basketball are 400:1.¹¹⁶ Schools exploit ambition and lack of

¹¹² RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* 69-70 (1996).

¹¹³ See *supra* notes 34-41 and accompanying text.

¹¹⁴ Eitzen, *supra* note 23.

¹¹⁵ Barbash, *supra* note 12.

¹¹⁶ *Id.*

pragmatism to use collegiate athletes for what amounts to low wage labor in a high revenue industry.

Classifying student-athletes as employees would prove problematic for the NCAA, and it seeks to avoid that classification for good reason. Employee-athletes would require higher pay that might trigger Title IX fund allocation problems.¹¹⁷ Paying student athletes also devalues the educational aspect of attending college and runs the risk of alienating the college sports fan base. The ideal solution for the NCAA would be for collegiate athletes to actually receive a legitimate education. The educator-student analysis becomes more appropriate and the employer-employee analysis is rendered moot. This means, of course, that universities must assure athletes actually *can* and *want* to receive an education.

V. CONCLUSION

A fiduciary duty exists between universities and vulnerable student-athletes. However, the scope of the relationship is dependent upon where a student-athlete falls along a continuum: at one end are those student-athletes who genuinely want to pursue their education and earn a four-year degree. Some of these students, despite their noble intentions, lack the ability to succeed at the major college level academically and are rendered worse off as a consequence of trying. At the other end of the continuum are student-athletes who attend class only because doing so is a requirement for them to play sports. These student-athletes are more interested in playing professional sports rather than earning an education. It makes little sense to force an education upon them or to impose a fiduciary duty upon schools to educate them.

¹¹⁷ Wheeler, *supra* note 7, at 231.

In the absence of an education, schools are able to offer very little to the athletes (given the long odds against professional success for the athletes), and run a high risk of exploiting the most vulnerable athletes. By recruiting and admitting athletes who fall far below normal admissions standards, a university virtually guarantees the presence of student-athletes along the continuum mentioned above, and triggers the heightened fiduciary duties discussed. It is only by reevaluating the admissions process and granting admission only to those students willing *and* able to attain a true education that schools can avoid a breach of their fiduciary duties.