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International Student Athletes and NCAA Amateurism: Setting an Equitable Standard for Eligibility after Proposal 2009-22

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International Student Athletes and NCAA Amateurism: Setting an Equitable Standard for Eligibility after Proposal 2009-22

ABSTRACT

The United States is often called the land of opportunity. In many ways it has proven so, but this is not always the case. International student athletes are not granted equitable treatment with their American peers under National Collegiate Athletic Association (NCAA) amateurism rules. While the NCAA bylaws, through Proposal 2009-22, grant international student athletes the right to participate on professional teams, the proposal does not give the athletes the ability to truly exercise that right. Through the lens of Turkish basketball player Enes Kanter, this Note explores amendments to NCAA bylaws that are necessary for the NCAA to promote such an opportunity for international student athletes. The value of education and the acknowledgment of cultural differences require further steps to protect these athletes. This Note advocates for the recognition of education expenses as necessary and for a “pay-back” provision for excess compensation to protect athletes from issues arising from cultural and language differences.

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I. INTRODUCTION

Since the inception of the National Collegiate Athletic Association (NCAA) and its first rules governing foreign students, the impact of international student athletes (ISAs) on NCAA competition has grown tremendously.¹ The NCAA estimated that in 1991–1992, approximately 6,833 ISAs competed in NCAA-sponsored athletic competitions.² This number nearly tripled to 16,063 (or almost 4 percent of the total student–athlete population) in 2007.³ The globalization of NCAA sport⁴ is the result of several factors, including the emergence of the internet, institutional desire for athletic prestige, and the desirability of diversity.⁵ Today, many prospective ISAs spend their formative years in cultures very different from the United States. The experiences of these ISAs differ in numerous ways, from local education and regulatory structures to national athletic and cultural backgrounds.⁶

The NCAA has attempted to keep pace with the growing number of ISAs through various rules changes.⁷ One crucial change, adopted June 28, 2010, and effective on August 1 of that year, was Proposal 2009-22.⁸ Proposal 2009-22 made several changes to existing NCAA

1. See Anastasios Kubarakis, *U.S. Athletic Associations' Rules Challenges by International Prospective Student-Athletes—NCAA DI Amateurism*, 1 INT'L SPORTS L.J. 74, 78–80 (2006) (laying out the history of ISA challenges to NCAA rules, beginning with the Foreign Student Rule and *Howard Univ. v. NCAA*, 367 F. Supp. 926 (D.D.C. 1973), and moving to the present).

2. David Pierce, Anastasios Kaburakis & Lawrence Fielding, *The New Amateurs: The National Collegiate Athletic Association's Application of Amateurism in a Global Sports Arena*, 11 INT'L J. SPORT MGMT. 304, 308 (2010).

3. *Id.*

4. See generally Maureen A. Weston, *Internationalization in College Sports: Issues in Recruiting, Amateurism, and Scope*, 42 WILLAMETTE L. REV. 829 (2006) (providing a background into the internationalization of sport in its entirety).

5. See Pierce, Kubarakis & Fielding, *supra* note 2, at 309–11 (discussing reasons for increased presence of international athletes).

6. See Anastasios Kaburakis, *International Prospective Student-Athletes and NCAA Division I Amateurism*, 2 INT'L J. SPORT MGMT. & MARKETING 100, 106 (2007) (discussing how ISAs come from “a different philosophical, cultural, structural, educational, and athletic background”).

7. See *id.* at 107 (discussing how NCAA administrators have made rule revisions with hopes of preempting litigation).

8. Nat'l Collegiate Athletic Ass'n [NCAA], *Amateurism and Eligibility—Involvement with Professional Teams—Exception—Prior to Initial Full-Time Collegiate Enrollment—Delayed Enrollment—Seasons of Competition—Sports Other than Men's Ice Hockey and Skiing*, Proposal No. 2009-22 (2010) [Hereinafter NCAA Proposal 2009-22]. For best results in finding a copy of the proposal, go to *Division I Proposal Search*, NCAA, <https://web1.ncaa.org/LSDBi/exec/propSearch> (last visited Feb. 18, 2013), and search for the proposal number.

bylaws relating to amateurism, including various tweaks to delayed enrollment rules in various sports.⁹ Most important to ISAs was the modification that the Proposal made to Bylaw 12.2.5; with certain exceptions, athletes may now compete on professional teams prior to NCAA enrollment.¹⁰ Athletes maintain their status as amateurs for NCAA eligibility purposes if they do not receive more than actual and necessary expenses (as defined by Bylaw 12.02.4).¹¹ This significant rule change opens the world of American collegiate athletics and, more importantly, American higher education to many new ISAs. It demonstrates an understanding of cultural differences and accommodates ISAs who make sincere efforts to maintain their amateur status abroad. However, more must be done.

These new provisions still do not fully protect innocent ISAs, as two issues make evident. First, Bylaw 12.02.4's definition of *actual and necessary expenses* requires modification. Currently, educational expenses are not deemed "necessary" for an amateur's participation on a professional team.¹² Cultural differences may foreclose American notions of education to many ISAs.¹³ For ISAs to compete in their sport while maintaining NCAA academic eligibility, these expenses are necessary.

Second, a "pay-back" provision is essential. ISAs experience issues that domestic student athletes do not. For example, there are often language barriers between a student's home country and the United States.¹⁴ Cross-language interpretation of rules and the systems of reimbursement and payment in other countries may cause confusion as to what is actual and necessary, even when an athlete makes a sincere effort to follow NCAA rules. Thus, the NCAA should create a provision allowing the ISAs (and their families) to pay back any funds found to be greater than actual and necessary. Such a rule would allow ISAs to right any perceived wrong associated with payment by professional teams. Many athletes turn down major contracts in order to maintain eligibility,¹⁵ and these ISAs should be protected.

9. See generally NCAA Proposal 2009-22, *supra* note 8. (proposing various amendments and additions).

10. *Id.* (adding Bylaw 12.2.5).

11. NCAA, 2011–12 NCAA DIVISION I MANUAL, art. 12.02.4 (2011) [hereinafter NCAA DIVISION I MANUAL].

12. See *id.* (listing expenses deemed actual and necessary while not including education expenses).

13. See *infra* Part III.A–B.

14. ISAs often speak very little English before coming to the United States. For a look at Enes Kanter's efforts to learn English and his skills upon arriving in the United States, see Sean Deveney, *Enes Kanter's Dedication To Learn English Catches Attention*, SPORTING NEWS (June 19, 2011), <http://aol.sportingnews.com/nba/story/2011-06-19/enes-kanter-dedication-to-learn-english-catches-attention>.

15. See Andy Katz, *Enes Kanter Won't Be a Trendsetter*, ESPN (Nov. 12, 2010), http://espn.go.com/blog/collegebasketballnation/post/_/id/17907/enes-kanter-wont-be-a

Such an argument about NCAA bylaws rather than true governmental “law” has broad ramifications for general legal conceptions. This issue involves conceptions of equal rights and opportunity. The NCAA opens its doors to ISAs who often choose to pursue both an education and athletic experience at member institutions.¹⁶ Such a regime that, even if inadvertently, discriminates against others due to cultural and economic differences is one that must be adjusted. American society is founded and maintained upon the thought that all are created equal and should be treated as such.¹⁷ In a system that plays a critical role in future athletic and career success,¹⁸ individuals must be treated equally. Therefore, although NCAA bylaws are not traditional “law,” they impact core legal principles. Even outside the realm of traditional law, protection of these principles is essential.

In Part III, this Note analyzes the differences between foreign and U.S. athletics systems.¹⁹ Part IV explains the changes made by Proposal 2009-22 and impact of those changes on ISA eligibility today. Part V argues for two modifications, with examples illustrating current inconsistencies in NCAA rules. This analysis occurs through the story of Enes Kanter, a Turkish ISA ruled permanently ineligible for violation of the actual-and-necessary expense provision in

trendsetter (discussing how Enes Kanter is an exception to the rule for elite foreign basketball prospects, in which most do not attend college and opt to move straight to the National Basketball Association (NBA)).

16. See *supra* notes 1–3 and accompanying text. Of that number of ISAs, nearly two-thirds participate at the Division I level. See Steve Wieberg, *Influx of Foreigners Presents New Challenges for NCAA*, USA TODAY (Oct. 1, 2008), http://www.usatoday.com/sports/college/2008-10-01-foreign-influx_N.htm (“More than 16,000 foreign athletes dotted NCAA rosters in 2006-07, nearly two-thirds of them in Division I. They accounted for 6.2% of all Division I athletes, up from 2.4% eight years earlier.”). In some sports, such as women’s ice hockey and tennis, ISAs account for half of the total student athletes. See *id.* (chart accompanying article).

17. The manifestations of this concept are too numerous to name, but prominent examples include the Declaration of Independence, Abraham Lincoln’s Gettysburg Address, the Seneca Falls Convention’s Declaration of Sentiments, and Martin Luther King Jr.’s “I Have a Dream” speech.

18. For example, the vast majority of NBA First Round Draft Picks are NCAA student-athletes. Between 2000 and 2008, only 41 of 263 NBA First Round Draft Picks were selected directly from other countries. See *Complete First Round Results: 2000-08*, NBA, http://www.nba.com/history/draft_round1_2000s.html (last visited Feb. 18, 2013). In the most recent NBA Draft, only 1 of the 30 First Round Picks was selected from a source other than an NCAA institution. See *Draft 2012*, NBA, <http://www.nba.com/draft/2012/> (last visited Feb. 18, 2013). However, 2 players selected in that first round were ISAs. See *id.* (Fab Melo, a native of Brazil, and Festus Azili, a native of Nigeria). In 2006, 18.2 percent of NBA players were born outside the United States. Pierce, Kubarakis & Fielding, *supra* note 2, at 308.

