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March 28, 2006

VIA OVERNIGHT COURIER

National Collegiate Athletic Association
1802 Alonzo Watford Sr. Drive
Indianapolis, Indiana 46202
Attention: Executive Committee

Ladies and Gentlemen:

On behalf of the University of Illinois Board of Trustees and the University of Illinois at Urbana-Champaign (the "University"), I provide this rebuttal to the March 7, 2006 NCAA Staff Committee's Response (the "Staff Committee Response" or "Response") in regard to the University's appeal of its inclusion on the list of member institutions subject to the NCAA's policy restricting the use of Native American "mascots, names, and imagery" (the "Policy"). As dictated by the NCAA appeal process, this document addresses only the specific matters set forth in the Staff Committee Response. (Response, p. 7).

This rebuttal disputes the Executive Committee's claim of authority under the NCAA Bylaws for enacting the Policy by arguing that sociological or political issues are not "core issues" over which the Executive Committee has authority; shows that the process for *appealing* the Staff Review Committee's determination under the Policy is fundamentally flawed and does not provide a fair process for member institutions; and, demonstrates that the University has rebutted the presumption imposed by the NCAA.[1]

I. Sociological or Political Issues Are Not "Core Issues" over Which the NCAA Executive Committee Has Authority

The University argued in its appeal that the Executive Committee exceeded its authority under the Bylaws by enacting the Policy, which is akin to "legislation" and thus should have involved the process set forth in the Bylaws for enacting legislation.[2] (University Appeal, Jan.

[1] As a preliminary matter, the University again questions the statement made repeatedly by the Staff Committee that the NCAA does not "ask or demand that the University cease use of the Chief Illiniwek tradition." (Response, pp. 14, 18; SRC Decision, Nov. 11, 2005, pp. 2, 3). It strains credulity to suggest that there is a meaningful difference between *demanding* that a member institution do something and adopting a new policy, applying it to a select number of member institutions and imposing penalties for non-compliance.

[2] The Staff Committee Response improperly asserts that this argument is "beyond the scope" of this appeal because the NCAA provided a separate process for institutions seeking to modify or amend the Policy. (Response, p. 11). In this appeal, however, the University is not seeking to modify or amend the Policy. Instead, the University is challenging, among other things, the Executive Committee's power to enact the Policy under the Bylaws. Accordingly, the University's argument on this point is properly raised in this appeal. The University's earlier

30, 2006, pp. 2-6). The University also requested that the NCAA specifically identify the provisions that provide the basis for the Executive Committee's purported power to adopt the Policy and what, if any, limits are imposed on the Executive Committee's powers. (University Appeal, p. 4).

The Staff Committee Response reveals for the first time the view that the presence of Native American mascots, nicknames and logos by member institutions is subject to the jurisdiction of the Executive Committee pursuant to Bylaw 4.1.2(d) because it is a "core issue" affecting the NCAA. (Response, pp. 11-13). The Response argues that the Executive Committee possesses "broad authority" to act on behalf of the NCAA, limited only by the ability of the membership to change the NCAA governance, restrict the authority of leadership bodies (including the Executive Committee), or require that all Association-wide decisions be approved by a vote of all member institutions. (Response, p. 12).

This argument ignores the fact that the NCAA Bylaws restrict the Executive Committee's authority to specifically delineated powers. As the University noted in its appeal, Bylaw 4.1.2 lists thirteen specific duties and responsibilities of the Executive Committee. (University Appeal, pp. 2-4). These specific responsibilities do *not* include enacting legislation. Instead, the Bylaws provide separate and specific processes for enacting legislation. (NCAA Bylaws 5.01-5.3; *see also* University Appeal, pp. 4-6). For example:

> All legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled, or by the presidential administrative groups and the division management councils. . . . (Bylaws, Sec. 5.01.1).

These provisions clearly vest the power to enact legislation in the NCAA membership and in the division presidential groups. The membership did not intend the Executive Committee's power to resolve "core issues" under the Bylaws to be so broad that the other legislative processes and powers for enacting legislation described in the Bylaws are rendered moot whenever the Executive Committee determines in its sole discretion that a particular issue is a "core issue" of the Association. This is especially true with respect to the Policy given the specific reference in Section 5 to "the establishment and control of NCAA championships" as part of the *legislative* process. (Bylaws, Sec. 5.2.2 (b)).[3]

Moreover, the NCAA's position would give the Executive Committee virtually unlimited power. If the NCAA is correct, the Executive Committee could issue policies on any issue it unilaterally deems to be a "core issue" of the Association under Bylaw 4.1.2(d). For example, the Executive Committee could decide that a particular political viewpoint is a "core issue"

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suggestion that the Policy be amended was intended to illustrate but one aspect of the Policy's arbitrariness, namely, that the Policy was far broader than necessary to achieve its stated goals. (University Appeal, Jan. 30, 2006, pp. 8-9, 15). That fact remains true.

[3] Equally troubling is the fact that the Executive Committee enacted the policy without advance notice. The Agenda for the August 4, 2005 meeting of the Executive Committee depicted agenda item #6 as an "Information" item, not an "Action" item. The Agenda is available on the NCAA's website.

affecting the Association and declare that only those member institutions that support or oppose that viewpoint may host championships.[4] Such a view is untenable. Nor can the membership be presumed to have intended Bylaw 4.1.2(d) to provide such power. Accordingly, the Executive Committee's reliance on this provision to justify its power to enact the Policy is misplaced.[5]

II. The NCAA's Appeal Process Is Fundamentally Flawed and Does Not Provide a Fair Process for Member Institutions

The *appeal* process itself is fundamentally flawed and does not provide a fair process.

A. The *Ad Hoc* Appeals Process Is Unprecedented and Unfair

The Bylaws provide a specific appeal process for legislation that is enacted through the formal process outlined in the Bylaws. (Bylaws, Sec. 5). The Bylaws do not provide or contemplate an appeal process for matters such as the Policy because, as discussed above, the Executive Committee has no power to legislate under the Bylaws. Nonetheless, the NCAA has arbitrarily created an after-the-fact appeal process that lacks many of the fundamental safeguards of a formal appeal process.

In addition, only now in its Response, *seven months* after the Policy was announced, does the NCAA identify the "standard of review" governing its process; only now does the NCAA identify the meaning of the core terms – hostile and abusive – used in the Policy; and only now does the NCAA identify the so-called "research and analysis" upon which the Policy was allegedly based.[6] The University submits that a meaningful appeal process would be one in which the Policy's meaning, evidentiary basis, and the appeal rules are revealed at the beginning, not the end, of the process.

B. The NCAA Executive and Staff Committees Improperly Combine the Role of Advocate with the Role of Decision Maker

A fundamental prerequisite to any valid truth-seeking process is the principle that the role of the advocate be separate and distinct from the role of the decision maker. Here, the Executive

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[4] Another example cited by the University of North Dakota is the recent request by the People for the Ethical Treatment of Animals ("PETA") for restrictions to be placed on the use of animal mascots by certain universities. If mascots constitute a core issue, then certainly the Executive Committee would have the power to regulate what animals may be used and even how they are housed, fed and displayed under the "broad authority" described in the Staff Committee Response.

[5] In any event, and as we have stated before, as a "rule" that requires compliance, the Policy leaves a lot to be desired in terms of providing useful guidance for member institutions. For example, how will compliance be measured or monitored by the NCAA? Will the NCAA certify compliance? While the Policy is rooted in the portrayal of an institution's athletic teams and programs, will the NCAA seek to involve itself in arts or research or in alumni or student groups? So far, the NCAA has ruled that a namesake tribe endorsement is an exception to the Policy, will there be others? And if so, what will be the process for determining those?

[6] Juxtaposed against this, the NCAA's criticism of the University for failing to set forth in detail each and every one of its arguments at the outset of the appeal process is ironic.

Committee is both advocate *and* decision maker. Fundamental fairness mandates that these functions be separate. Unfortunately, this commingling of roles diminishes our optimism for fair deliberation on an issue of great importance to us and other institutions on the list.

This commingling of roles is especially troubling when combined with the over-reaching nature of the Policy. If the NCAA is correct, the Executive Committee can enact far-reaching "policies" having little or nothing to do with athletics; can do so without resort to the formal legislative process; can create its own appeal process with self-determined standards and burdens of proof; and can assign to *itself* the right to determine whether *it* acted properly.

C. The NCAA Has Improperly Relied on Evidence Submitted by Interested Advocates That Was Not Made Available to the University, Making the University's Task of Rebutting the Evidence Virtually Impossible

The Staff Committee Response notes that the University must attack the "weight of the evidence submitted to the staff committee" as part of its burden of rebutting the presumption that the Chief Illiniwek performance at halftime of certain sporting events creates or leads to a hostile or abusive environment. (Response, p. 11). However, the NCAA has neither cited specifically nor made available to the University the vast majority of evidence that it purportedly relied on in reaching its decision.

Another fundamental prerequisite of any valid truth-seeking process is that all parties be allowed to examine and comment upon the "evidence" involved in the process. The Response states that the rebuttable presumption was established based on "the documented and overwhelming indication by Native American leaders and organizations that such usage is stereotypical, psychologically harmful, and generally has the opposite effect to honoring or respecting Native American history and culture." (Response, p. 6). The Response also states that its decision was based on "extensive research and analysis," including information provided by groups such as the Progressive Resource/Action Cooperative, but that a "comprehensive recitation of all authorities supporting the policy is unnecessary at this stage." (Response, pp. 3, 15).[7] None of this evidence was cited previously by the NCAA, and none has been made available to the University. Such circumstances make a meaningful challenge to the "weight of the evidence *submitted to the staff committee*" impossible.

III. The University Has Rebutted the "Presumption" Created by the NCAA

Finally, contrary to the Staff Committee's assertions, the University has twice provided compelling and persuasive evidence and argument as to why the Policy should not apply to the University. The University submits that an objective fact-finder would find this showing to be more than sufficient to rebut the "presumption" created by the NCAA, and would find objective conclusions reached by independent parties following established rules of procedure (i.e., a federal agency and a state court judge) more credible and meaningful than the single set of unpublished studies upon which the NCAA relies.