19. The analysis of this Note will be restricted generally to the sport of basketball because of its high-profile nature, the influx of elite caliber talent, and the ease of reference. Though the propositions made may not be directly applicable to each and every NCAA-sponsored sport, they can be viewed as general guiding principles across sports.

Proposal 2009-22.²⁰ The subject of Part II, Kanter's story garnered national media attention and illustrates the need for further changes with regard to ISAs.

II. THE STORY OF ENES KANTER

"Free Enes" became a rallying cry for an entire fan base. The phrase could be seen all over the country, from Fenway Park and Yankee Stadium to the U.S. Capitol in Washington D.C.²¹ It was written in lights on a water fountain at the World Equestrian Games and placed in apartment listings in Florida.²² It was even seen in Afghanistan and at Pearl Harbor.²³ On January 7, 2011, the NCAA Student-Athlete Reinstatement Committee silenced that cry when it determined that Enes Kanter was correctly adjudged permanently ineligible.²⁴

Born in Switzerland in 1992,²⁵ Enes Kanter spent the first seventeen years of his life in Turkey, where his father is a well-respected doctor and professor.²⁶ Between 2006 and 2009, Kanter played three seasons for the Turkish club Fenerbahçe.²⁷ Fenerbahçe, like many clubs in Europe, competes in multiple sports on multiple

20. Press Release, NCAA, Kanter Ruled Permanently Ineligible (Jan. 7, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/January/Kanter+ruled+permanently+ineligible>.

21. See John Clay, *The Story Behind 'Free Enes,'* KENTUCKYSPORTS.COM (Oct. 6, 2010), <http://www.kentucky.com/2010/10/06/1466140/john-clay-the-story-behind-free.html> (quoting the man who started the rally cry).

22. See Matt Jones, *The Free Enes! Movement Continues To Spread,* KY. SPORTS RADIO (Sep. 30, 2010, 2:00 PM), <http://kentuckysportsradio.com/?p=61234> (presenting photographs showing the reach of the rally cry).

23. Brian the Intern, *Free Enes in Afghanistan,* KY. SPORTS RADIO (Nov. 11, 2010, 2:00 PM), <http://kentuckysportsradio.com/?p=63869> (discussing a "Free Enes" photo taken in Afghanistan); Brian the Intern, *Free Enes Makes Its Way to Pearl Harbor on Veterans Day,* KY. SPORTS RADIO (Nov. 11, 2010, 10:45 AM), <http://kentuckysportsradio.com/?p=63846> (discussing a "Free Enes" photo taken at Pearl Harbor). For an entertaining look into the humorous extent of the Free Enes campaign by fans of the University of Kentucky, search the archives of KY. SPORTS RADIO, <http://www.kentuckysportsradio.com> (last visited Feb. 18, 2013).

24. Press Release, NCAA, *supra* note 20 ("The NCAA Student-Athlete Reinstatement Committee has upheld the NCAA staff decision that Kanter received \$33,033 above his actual and necessary expenses for one year while playing for a club basketball team in Turkey.")

25. *Enes Kanter,* ESPN, http://espn.go.com/nba/player/_id/6447/enes-kanter (last visited March 20, 2013) (providing biographical information).

26. Evan Daniels, *Kanter Turns Down Millions for US Experience,* SCOUT (Aug. 18, 2009), <http://scouthoops.scout.com/2/889671.html> (noting that this motivated Kanter to pursue an education).

27. Press Release, NCAA, *supra* note 20 (discussing Kanter's association with the Turkish club).

levels.²⁸ It sponsors teams in soccer, basketball, volleyball, and several other sports.²⁹ Kanter primarily participated in the club's under-eighteen junior basketball team, although he spent the 2008–2009 season with its senior team.³⁰ During his time with Fenerbahçe, Kanter never signed a contract with the team.³¹

In 2009, Kanter moved to the United States.³² At the time, he rejected reported offers from the largest and most popular Greek club, Olympiacos, (two years, \$2 million) and from an unnamed Turkish club (five years, \$6 million).³³ Kanter cited his desire to experience the NCAA game and to compete in the bigger arena of the National Basketball Association (NBA) as his motivations behind the move.³⁴ With his “aggressive rebounding and physical style of play,” Kanter was predicted to be a lottery pick³⁵ before ever playing a high school game in the United States.³⁶

Upon arrival in the United States, Kanter attended multiple prep schools before landing at Stoneridge Prep in Merced, California.³⁷ Some considered him to be the best post player in the world for his age.³⁸ Described as “a man playing with boys at the high

28. See FENERBAHÇE SPOR KULÜBÜ, <http://www.fenerbahce.org/eng/> (last visited Feb. 18, 2013) (listing on its home page various sports offered by the club, and listing on each sport's page the club levels offered). For another example of a major European club that sponsors numerous teams in multiple sports, see *Other Sports*, FC BAYERN MÜNCHEN AG, http://www.fcbayern.telekom.de/en/company/club/other_sports/index.php (last visited Feb. 18, 2013).

29. FENERBAHÇE SPOR KULÜBÜ, *supra* note 28 (last visited Feb. 18, 2013).

30. Press Release, NCAA, *supra* note 20 (“Kanter played three seasons with the Turkish sport club Fenerbahce from 2006–07 to 2008–09. Although he competed primarily for the club's under-18 junior team, he did compete on the club's senior team in 2008–09.”).

31. See Pete Thamel, *Turkish Team Says It Paid a Top Kentucky Recruit*, N.Y. TIMES, Sep. 8, 2010, http://www.nytimes.com/2010/09/08/sports/ncaabasketball/08basketball.html?pagewanted=all&_r=1&. (“Kanter's case is complicated because he did not sign a contract with the club.”).

32. See *id.* (noting that Kanter arrived in the United States “nearly a year” before September 2010).

33. See Daniels, *supra* note 26 (noting the offers Kanter received).

34. See *id.* (quoting Kanter as indicating he “wanted to come [to the United States] and experience the NCAA”).

35. This refers to the NBA's draft system. Each of the fourteen teams that fail to make the playoffs are entered into a lottery with their odds of gaining a higher draft pick decided by their record from the season before. Thus, a “lottery pick” is anyone drafted in the first fourteen picks of the NBA Draft.

36. See Daniels, *supra* note 26 (“It's very possible, but not for sure,” one NBA general manager said about the possibility of Kanter becoming a lottery pick in the future.”).

37. Thamel, *supra* note 31; see also Enes Kanter, NEXTCATS, <http://ukrecruiting.bloginky.com/2010-recruiting-class-player-profiles/enes-kanter/> (last visited Feb. 18, 2013) (listing Kanter's high school as Stoneridge Prep in Merced, California).

38. See *id.* (“Kanter . . . is considered by some as the best big man in the world for his age.”).

school level,”³⁹ Kanter was rated as high as the third overall player in his recruiting class.⁴⁰ Though motivated in his educational pursuits, he knew little of the English language and required a translator.⁴¹ Kanter initially committed to play basketball at the University of Washington, but reopened his commitment because “[h]e [had] been learning more about the U.S. and wanted to find out more about what’s out there.”⁴² Ultimately, Kanter committed and signed to play for John Calipari and the University of Kentucky Wildcats.⁴³

Throughout his recruitment, Kanter’s past led to concerns about his potential eligibility. Fenerbahçe’s General Manager, Nadim Karakas, was upset with his decision to leave Turkey and Fenerbahçe,⁴⁴ and is reported as claiming the team paid Kanter over \$100,000 in cash and benefits for his play.⁴⁵ Karakas claimed Fenerbahçe paid Kanter a salary of \$6,500 per month during his final season with the club, in addition to housing, food, and pocket money.⁴⁶ Kanter’s agent characterized it differently: “They paid the necessary expenses, like any other kid who goes to prep school and gets the \$30- or \$40,000 scholarship.”⁴⁷ Karakas was widely reported to have ulterior motives in his disclosure of information, as he stood to benefit from Kanter being ruled ineligible to play at Kentucky.⁴⁸ Upon making his assertions, Karakas claimed he gave the relevant

39. Jody Demling, *Turkish Sensation Commits to Kentucky*, LOUISVILLE COURIER-J. (March 23, 2010), http://www.courier-journal.com/blogs/demling/2010/03/turkish-sensation-commits-to-kentucky_23.html.

40. See Daniels, *supra* note 26 (“Thompson, Scout.com’s No. 3 prospect in the country, will now have a counterpart inside in Kanter, and there are big expectations coming with his move from Turkey to the United States.”).

41. See *id.* (noting that Kanter is a “quiet and unassuming kid who requires a translator”).

42. *Enes Kanter Commits to Kentucky*, MYNORTHWEST.COM, <http://mynorthwest.com/?nid=189&sid=301623> (last updated Apr. 5, 2011).

43. See Demling, *supra* note 39 (noting Kanter committed to Kentucky).

44. See Thamel, *supra* note 31 (“Karakas and Fenerbahçe’s basketball chief executive, Aydin Ors, both said they were unhappy with the way Kanter left the club because they had invested heavily in his development.”).

45. See *Will Enes Kanter Ever Play for Kentucky?*, RIVALDS.COM (Sept. 11, 2010), <http://basketballrecruiting.rivals.com/content.asp?CID=1124477> (noting that Karakas cited the \$100,000 figure).

46. See Thamel, *supra* note 31 (noting Karakas’s statements).

47. *Id.*

48. See Thamel, *supra* note 31 (“Fenerbahce stands to benefit if Kanter is declared ineligible to play college basketball since the team would be due a transfer fee if he plays in Europe next season, but Karakas said turning in the documents to the N.C.A.A. eligibility center was a matter of telling the truth.”); *Will Enes Kanter Ever Play for Kentucky?*, *supra* note 45 (noting Karakas and his team would “certainly benefit if Kanter never plays for Kentucky, which means there’s an ulterior motive to all of this”).

paperwork to the NCAA, but refused to divulge any information to reporters to corroborate his statements.⁴⁹

Nonetheless, from March 2010 through the fall of that year, the NCAA investigated allegations that Kanter received funds in excess of his actual and necessary expenses prior to coming to the United States.⁵⁰ On November 11, 2010, Kanter was ruled ineligible by NCAA reinstatement staff; subsequent appeals by Kentucky were denied.⁵¹ During his time with Fenerbahçe, Kanter was determined to have received \$33,033 beyond his actual and necessary expenses to play for the team, a figure agreed upon by the NCAA Eligibility Center and the University of Kentucky.⁵² Of that figure, roughly \$20,000 was education expenses.⁵³ Following the decision, NCAA Vice President of Academic and Membership Affairs Kevin Lennon reasoned, “The final decision of the reinstatement committee is completely compatible with the collegiate model of sports our members have developed, since he received a significant amount of money, above his actual expenses, from a professional team prior to coming to college.”⁵⁴

Many of those involved in college basketball, including famed ESPN analyst Dick Vitale, criticized the decision as an attack on John Calipari.⁵⁵ Many parties posited that if Kanter had chosen to attend the University of Washington, the ruling might have been different—a notion vehemently denied by the NCAA.⁵⁶

After being ruled permanently ineligible, Kanter chose to stay at the University of Kentucky, where he was still eligible to receive financial aid to fund his education.⁵⁷ John Calipari hired Kanter to

49. See Thamel, *supra* note 31 (“Karakas declined to show a reporter records of the payments. But he said Fenerbahçe’s lawyers have sent housing records and bank records to the N.C.A.A. . . .”).

50. See Press Release, NCAA, *supra* note 20 (timeline of investigation).

51. *Id.*

52. See *id.* (“According to facts agreed to by the university and the NCAA Eligibility Center, Kanter received \$33,033 more than his actual expenses for the 2008–09 season.”).

53. See *Enes Kanter Ruled Permanently Ineligible*, ESPN (Jan. 8, 2011), <http://sports.espn.go.com/ncb/news/story?id=6000134> (“Calipari said about \$20,000 of that money went toward Kanter’s educational expenses, but the NCAA bylaws consider a player who receives money above necessary expenses a professional.”).

54. *Id.*

55. See Diamond Leung, *Josh Harrellson Touts Enes Kanter Theory*, ESPN (Apr. 18, 2011, 9:35 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/29919/josh-harrellson-touts-enes-kanter-th (“The notion that Kanter would not have been ruled permanently ineligible had he attended Washington instead isn’t a new one. Dick Vitale has talked about it, and the NCAA has vehemently denied that Kanter was treated differently because he plays for Calipari at Kentucky.”).

56. See *id.* (quoting Kentucky player Josh Harrellson as stating that the NCAA “took it out” on Kanter because “nobody wants us to get back to where Kentucky used to be”).

57. *Enes Kanter Ruled Permanently Ineligible*, *supra* note 53.

serve as a student assistant coach, allowing him to practice with the team.⁵⁸ Josh Harrellson, a second-round pick in the 2011 NBA Draft and current member of the Miami Heat, attributed much of his unlikely success to his practice time against Kanter.⁵⁹ In that same NBA Draft, the Utah Jazz selected the nineteen-year-old Kanter with the third overall pick.⁶⁰ He went on to represent Turkey in the 2011 EuroBasket tournament in Lithuania, and currently plays for the Jazz.⁶¹

III. DIFFERING SYSTEMS OF ATHLETICS AND ACADEMICS

The U.S. athletics and academics systems, predominately governed by the NCAA at the collegiate level,⁶² differ greatly from those in other countries.⁶³ It is therefore important to understand several items regarding the history of the NCAA, the structure of athletics in the United States and abroad, and the nature of scheduling in foreign systems, as well as scheduling's effect on the academic life of ISAs prior to coming to the United States. An understanding of these differences allows for a better appreciation of the necessity of further change following Proposal 2009-22.

58. See Sam Khan Jr., *NBA Draft: Ineligibility Issues No Longer in Kanter's Way*, HOUS. CHRON. (June 22, 2011), <http://www.chron.com/sports/rockets/article/NBA-draft-ineligibility-issues-no-longer-in-2080274.php> ("Kanter opted to stay with the Wildcats and practiced with the team while also serving as a student assistant coach.").

59. See Diamond Leung, *Kentucky Still Feels Enes Kanter's Presence*, ESPN (Mar. 30, 2011, 4:37 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/28941/kentucky-still-feels-enes-kanters-presence (quoting Harrellson as stating that "being able to stop him in practice make[s] me go into every game knowing I am not going to play someone as good as Enes").

60. See Jody Genessy, *Utah Jazz Draft Pick Enes Kanter Will Play for Turkey in Eurobasket Tournament*, DESERET NEWS (July 7, 2011), <http://www.deseretnews.com/article/700149877/Utah-Jazz-draft-pick-Enes-Kanter-will-play-for-Turkey-in-EuroBasket-tournament.html> (noting that Kanter was the third pick).

61. See *id.* ("New Utah Jazz center Enes Kanter has agreed to play for his national team this summer and will represent Turkey at the upcoming EuroBasket tournament in Lithuania . . .").

62. Other organizations, such as the National Association of Intercollegiate Athletics, the National Christian College Athletic Association, and the National Junior College Athletic Association, also regulate their own member institutions, but at a much smaller level than that of the NCAA.

63. See Anastasios Kaburakis & Jacob Solomon, *Mind the Gap*, 1 INT'L SPORTS L.J. 37, 37 (2005) (discussing how "[t]he differences in structure of these sport administrative entities and the legal implications they may cause will be applied and analyzed in the scope of international prospective student-athletes, who wish to overcome these challenges and pursue higher education combined with sport in the U.S.").

A. *The American System: The NCAA*

Founded as the Intercollegiate Athletic Association of the United States in 1906, the NCAA adopted its current moniker four years later.⁶⁴ Its creation was a response to President Theodore Roosevelt's concerns about the violence in intercollegiate football at the time.⁶⁵ The NCAA was a small, generally weak organization until it appointed Walter Byers as the first full-time executive director in 1951 and established a national headquarters in Kansas City, Missouri, the following year.⁶⁶ Under Byer's tutelage, the NCAA became the organization it is today.

It was over fifty years before the NCAA dealt with its first issues involving ISAs. In 1973, courts decided both *Howard University v. NCAA* and *Buckton v. NCAA*.⁶⁷ Though these cases set the stage for the policy of Proposal 2009-22, their facts bear only minimal relevance to the topic at hand and, thus, need not be expounded. The important lesson of these cases is that policy involving ISAs is a relatively new phenomenon under the NCAA, one that constantly evolves in an attempt to attain fairness.

B. *Scholastic vs. Club Systems*

One particularly important distinction between the United States and the home nations of many ISAs is the difference between available systems of athletic competition. The United States operates on a largely scholastic-based system. Though athletes often do compete on "travelling teams" under organizations such as the Amateur Athletic Union, the focus of the American system prior to college is on secondary schools.⁶⁸ Eligibility to participate in NCAA-sponsored athletic competition arises in part from educational performance prior to enrollment in an NCAA institution.⁶⁹ Athletes usually compete for their schools prior to any collegiate participation.

64. See *History*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/history> (last updated Aug. 13, 2012) (noting the NCAA started using that name in 1910).

65. See *id.* (noting that President Roosevelt implemented athletic conferences at the White House to discuss reform).

66. See *id.* (discussing the growth that occurred after these changes).

67. *Howard Univ. v. NCAA*, 367 F. Supp. 926, 932 (D.C. Cir. 1973); *Buckton v. NCAA*, 366 F. Supp. 1152, 1157 (D. Mass. 1973).

68. See, e.g., *About AAU*, AAU, <http://aausports.org/AboutAAU.aspx> (last visited Feb. 18, 2013) (describing itself as a nonprofit, volunteer amateur-sports organization).

69. See NCAA DIVISION I MANUAL, *supra* note 11, art. 14.02.11 (providing standards for student-athlete eligibility for participation in NCAA athletics).

Pay-for-play is specifically prohibited, and participants are exclusively amateurs under such systems.⁷⁰

Unlike the American system, many other countries operate under a club-based regime.⁷¹ Under such a system, clubs provide opportunities for competition, usually on different (or multiple) levels and often in various sports.⁷² The distinction between amateur and professional is blurred.⁷³ Top-tier squads for such clubs often contain junior, amateur players, in addition to those who are paid pursuant to professional contracts.⁷⁴ High-caliber junior players frequently sign contracts with clubs out of competitive necessity, and may receive compensation in forms such as educational expenses, housing, stipends, equipment, facilities, coaching, and transportation.⁷⁵

Unlike the United States, most countries do not regulate sports agents.⁷⁶ For example, under the International Basketball Federation (FIBA) and the Union of European Basketball Leagues (ULEB), agents often have relationships with specific clubs and may sign players as young as twelve-years old in order to compete with those clubs.⁷⁷ This is an important fact because FIBA organizes most basketball competition worldwide and ULEB establishes the Euroleague for top European club teams.⁷⁸ Thus, ISAs in the sport of basketball are raised under a system in which they can sign with sports agents at an early age.

Finally, foreign club-based systems and norms of compensation are very different from the American scholastic-based system. Most notably, while payment is forbidden in the United States under state amateurism rules for secondary school competition, it is expected

70. See, e.g., TENN. SECONDARY SCH. ATHLETIC ASS'N [TSSAA], 2012–13 TSSAA HANDBOOK, art. II, § 18 (2012) (delineating one state's amateurism standard).

71. Weston, *supra* note 4, at 848 (“Unlike the U.S. system, sport in many other countries is sponsored through a club-based system, with the national sport federation as its governing body.”).

72. *Id.*

73. *Id.*

74. *Id.* (discussing how elite teams may contain amateur and professional players, as well as paid and unpaid players).

75. See *id.* at 848–49 (describing how participation in clubs is necessary for those who are hoping to be identified by a scout for purposes of receiving U.S. college basketball scholarships).