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[7] The NCAA's use of the phrase "at this stage" is potentially misleading. To be clear, the NCAA has *never* provided a comprehensive recitation of all authorities supporting the Policy – at this or any other stage.

A. The Staff Committee Response Trivializes Authorities Cited by the University, Which Were Decided by Independent Arbiters in Accordance with Substantive and Procedural Protections of Federal and State Law

The Staff Committee Response summarily rejects the authorities cited by the University, which were decided by independent arbiters in accordance with the substantive and procedural protections of state law, in favor of a single set of studies by Dr. Fryberg, a resolution of the American Psychological Association, and other unnamed evidence.

The first authority cited by the University in support of its appeal was a 1995 decision by the Office for Civil Rights ("OCR"), which concluded that the existence of the Chief did not constitute a racially hostile environment at the University. As set forth in the University's appeal, the OCR investigation and decision were based on an extensive investigation performed by a federal agency in accordance with the substantive and procedural protections of federal law. (University Appeal, pp. 9-11). Similarly, the University cited the recent ruling in *Illinois Native American Bar Association, et al. v. University of Illinois Board of Trustees*, No. 05 CH 4735, in which the Circuit Court of Cook County held that the University's use of the Chief did not violate Illinois civil rights laws. (University Appeal, pp. 10-11). This ruling was made by a Judge in accordance with substantive and procedural protections of Illinois law.

The Staff Committee Response attempts to distinguish both of these decisions by arguing that the NCAA is not charged with enforcing civil rights laws. (Response, p. 14). We agree and contend that this fact perfectly supports our appeal. The federal and state decision makers that *are* charged with enforcing civil rights laws have concluded that the University's use of the Chief does not create a racially hostile environment at the University and does not "subject a person to discrimination under any program or activity on the basis of that person's race, color, or national origin." (*See* University Appeal, pp. 9-12). The Response also attempts to distinguish the OCR decision by stating that the "volume and frequency of contentiousness around Chief Illiniwek has increased," but fails to provide any evidence in support of this statement.

In sum, the Response rejects the thorough investigations and decisions of the federal agency and state court that are charged with promulgating, interpreting and enforcing regulations and laws addressing the very societal and political issues underlying the Policy. Instead, the Staff Committee relies on its own arbitrary and unsupported determination, as well as statements from persons or groups whose credibility has not been determined, that the Chief Illiniwek halftime performance creates a "hostile or abusive" environment based on dictionary definitions of those terms. The Response purportedly bases its decision on its own "extensive research and analysis," but as shown below, the Response relies primarily upon one set of unpublished and untested studies and questionable testimony.

B. The Staff Committee Response Places an Unjustifiable Degree of Reliance on a Single Set of Untested Academic Studies

The Staff Committee Response states that the Policy is based on "extensive research and analysis," yet the Response relies almost exclusively upon an unpublished and undisclosed set of

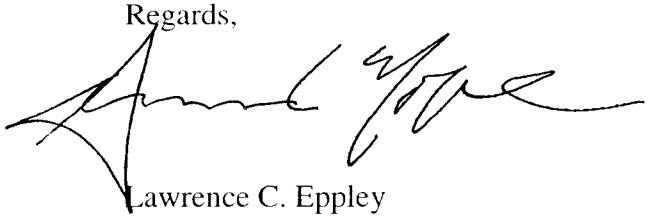
academic studies prepared by Stephanie Ann Fryberg as a graduate student before she received her Ph.D. degree. (*See* Response, pp. 3-5). The Staff Committee's heavy reliance on this single authority is inappropriate.

Dr. Fryberg's set of studies is untested and would not meet the standard of "inherent reliability" that would be required for the studies to be admissible in a court of law. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). Dr. Fryberg conducted the studies in 2002 while a graduate student at Stanford University. The studies have not been published in a peer-reviewed academic journal, nor have they been exposed to any other adversarial process that would test whether they are credible or reliable. The Staff Committee Response's heavy reliance on Dr. Fryberg's studies is clearly misplaced in light of their untested status, especially where the University has cited several authorities in support of its appeal that were decided by impartial arbiters. (See Section III A, above).

The Staff Committee no doubt would respond by saying that *Daubert* standards do not apply because the NCAA Executive Committee is not a court of law. However, as the NCAA admits, the University's membership in the NCAA entitles the University and other member institutions to certain contractual rights and reasonable expectations flowing from them. These rights and expectations cannot be eliminated without inflicting substantial harm on the University and other member institutions. If the NCAA had used more objective and fair standards – like those endorsed in *Daubert* – it would not have ignored the University's well-supported authorities in favor of untested graduate level studies simply because it preferred the results of the latter.

For the reasons stated in this letter and University's appeal letter dated January 30, 2006, the University of Illinois respectfully requests that it be removed from the list of member institutions subject to the Policy.

Regards,



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