76. See Kubarakis & Solomon, *supra* note 63, at 44 (discussing how NCAA member institutions wishing to recruit foreign athletes should be aware that many foreign agents are unregulated and may be related to club teams).

77. See *id.* (“Agents are unregulated. Many agents have relationships with club teams and procure players for the teams.”); Weston, *supra* note 4, at 849 (“The NCAA has found that some agents ‘sign elite players as young as [twelve] years old . . .’” (alteration in original)).

78. See Kubarakis & Solomon, *supra* note 63, at 44 (describing FIBA and ULEB).

under a club system.⁷⁹ In order to compete at levels commensurate with their abilities, ISAs often must turn beyond the educational experience to professional teams and participate with professional players. Domestic student athletes participate through school-sponsored squads that do not feature professionals. Agents have access to athletes at a very young age in a club system, while under the American system, involvement with agents does not exist because of the contract-less nature of scholastic competition. Finally, and very importantly, since club systems involve play at the highest levels, athletes travel nationwide (and sometimes internationally) to compete during the season.⁸⁰ Though American high school teams may occasionally travel across state lines, contests are typically held within state borders.⁸¹

The consequence of all this is that, from the viewpoint of ISAs raised under such a system, NCAA rules may take on a different interpretation than they do in the United States. Importantly, because of the pervasiveness of club-sponsored sport and the norm of compensation even to junior players, basketball-playing ISAs⁸² are likely to broadly interpret the NCAA's definition of *actual and necessary expenses*.⁸³ Generally, even junior contracts for elite players include housing, per diem, stipends, allowances, equipment, facilities, transportation, coaching, and, importantly, educational expenses.⁸⁴ Thus, the differences between foreign and U.S. athletics systems reveal the necessity of flexible NCAA rules for ISAs.

C. Club Scheduling

In addition to the compensation and agent contact issues for ISAs hoping to compete in the United States, there are also problems caused by the rigors of club schedules. For any athlete hoping to compete in an NCAA-sponsored event, including ISAs, there are academic-eligibility requirements. These requirements, as established in Bylaw 14.02.11.1 of the NCAA Division I Manual, are

79. See, e.g., TSSAA, *supra* note 70 (laying out the rules governing secondary school competition in the state of Tennessee).

80. For an example of the nationwide nature of a professional basketball league, in this case that of Germany, see BEKO BASKETBALL BUNDESLIGA, <http://www.beko-bbl.de/index.php> (last visited Feb. 18, 2013).

81. For an example of one state's schedules of high school basketball contests, see *2011/12 Kentucky High School Boys Basketball*, KY. HIGH SCH. ATHLETIC ASS'N, <http://scoreboard.12dt.com/scoreboard/khsaa/kybbk11> (last visited Feb. 18, 2013) (showing that games are in-state).

82. See Kubarakis & Solomon, *supra* note 63, at 44 (noting those involved with international basketball tend to interpret the NCAA's definition more broadly).

83. See *infra* Part IV.A (describing the U.S. system and interpretation of expenses).

84. See *infra* Part III.B (describing the European club system).

that a student must graduate from high school, complete a stipulated core curriculum, achieve a minimum grade point average in that core curriculum, and achieve a minimum ACT or SAT score.⁸⁵

Understanding that each country's educational system is unique, the NCAA provides equivalents to these academic eligibility requirements for individual countries.⁸⁶ As an example, a *Lise Diploması* (secondary school diploma) and *Lise Bitirme Diploması* (secondary school completion diploma) meet both high school graduation and core curriculum requirements for Turkish ISAs.⁸⁷ In much the same fashion, the NCAA delineates accepted degrees from countries such as Germany and Russia.⁸⁸ The NCAA requirements are absolute and cannot be avoided simply because an ISA competes in a certain sport.

The schedules of educational systems in various countries are similar to those in the United States. In Turkey, the academic calendar for schools runs from mid-September until the beginning of June.⁸⁹ German schooling runs from August until July each calendar year,⁹⁰ and the Russian school year lasts from September until the end of May.⁹¹ Though there are some differences, these schedules indicate an academic calendar similar to that followed by secondary schools in the United States.

Further, the schedule for premier basketball leagues in foreign countries is similar to that of the NBA. The premier basketball league in Turkey, the Turkish Basketball League, plays its schedule over a period of seven months. For the 2011–2012 season, games were grouped into “days,”⁹² with the thirty “days” comprising a season running from October 15, 2011, to April 29, 2012.⁹³ In Germany's

85. See NCAA DIVISION I MANUAL, *supra* note 11, art. 14.02.11.1 (laying out the academic eligibility requirements).

86. See NCAA, GUIDE TO INTERNATIONAL ACADEMIC STANDARDS FOR ATHLETICS ELIGIBILITY (2011) [hereinafter INTERNATIONAL ACADEMIC STANDARDS] (describing the eligibility requirements equivalents for other countries).

87. *Id.* at 150.

88. While Turkey was chosen for analysis because it is the home nation of Enes Kanter, Germany and Russia were chosen at random to exemplify the point of schedule conflict. See INTERNATIONAL ACADEMIC STANDARDS, *supra* note 86, at 73, 128.

89. See Thomas Robb, *School Calendars Around the World*, KYOTO SANGYO UNIV., <http://www.cc.kyoto-su.ac.jp/~trobb/terms2.html> (last visited Feb. 18, 2013) (offering examples of a typical school year in other countries, including Turkey).

90. See INTERNATIONAL ACADEMIC STANDARDS, *supra* note 86, at 73 (noting the typical school year in Germany).

91. See *id.* at 128 (noting the typical school year in Russia).

92. The “days” played in the Turkish Basketball League are similar to the concept of “weeks” in the National Football League. They are used to divide the season into specific periods of competition. The same is the case for the “rounds” played in Basketball Bundesliga.

93. See *Turkish Basketball Games/Schedule (2011-2012—Turkish Men TBL)*, EUROBASKET, <http://www.eurobasket.com/Turkey/games-schedule.asp?League=1&>

Basketball Bundesliga, the “rounds” lasted even longer, from October 3, 2011, to April 28, 2012.⁹⁴ Finally, another season that lasted in excess of six months is that of the premier Russian league, the Russian Professional Basketball League. Its 2011–2012 season lasted from October 6, 2011 to April 24, 2012.⁹⁵

An important conflict can be gleaned from these schedules: club seasons and the academic year consistently overlap for extended periods. In fact, the overlap is almost complete. In Turkey, all but less than two months of the school year overlaps with the play of the Turkish Basketball League. Since the school year is longer in Germany, more academic time is free, but basketball is played during eight of the eleven school months. The Russian Professional Basketball League overlaps with all but approximately one month of the academic year. This conflict indicates that athletes wishing to compete on the highest level within their home country prior to enrollment at an American institution may be forced to miss a vast majority of traditional education during the school year. As mentioned above, these players are travelling throughout the country for a period of months, far from whatever school they may be enrolled in or expected to attend. Their attendance is simply not possible if they are to play for elite clubs in their home countries.

And all of this points to an absolute necessity—a means of education that will follow players across the country throughout their season. This is not a burden that will be borne by the public. Governments are unlikely to finance private education in order to accommodate athletes wishing to compete as amateurs with professionals. Thus, the education must be achieved through other means. The club-based systems of Europe and elsewhere have developed a simple solution to this problem: payment to their players for educational expenses.⁹⁶ Thus, teams pay for their education while they are on the road for competition, which allows ISAs to achieve the education level required for eligibility at an NCAA institution.⁹⁷ Teams may consider this payment to be as necessary as housing,

LName=TBL%202011-2012&Year=2011-2012 (last visited Feb. 3, 2013) [hereinafter *Turkish Basketball Games/Schedule*] (outlining the Turkish basketball schedule).

94. See *German Basketball Games/Schedule (2011-2012—German Men BBL)*, EUROBASKET, <http://www.eurobasket.com/Germany/games-schedule.asp?League=1&LName=BBL%202011-2012&Year=2011-2012> (last visited Feb. 3, 2013) (laying out the German basketball schedule).

95. See *Russian Basketball Games/Schedule (2011-2012—Russian Men PBL)*, EUROBASKET, <http://www.eurobasket.com/Russia/games-schedule.asp?League=1&LName=PBL%202011-2012&Year=2011-2012> (last visited Feb. 3, 2013) (noting the basketball schedule in Russia).

96. See Kubarakis & Solomon, *supra* note 63, at 44 (noting that clubs may pay educational expenses).

97. See *id.* at 43–44 (noting the NCAA is working with international groups to clarify what obligations student athletes need to fulfill in order to play in the NCAA).

coaching, and transportation, depending on the state of their funding.⁹⁸

Since many athletes wish to maintain their eligibility to compete in the NCAA, they will turn down large contracts.⁹⁹ Instead, they will opt for only actual and necessary expenses in order to survive while competing for the team. A conflict arises, however, in the determination of how to interpret that provision.¹⁰⁰ Educational expenses, from the analysis above, seem to be necessary to the participation of athletes on elite club teams. It is unlikely that most families can afford to pay the cost of a private tutor on their own. For this reason, there is a conflict between the NCAA's interpretation of *actual and necessary* and that of the athletes, their families, and clubs in other countries.¹⁰¹

IV. PROPOSAL 2009-22 AND CURRENT NCAA RULES

Proposal 2009-22, with its provisions now incorporated into various NCAA bylaws, was a significant change in the fields of NCAA amateurism and eligibility, especially for ISAs. Though the language is not limited to ISAs, the fact that very few (if any) American student athletes compete with a professional team prior to college attendance reveals that the impact of 2009-22 is mostly on ISAs.¹⁰²

A. NCAA Rules Prior to Proposal 2009-22

Prior to Proposal 2009-22, NCAA bylaws found in Article 12 (Amateurism) strictly forbade an athlete from competing on a professional team or club.¹⁰³ With limited exceptions for tennis, golf, two-person sand volleyball, and two-person synchronized diving, participation on a professional team prior to enrollment led to a blanket ban on NCAA participation.¹⁰⁴ Bylaw 12.2.3.2 provided the full text of the rule:

98. *Id.* at 44 (“The better-funded clubs have facilities where participants are lodged and fed. These clubs may also pay educational expenses as well as provide equipment, facilities, coaching, transportation, stipends and per diems at no cost to the player.”).

99. *See, e.g.,* Katz, *supra* note 15 (describing how Kanter was determined to play college basketball instead of going straight into the NBA).

100. *See infra* notes 105–06 and accompanying text (outlining the bylaws that are up for debate).

101. *See infra* Part IV (describing the NCAA's definition and interpretation of *actual and necessary*).

102. *See supra* Part III.A (explaining how U.S. players generally attend college before playing with a professional team).

103. *See generally* NCAA Proposal 2009-22, *supra* note 8 (showing the original and replaced text, and laying out the changes Proposal 2009-22 made to the bylaws).

104. *Id.*

Competition with Professionals. An individual shall not be eligible for intercollegiate athletics in a sport if the individual ever competed on a professional team (per Bylaw 12.02.4) in that sport. However, an individual may compete on a tennis, golf, two-person sand volleyball or two-person synchronized diving team with persons who are competing for cash or a comparable prize, provided the individual does not receive payment of any kind for such participation.¹⁰⁵

A professional team is defined in Bylaw 12.02.4 as any organized team that “provides any of its players more than actual and necessary expenses for participation on the team, except as otherwise permitted by NCAA legislation” or that “declares itself to be professional.”¹⁰⁶

Bylaw 12.02.4 goes on to delineate what constitutes actual and necessary expenses. It provides an exhaustive list of items that constitute actual and necessary expenses, with the limitation that such expenses paid must not be excessive and must be commensurate with the fair-market value in the player’s locality.¹⁰⁷ This list comprises:

- (1) Meals directly tied to competition and practice held in preparation for such competition;
- (2) Lodging directly tied to competition and practice held in preparation for such competition;
- (3) Apparel, equipment and supplies;
- (4) Coaching and instruction;
- (5) Health/medical insurance;
- (6) Transportation (expenses to and from practice competition, cost of transportation from home to training/practice site at the beginning of the season and from training/practice site to home at the end of season);
- (7) Medical treatment and physical therapy;
- (8) Facility usage; . . .
- (9) Entry fees; and . . .
- (10) Other reasonable expenses. . . .¹⁰⁸

Prior to Proposal 2009-22, any payments in excess of these expenses to any player would be deemed to be compensation for competition on a professional team and would disqualify a player from NCAA competition. It is important to note that Bylaw 12.02.4 does not provide for the payment of education expenses by a team. Any such payment, unless classified under the exceedingly ambiguous and generally unhelpful “other reasonable expenses” provision, would prevent a player from participating in NCAA competition.

Prior to Proposal 2009-22, the NCAA’s blanket ban on participation on any professional athletics team was particularly broad given the NCAA definition of *professional*. Whether a team was

105. NCAA DIVISION I MANUAL, *supra* note 11, art. 12.2.3.2.

106. *Id.* art. 12.02.4.

107. *See id.* (defining *actual and necessary expenses*).

108. *Id.*

considered “professional” under pre-Proposal NCAA rules depended upon whether that team either considered itself to be professional or paid *any* of its players more than actual and necessary expenses.¹⁰⁹ Thus, regardless of the payment situation of the athlete in question, the NCAA had to determine the payment situation of every player on a given team. This team, rather than individual, approach meant that a prospective student athlete could be declared ineligible due to an arrangement between a teammate and the team. It also inherently created more work for the NCAA.

Further, Bylaw 12.2.5 spoke to the impact of a player signing a professional athletics contract prior to enrollment in an NCAA institution. This bylaw’s language provided a blanket ban that read:

Contracts and Compensation. An individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement.¹¹⁰

The language “regardless of the legal enforceability of that agreement” is extremely important. The practical effect of this provision is to prevent any competition with a professional team, even if the athlete only receives actual and necessary expenses. It is difficult to imagine a situation where the NCAA could not present the argument that a player was under an oral agreement with a team, with the understanding that these agreements are generally necessary to outline both the player’s and the professional team’s rights and obligations. When this fact is paired with the rule that the agreement need not be legally enforceable, the logical conclusion is that any competition with a professional team would be precluded. Even to provide actual and necessary expenses, there must be at least some kind of oral contract between the player and the professional team.

109. This revision would alleviate the situation in which a prospective student-athlete’s eligibility is jeopardized due to a teammate receiving remuneration above actual and necessary expenses, even though the prospective student athlete may be unaware of this arrangement and does not receive more than actual and necessary expenses for participation on the team. Under this approach, an institution would no longer be required to determine whether a team is considered professional.

NCAA Proposal 2009-22, *supra* note 8.

110. NCAA DIVISION I MANUAL, *supra* note 11, art. 12.2.5.

B. Amendments to Proposal 2009-22

On June 22, 2009, the NCAA proposed major changes to rules governing ISAs.¹¹¹ These proposed changes, amended several times before eventually being adopted on June 28, 2010, came to be known as Proposal 2009-22.¹¹² Though provisions of Section E of the proposal, involving delayed enrollment, had their effective dates pushed back to August 1, 2011 and 2012, Sections A–D took effect on August 1, 2010.¹¹³ These sections constitute the bulk of the changes made by the proposal and contain the provisions most relevant to this analysis.

The NCAA stated that its aim in passing Proposal 2009-22 was in part to specify that “prior to initial full-time collegiate enrollment, an individual may enter into an agreement to compete on a professional team and compete on a professional team, provided the agreement does not guarantee or promise payment (at any time) in excess of actual and necessary expenses to participate on the team.”¹¹⁴ Part of the NCAA’s rationale behind this rule is to combat the problem of determining eligibility based on teammates, as discussed in Part IV.A.¹¹⁵ The NCAA determined that it is “more equitable” to evaluate eligibility based on the individual student athlete, rather than his or her teammates.¹¹⁶ A determination of whether an individual student athlete crossed the “threshold of receipt of more than actual and necessary expenses” would better serve student–athlete interests than a blanket determination of a team’s status.¹¹⁷

In addition to the changes involving competition on professional teams discussed later, Proposal 2009-22 also modified existing delayed enrollment provisions.¹¹⁸ Though the rule varies based on sport, it essentially causes a student athlete who does not enroll in a collegiate institution within one year of high school graduation to forfeit a year of eligibility each year they do not enroll, and forces that student athlete to fulfill an academic year in residence prior to

111. See NCAA Proposal 2009-22, *supra* note 8 (proposing bylaw changes relating to amateurism and eligibility and to involvement with professional teams).

112. *Id.*

113. *Id.*

114. *Id.* These provisions are not applicable to men’s ice hockey and skiing.

115. See *id.* (stating that “it is more equitable to determine eligibility based on the circumstances as they relate to the individual prospective student-athlete, as opposed to his or her teammates,” since individual team members may not be aware of other teammates receiving illegal remuneration); see *supra* Part IV.A (analyzing the rules prior to Proposal 2009-22).

116. NCAA Proposal 2009-22, *supra* note 8.

117. *Id.*

118. *Id.* (amending Bylaw 14.2.3.2: “Delayed Enrollment”).

eligibility for competition.¹¹⁹ This provision, though not particularly relevant to this analysis and better left to a different discussion, could have an impact on ISAs, as there may be confusion and issues with graduation dates and enrollment procedures. The NCAA also inserted a definition of *organized competition* into the definitions section of Article 14, Eligibility: Academic and General Requirements.¹²⁰ In doing so, the NCAA better defined the contours of allowed participation.

The most important changes of Proposal 2009-22 to this analysis arise with regard to prospective student athletes vis-à-vis professional athletics teams.¹²¹

One important amendment to Article 12 involves Bylaw 12.2.3.2, covering competition on a professional athletics team. The amendment, now Bylaw 12.2.3.2.1, creates an exception that allows prospective student athletes to compete on professional sports teams.¹²² The amendment states:

Exception—Competition Before Initial Full-Time Collegiate Enrollment—Sports Other Than Men’s Ice Hockey and Skiing.

In sports other than men’s ice hockey and skiing, prior to initial full-time collegiate enrollment, an individual may compete on a professional team (per Bylaw 12.02.4), provided he or she does not receive more than actual and necessary expenses to participate on the team.¹²³

A few important points can be taken from this language. First, and most importantly, is the obvious impact of the provision: prior to enrollment in college, student athletes may compete with professional teams. The necessity of determining whether a team is professional is gone. It is now irrelevant whether the team is professional; it is only relevant whether the team treated the individual as a professional. This leads to the second point: student athletes, rather than teams, are now judged based on Bylaw 12.02.4’s definition of *actual and necessary expenses*. This would logically indicate that the standard should change from what is actual and necessary for any player to

119. *Id.*; see also NCAA DIVISION I MANUAL, *supra* note 11, art. 14 (laying out the established academic requirements for student athletes).

120. See NCAA Proposal 2009-22, *supra* note 8 (amending Bylaw 14.02.9 and defining *organized competition*).

121. The Proposal made amendments to the existing Article 12 bylaw structure. The NCAA also chose to adopt exceptions into the bylaws rather than to replace the existing language. *Id.* These exceptions clearly delineate which sports they apply to, which in all cases involving Article 12 are men’s ice hockey and skiing. *Id.* It is important to note that the changes of Proposal 2009-22 also only apply to NCAA Division I athletes. NCAA Divisions II and III have separate rules entities, manuals, and bylaws.

122. *Id.* (adding Bylaw 12.2.3.2.1).

123. *Id.*

compete on the professional team, to what is actual and necessary for *this* player to compete on the professional team.

In addition to the amendment for participation on a professional team, the Proposal also amended the ban on contracts.¹²⁴ To align itself with the new language of Bylaw 12.2.3.2.1, this exception (Bylaw 12.2.5.1) states:

Exception—Before Initial Full-Time Collegiate Enrollment—Sports Other Than Men’s Ice Hockey and Skiing.

In sports other than men’s ice hockey and skiing, prior to initial full-time collegiate enrollment, an individual may enter into an agreement to compete on a professional team (per Bylaw 12.02.4), provided the agreement does not guarantee or promise payment (at any time) in excess of actual and necessary expenses to participate on the team.¹²⁵

This change removes the problem discussed earlier in Part IV(A). The fear that even if a student athlete receives only actual and necessary expenses, they will be deemed ineligible because of some legally unenforceable, oral agreement no longer exists. Players may now enter into an agreement with a professional team (oral, written, or otherwise) with much less fear.¹²⁶ Now they must only stay within the limits of actual and necessary expenses in order to maintain eligibility.

The impact of Proposal 2009-22 cannot be overstated. Its amendments to the NCAA’s amateurism provisions open the world of NCAA competition to ISAs in ways that have never before been available. Now athletes from countries employing a club-based, rather than scholastic, system of athletics for precollege students will be given an opportunity to pursue dreams of collegiate participation. Such athletes may now compete on levels commensurate with their abilities in their countries, including the highest professional levels, without forfeiting their NCAA eligibility. ISAs must now only remain vigilant as to their compensation and they will be eligible (barring other reasons) to compete in NCAA Division I athletics.

V. PROPOSED SOLUTION

Though the changes made in Proposal 2009-22 are an unprecedented step in the right direction, more must be done. The changes made provide a framework upon which a system that is truly

124. *Id.* (adding Bylaw 12.2.5.1).

125. *Id.*

126. *See id.* (adding Bylaw 12.2.5.1 so that qualifying athletes can enter into agreements as long as “the agreement does not guarantee or promise payment . . . in excess of actual and necessary expenses”).

“equitable”¹²⁷ can be created, but they are not the finish line. ISAs are born, raised, and educated in systems very different from that of the United States.¹²⁸ Cultural norms, education, language, and athletics all differ substantially from one country to the next, and from that of the United States in many, if not most, cases.

In order to provide for a better understanding of the NCAA system and allow for more equitable results while operating through the framework of different cultures, further changes are required. First, education expenses should be included in the list of actual and necessary expenses. Second, a pay-back provision should be guaranteed under Bylaw 12.2.3.2.1 to allow for ISAs (and other potential student athletes) who fall under that bylaw to repay any funds they may receive in excess of actual and necessary expenses. The following subparts will expound the reasons for these two changes.

A. *Education Expenses Are Necessary*

Under the framework established by the NCAA following Proposal 2009-22, there are ten types of expenses considered actual and necessary for an athlete to compete on a professional team.¹²⁹ Any reimbursement a player receives beyond these is deemed to be salary, and will cause the player to forfeit NCAA eligibility.¹³⁰ Among these expenses are meals, lodging, insurance, and medical treatment.¹³¹ Few people would argue that these are not necessary; at least, it is likely most people would concede they are at least as important as education expenses.

There are other actual and necessary expenses that do not appear to be more important than education expenses. Transportation costs to and from practice would be one example.¹³² One can also argue that it is as sensible to require a player to pay for his or her own equipment as it does to make that player pay for his or her own education.¹³³ It is logical to believe that education is at least

127. See *supra* note 116 and accompanying text (discussing how the changes made by the Proposal were intended to make the bylaws more equitable).

128. See *supra* Part III (analyzing how NCAA regulations affect U.S. student athletes and ISAs differently).

129. See NCAA DIVISION I MANUAL, *supra* note 11, art. 12.02.4 (detailing the types of expenses that are considered actual and necessary).

130. See NCAA Proposal 2009-22, *supra* note 8 (adding Bylaw 12.2.3.2.1 and describing how reimbursement beyond actual and necessary expenses can cause a player to forfeit eligibility).

131. See NCAA DIVISION I MANUAL, *supra* note 11, art. 12.02.4 (listing expenses that are not actual and necessary).

132. See *id.* art. 12.02.4(a)(6) (including transportation costs to and from practice in actual and necessary expenses).

133. See *id.* art. 12.02.4(a)(3) (including apparel, equipment, and supplies in actual and necessary expenses).

as expensive as sneakers and a uniform. For these reasons, and reasons explained below, the NCAA should amend Bylaw 12.02.4 to include education expenses as necessary.

One argument for classifying education expenses as necessary is theoretical: education is necessary for advanced societies. As stated by Chief Justice Earl Warren, “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹³⁴ Forty years ago, studies already showed that the education level of a parent (in this case fathers) was an indicator of college attendance.¹³⁵ Regardless of race, a student whose father attended high school was on average almost 10 percent more likely to attend college.¹³⁶ If the father attended college, the number grew to anywhere from two to three times more likely.¹³⁷ President Dwight D. Eisenhower even called for a strengthening of education in 1959.¹³⁸

Further, individuals living in the turbulent, global society of the twenty-first century are likely to find better ways of coping with their daily stresses if they have access to education.¹³⁹ Secondary education is described as “the gateway to social and economic advancement.”¹⁴⁰ One study involving secondary education in remote African countries called schools “the one site that draws adolescents and adults together in a single institution and endeavors to prepare them to make valuable contributions to civil society.”¹⁴¹ Students who attend secondary schools are generally determined to have better success in the labor market and gain greater access to post-secondary education opportunities.¹⁴² Even earlier, primary education is seen as

134. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

135. See Gail E. Thomas, Karl L. Alexander & Bruce K. Eckland, *Access to Higher Education: The Importance of Race, Sex, Social Class, and Academic Credentials*, 87 SCH. REV. 133, 138 (1979) (studying rates of college attendance based on parental factors).

136. *Id.* at 138 fig.1.

137. *Id.*

138. See *Strengthen Education*, 75 SCI. NEWS-LETTER 357, 357 (June 6, 1959) (describing Eisenhower’s statement of U.S. educational goals and needs).

139. See Rupert Maclean, *Overview: Secondary Education at the Crossroads*, 31 PROSPECTS 39, 43 (2001) (noting “knowledge, skills, and understanding” from education may enable young people to find effective ways to cope).

140. JACQUES DELORS ET AL., *LEARNING THE TREASURE WITHIN: REPORT TO UNESCO BY THE INTERNATIONAL COMMISSION ON EDUCATION FOR THE TWENTY-FIRST CENTURY* 125 (1996).

141. Robert Smith, et al., *The Link Between Health, Social Issues, and Secondary Education: Life Skills, Health, and Civic Education* 55 (World Bank, Working Paper No. 100, 2007).

142. See DONALD B. HOLSINGER & RICHARD N. COWELL, UNESCO, *POSITIONING SECONDARY SCHOOL EDUCATION IN DEVELOPING COUNTRIES* 77 (2000) (“Secondary schooling, it is generally agreed, will help determine which individual youths experience greater success in the labour market or gain greater access to the university.”).

a way to create social consciousness and awareness of the challenges society faces as it moves forward.¹⁴³ It is clear that education—especially the secondary education under consideration here—is critical to societal and individual development. To deprive a student athlete of that opportunity simply because it is not deemed necessary to competing with a sports team is irrational.

As presented in Part III.B, teams must provide athletes with education expenses in a club-based system simply because it is not feasible for them to attend traditional schooling based on the scheduling of the season.¹⁴⁴ The education schedules of many countries, especially those of Europe, tend to follow a similar pattern to those of the United States.¹⁴⁵ During this same time, many of the various club leagues around the world are in season.¹⁴⁶

Thus, traditional schooling is foreclosed as an option for many athletes. And unlike in the United States, if a foreign athlete wishes to compete on a level commensurate with their abilities, they are forced to do so with club teams.¹⁴⁷ These club athletes must turn to alternative sources of education. Due to the nature of travel in a professional team's season, this likely means a private tutor. And tutors, who require a salary, provide a necessary service to the athlete. The expenses to cover that necessary service are undoubtedly necessary in return. Education is thus a necessary expense for any athlete who is still in school to compete with a professional team, pursuant to their rights under NCAA Bylaw 12.2.3.2.1.

Beyond theoretical and scheduling arguments, there are several arguments that can be made using the NCAA's own bylaws. Most notably is the importance of education expenses to an NCAA student athlete. The NCAA recognizes the commitment made by student athletes and allows universities to award scholarships in return for

143. See, e.g., UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG., THE CONTRIBUTION OF EARLY CHILDHOOD EDUCATION TO A SUSTAINABLE ECONOMY (Ingrid Pramling Samuelsson & Yoshie Kaga eds., 2008) (describing the influence of an early childhood education on an individual).

144. See *supra* Part III.B (noting the reasoning behind educational expenses).

145. See generally Robb, *supra* note 89 (detailing the typical school years of other countries).

146. See *supra* notes 89–95 and accompanying text. For example, in the season that Enes Kanter played for Fenerbahçe's elite team, the school year would have run from mid-September until early-June. His season with Fenerbahçe in the Turkish Basketball League would have run approximately from mid-October to late-April, excluding any postseason play. Robb, *supra* note 89 (detailing school year in Turkey). Thus, of a school year comprising approximately eight months of the year, Kanter would have been playing with his professional club for over six of them. At most, Kanter would have been out of season and able to attend traditional schooling for a month and a half, even less if his team qualified for postseason play.

147. See *supra* Part III.B (describing how elite players in other countries must sometimes play on club teams to achieve the same level of play as in U.S. secondary schools).

their participation.¹⁴⁸ Referred to as “grants-in-aid” by the NCAA, scholarships are not deemed to be pay-for-play.¹⁴⁹ The language of Bylaw 12.01.4 states that:

A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association’s membership.¹⁵⁰

Scholarships, therefore, are seen as a necessary expense of participating in collegiate athletics and not pay that could be construed as beyond what is actual and necessary to participate in an NCAA-sponsored event. Bylaw 12.01.4 states that this is only true if the grant-in-aid does not exceed the financial aid limitations established by the NCAA’s member institutions.¹⁵¹

Bylaw 15.1 establishes such limit for financial aid that a student athlete may receive based on the limitations of member institutions:

A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2. A student-athlete may receive institutional financial aid based on athletics ability . . . and educational expenses . . . up to the value of a full grant-in-aid, plus any other financial aid up to the cost of attendance.¹⁵²

The bylaws go on to define *full grant-in-aid* as “financial aid that consists of tuition and fees, room and board, and required course-related books.”¹⁵³ A student athlete may receive the full costs of this, plus anything up to the “cost of attendance,” defined as “the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”¹⁵⁴ Within this definition, institutions may provide student athletes with academic support services,¹⁵⁵ medical expenses,¹⁵⁶ housing and meals,¹⁵⁷ certain friend and relative expenses,¹⁵⁸ entertainment,¹⁵⁹ practice and competition expenses,¹⁶⁰ and certain other benefits, gifts, and services.¹⁶¹

148. This is not true for Division III, but the scope of this Note applies only to Division I.

149. See NCAA DIVISION I MANUAL, *supra* note 11, art. 12.01.4 (defining *grants-in-aid*).

150. *Id.*

151. See *id.* art. 12.01.4 (detailing the limitations on a grant-in-aid).

152. *Id.* art. 15.1.

153. *Id.* art. 15.02.5.

154. *Id.* art. 15.02.2.

155. *Id.* art. 16.3.

156. *Id.* art. 16.4.

157. *Id.* art. 16.5.

158. *Id.* art. 16.6.

159. *Id.* art. 16.7.

A comparison between the allowable financial aid given to an NCAA student athlete and the actual and necessary expenses of Bylaw 12.02.4 is instructive. Subheadings 1 and 2 under that bylaw allow for meals and housing, as do NCAA financial aid rules.¹⁶² Subheadings 3, 4, 8, and 9 of Bylaw 12.02.4 cover expenses related to practice and competition, which are also permitted for NCAA student athletes.¹⁶³ The medical expense and transportation provisions (5, 6, and 7) of Bylaw 12.02.4 are also allowed by NCAA financial aid rules.¹⁶⁴ Finally, the broad subheading 10 “other expenses” is covered in the definition of cost of attendance.¹⁶⁵ Thus, all ten expenses considered to be actual and necessary for participation on a professional team are deemed allowable for a scholarship to an NCAA student athlete.

The analysis does not end there. In addition to each of the expenses allowed under Bylaw 12.02.4, financial aid awards to student athletes may feature more expenses per Article 16. These include friend and relative expenses, entertainment, benefits, gifts, and services, and most importantly, *academic support services, books, and tuition and fees*.¹⁶⁶ Thus, under current NCAA rules, a bevy of education expenses are implicitly necessary for student-athlete participation in sponsored events. At the same time, such expenses are not considered necessary for prospective student athletes (notably ISAs) who must compete on professional teams in order to participate. This is a notable discrepancy, and the logic of allowing scholarships to student athletes dictates that education expenses are also necessary to a student who wishes to participate with a professional team as the right is given by NCAA Bylaw 12.2.3.2.1.

Even prior to enrollment in an NCAA institution, student athletes may receive education expenses and maintain collegiate eligibility. The NCAA allows prospective student athletes to receive educational expenses or services under Bylaw 12.1.2.1.3.1. This provision sets the rules as follows:

160. *Id.* art. 16.8.

161. *Id.* art. 16.11.

162. *Id.* art. 12.02.4(a)(1)–(2) (providing that meals and lodging related to competition and practice are actual and necessary expenses).

163. *See id.* art. 12.02.4(a)(3)–(4), (8)–(9) (providing that apparel, equipment, supplies, coaching, instruction, facility usage, and entry fees are actual and necessary expenses).

164. *See id.* art. 12.02.4(a)(5)–(7) (providing that travel expenses related to practice and competition and to medical treatment and physical therapy are actual and necessary expenses).

165. *See id.* arts. 12.02.4, 15.02.2 (allowing student athletes to receive financial aid that corresponds with the cost of attending the institution).

166. *See id.* arts. 15.2.1, 16.3, 16.6–7, 16.11 (providing that institutions can pay for the cost of tuition and required fees as well as extra awards and benefits incidental to practice and competition allowed in Article 16).

A prospective student-athlete may receive educational expenses or services (e.g., tuition, fees, room and board, books, tutoring, standardized test preparatory classes) prior to collegiate enrollment from any individual or entity other than an agent, professional sports team/organization, member institution or a representative of an institution's athletics interests, provided the payment for such expenses or services is disbursed directly to the individual, organization or educational institution (e.g., high school, preparatory school) providing the educational expense or service.¹⁶⁷

Under this provision, as long as the provider of the expenses is not an agent, professional sports team, NCAA institution, or athletics booster, NCAA rules allow any education expenses that a prospective student athlete receives.¹⁶⁸ Not only is tuition included, but also room and board, books, tutoring, and test preparation.¹⁶⁹

This bylaw contrasts sharply with the omission of education expenses from Bylaw 12.02.4. Bylaw 12.1.2.1.3.1 makes no distinction between education expenses that are provided for academic reasons and those provided for extracurricular (i.e. athletic) reasons.¹⁷⁰ Therefore, what could amount to athletic scholarships for high school athletes does not preclude eligibility to participate in NCAA-sponsored athletics. At the same time, student athletes participating on professional teams may not receive education expenses. Any such reimbursement would be considered beyond what is actual and necessary to compete on the team and would constitute a violation of NCAA eligibility requirements.

This distinction is troubling. It implicitly states that education expenses are more important to student athletes who are educated in a scholastic system (the United States) than to those who live in a club-based athletic system (most other countries). If an athlete must participate with a club team because scholastic opportunities are not available, they may not receive education expenses for such competition. However, if a student athlete's school provides the team (and the expenses), they are acceptable. This distinction flies in the face of the "equitable" goals of Proposal 2009-22.¹⁷¹ In order to make the system equitable, athletes in a club system should be given equal opportunities to receive education expenses as those who participate in the American scholastic system.

Finally, there are several other provisions in the NCAA Bylaws that do not comport with the concept of equity and the failure to

167. *Id.* art. 12.1.2.1.3.1.

168. *See id.* (disallowing expenses paid by a representative of an institution's athletic interests, which would seemingly encompass a booster).

169. *Id.*

170. *See id.* (allowing educational expenses as long as they are not paid for by certain parties with no mention of the purpose of the payments).

171. *See supra* note 116 and accompanying text.

provide for education expenses as necessary under Bylaw 12.02.4.¹⁷² In an example of one type of permissible payment to a student athlete, Bylaw 12.1.2.4.1 allows student athletes, prior to enrollment in an NCAA institution, to receive prize money for athletic competition. The bylaw states:

Prior to collegiate enrollment, an individual may accept prize money based on his or her place finish or performance in an open athletics event (an event that is not invitation only). Such prize money may not exceed actual and necessary expenses and may be provided only by the sponsor of the open event. The calculation of actual and necessary expenses shall not include the expenses or fees of anyone other than the prospective student athlete (e.g., coach's fees or expenses, parent's expenses).¹⁷³

Under this bylaw, student athletes may be paid to participate in an athletic event up to having all their expenses covered. An athlete choosing to participate in a competition outside the scholastic arena may receive payment for expenses that are necessary for their participation. This is very similar to the case of an athlete competing on a club team. They are competing outside of scholastic pursuits and receiving payment for their necessary expenses, such as transportation and education. It is difficult to reconcile the acceptability of prize money and the unacceptability of education expenses. Few would argue that prize money is more necessary than education.

Student athletes may also receive expenses for travel to a predraft basketball camp held by a professional organization. Under Bylaw 12.2.1.3.1, professional teams may pay current collegiate athletes to attend their camps, up to actual and necessary expenses:

In basketball, a student-athlete may accept actual and necessary travel, and room and board expenses from a professional sports organization to attend that organization's predraft basketball camp regardless of the duration of the camp.¹⁷⁴

It is once again difficult to reconcile this provision with Bylaw 12.02.4. A student athlete may receive actual and necessary expenses to attend a camp that allows them to achieve a goal that is not scholastically related, but an athlete cannot receive necessary education expenses in order to ensure their ability to attend an NCAA institution. This result seems contrary to the scholastic

172. This discussion is not exhaustive of bylaws that do not appear equitable compared to the Bylaw 12.02.4 ban; rather, it is meant to be illustrative of the discrepancy in current NCAA bylaws.

173. NCAA DIVISION I MANUAL, *supra* note 11, art. 12.1.2.4.1.

174. *Id.* art. 12.2.1.3.1.

mission of the NCAA.¹⁷⁵ Athletes wishing to leave NCAA institutions are permitted to accept expenses to help do so, but athletes hoping to attend such institutions are not permitted to accept the actual expenses necessary to do just that. It is disparities like these that prevent the truly “equitable” environment sought by the NCAA with Proposal 2009-22.¹⁷⁶

Proposal 2009-22 gives athletes a right to play on a professional team prior to NCAA enrollment, and education expenses are necessary for athletes to exercise that right. There are numerous arguments to illustrate the “necessity” of education expenses. First, societal considerations of the value of education indicate that it is extremely important. Second, scheduling issues for athletes in club-based systems (ISAs) prevent attendance at traditional schools and create the necessity of expensive private tutors to fulfill NCAA eligibility requirements. Third, NCAA rules currently allow for education expenses as necessary for current student athletes (and all other Bylaw 12.02.4 expenses), but do not allow them for athletes exercising their Bylaw 12.2.3.2.1 rights. Fourth, scholarships are allowed for high school students, even if given for athletic reasons, which contrasts with the prohibition under Bylaw 12.02.4. Finally, numerous NCAA bylaws exist that are difficult to reconcile with the Bylaw 12.02.4 prohibition. Understanding that Proposal 2009-22 is but a first step, the NCAA should attempt to reconcile the existing discrepancies and extend the right to receive education expenses under 12.02.4.

B. *Bylaw 12.2.3.2.1 Should Feature a “Pay-Back” Provision*

In order to further protect sincere student athletes who attempt to maintain their NCAA eligibility while exercising the right Bylaw 12.2.3.2.1 provides them, an additional safeguard should be introduced. Student athletes who receive expenses beyond what is deemed necessary under Bylaw 12.02.4 should be given the opportunity to “pay back” such expenses in order to retain their eligibility. When the NCAA drafts such a provision, it should first word the provision so as to disincentivize professional teams from providing excess compensation to athletes that harbor a desire to compete at the intercollegiate level. Second, the NCAA should include a mechanism to prevent athletes from using the money they ultimately pay back to enrich themselves.

175. See *id.* art.1.2(c) (indicating one of the NCAA’s purposes is “[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism” (emphasis added)).

176. See *supra* note 116 and accompanying text.

In light of these considerations, a potential pay-back provision could read:

In the event a prospective student athlete exercising their Bylaw 12.2.3.2.1 rights receives excess benefits beyond actual and necessary expenses (defined by Bylaw 12.02.4), they shall be eligible to participate if, prior to competition, that student athlete makes a donation of the amount in question, plus interest to an NCAA-approved charity.

The recommended wording should disincentivize professional teams from paying an excessive amount to prospective ISAs because the teams would be risking having their money taken and given to a charity. They will not be reimbursed. It also will prevent any ulterior motives in payment from teams because the teams will no longer be able to pay excessive compensation in hopes of keeping athletes from moving on to an NCAA institution.¹⁷⁷ Requiring the payment of both the principal and interest will also prevent athletes from using money they will ultimately pay back to enrich themselves through interest income. Such a rule can be used to discourage excess payments by teams, while at the same time ensuring that prospective ISAs have not been enriched by their experience with a professional team.

Another reason for the implementation of such a provision is that translation problems may occur as a result of most of the world speaking languages other than English. English is undoubtedly one of the most important languages in the world. It is spoken by the populace of many of the world's prominent nations, such as the United States and the United Kingdom. This, however, does not mean that the majority of the world embraces English. In fact, English is spoken by only a small percentage of the world population. In 2009, only approximately 328 million people spoke English as their first language.¹⁷⁸ At the same time, the world population was near 6.8 billion.¹⁷⁹ According to these figures, in 2009 only approximately 4.8 percent of the world population spoke English as a first language. English is the official or national language in only seventy-six countries or regions, with many of those having other primary, and often more important, languages as well.¹⁸⁰ This number pales in comparison to the total number of such countries or regions in the world, with 195 countries and seventy-two dependent areas.¹⁸¹

177. Such was a problem in the case of Enes Kanter, where the team was accused of ulterior motives in their involvement with Kanter. *See supra* Part II.

178. *English*, ETHNOLOGUE: LANGUAGES OF THE WORLD, http://www.ethnologue.com/show_language.asp?code=eng (last visited Feb. 18, 2013) (reporting language use by country).

179. U.N. POPULATION FUND, STATE OF WORLD POPULATION 2009, at 5 (2009), available at http://www.unfpa.org/swp/2009/en/pdf/EN_SOWP09.pdf.

180. *English*, *supra* note 178.

181. *See Government: World*, CENT. INTELLIGENCE AGENCY WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (last updated

In light of the fact that a vast majority of the people in the world do not speak English as their first language, it is logical to expect there to be misinterpretations of NCAA bylaws. Enes Kanter came to the United States with this issue, requiring a translator and speaking little English.¹⁸² This language barrier may have contributed to the fact that Kanter believed that his education expenses, a large portion of the expenses deemed beyond what was necessary, were allowed under NCAA rules.¹⁸³ According to those close to Kanter, he believed that roughly \$20,000 was thought to be permissible as something similar to a prep school scholarship.¹⁸⁴

There is no way of knowing the extent of interpretation problems in this vein caused by such a language barrier. The fact that the bylaws are written in statutory language rather than prose further complicates interpretation by non-English speakers. With a massive global population that largely does not speak English, interpretation discrepancies are likely common. A pay-back provision would allow student athletes to maintain eligibility while surrendering gains contrary to NCAA bylaws. Honest mistakes could be rectified through such provision.

The pay-back provision is likely feasible under existing NCAA rules, in which the ability to reinstate a student athlete and what that may or does entail is rather vague. Regarding reinstatement for athletes guilty of a recruiting violation, current NCAA bylaws only state that “[t]he Committee on Student-Athlete Reinstatement may restore the eligibility of a student involved in such a violation only when circumstances clearly warrant restoration.”¹⁸⁵ The only further guidance given is that reinstatement should only be granted “in a unique case on the basis of specifically stated reasons.”¹⁸⁶ These vague existing bylaws allow for a pay-back provision to be inserted while remaining consistent with the existing structure of discretion exercised by the Committee on Student-Athlete Reinstatement.

Along these lines, the NCAA is generous in allowing athletes to pay back benefits they have received, both while enrolled and during recruitment. During the 2010–2011 basketball season, the NCAA allowed University of Kansas freshman Josh Selby to pay back nearly \$5,000 in clothes, transportation, meals, and lodging he received

Feb. 11, 2013). In many of these cases, these are countries or regions with very small populations, such as the Bahamas.

182. See Daniels, *supra* note 26 (mentioning Kanter’s use of a translator).

183. See *Enes Kanter Ruled Permanently Ineligible*, *supra* note 53 (citing the \$20,000 in education expenses that Kanter received); Thamel, *supra* note 31 (discussing benefits Kanter received from a Turkish club).

184. See Thamel, *supra* note 31 (citing Kanter’s adviser Ergul who stated that the club only paid the necessary expenses like for any other child who receives a preparatory school scholarship).

185. NCAA DIVISION I MANUAL, *supra* note 11, art. 13.01.1.

186. *Id.* art. 14.12.3.

during his recruitment.¹⁸⁷ In addition to the pay back, he served a nine game suspension.¹⁸⁸ In the fall of 2011, a scheme involving former booster Nevin Shapiro implicated twelve University of Miami football players, with all allowed to pay back the benefits they received and with eight serving suspensions.¹⁸⁹ The NCAA also allowed football players from the University of South Carolina, University of Florida, and Ohio State University to repay benefits they received and deemed them eligible to compete after serving suspensions during the 2011 season.¹⁹⁰

A particularly egregious situation occurred at the University of Connecticut during the 2011–2012 basketball season. Prior to the season, freshmen Ryan Boatright was found to have accepted benefits during his recruitment and served a six game suspension while paying back \$4,500.¹⁹¹ After playing in ten games, it was discovered that Boatright was still receiving impermissible benefits in the form of transportation and car payments for his mother.¹⁹² Two weeks later the NCAA cleared him to play because of his cooperation in the investigation.¹⁹³

These cases reveal the NCAA's willingness to allow student athletes to make amends for their violations through a pay-back and suspension system. There is a common strain running through all these cases that makes them very interesting as well—they were all

187. See Victoria Swoboda, *Josh Selby To Serve 9-Game Suspension Before Being Reinstated*, ACTION NEWS KHSB (Nov. 19, 2010), http://www.kshb.com/dpp/sports/college_sports/ku/josh-selby-to-serve-9-game-suspension-before-being-reinstated (discussing the reinstatement of Josh Selby after serving a nine-game suspension and paying back the \$5,000 in improper benefits that he received).

188. *Id.*

189. See *Jacory Harris 1 of 8 Canes Reprimanded*, ESPN (Aug. 31, 2011, 4:41 PM), http://espn.go.com/college-football/story/_id/6909795/ncaa-eight-miami-hurricanes-serve-suspensions-repayments (discussing twelve players that received extra benefits and were required to pay back restitution with eight of them serving various length suspensions).

190. See *Florida Football Student-Athlete Sharrif Floyd Must Sit Out Two Games, Repay Benefits*, NCAA (Sep. 8, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Florida+football+student-athlete+Sharrif+Floyd+must+sit+out+two+games,+repay+benefits>; *South Carolina's Damiere Byrd Must Miss Four Games, Repay Benefits*, NCAA (Sep. 9, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/South+Carolinas+Damiere+Byrd+must+miss+four+games+repay+benefits>; *Three Ohio State Football Student-Athletes Reinstated, Must Repay Benefits*, NCAA (Sep. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Three+Ohio+State+football+student-athletes+reinstated,+must+repay+benefits>.

191. See *Ryan Boatright Cleared To Return*, ESPN (Jan. 28, 2012, 9:06 PM), http://espn.go.com/mens-college-basketball/story/_id/7514039/connecticut-huskies-guard-ryan-boatright-cleared-return (discussing the reinstatement of Boatright).

192. See *id.* (detailing the impermissible benefits).

193. See *id.* ("The NCAA said it originally allowed Boatright to return to action while his family cooperated with the probe.").

American student athletes.¹⁹⁴ These student athletes were raised in an English-speaking country where NCAA rules are widely known in the athletics community. Even in light of this, they were allowed to repay benefits they should have known were wrong. In Boatright's case, he was allowed to participate after a violation was found *after* he repaid benefits from a prior violation. If domestic student athletes are given such latitude when they are in a better position to understand the rules, ISAs should be given an opportunity to correct honest mistakes through a similar pay-back procedure.

In addition to the possibility of serving a suspension,¹⁹⁵ ISAs who are exercising their Bylaw 12.2.3.2.1 rights should have the procedural safeguard of a payback provision. Such a provision also benefits domestic student athletes who utilize the right but, as discussed in Part III,¹⁹⁶ American students generally will participate in the scholastic-based rather than club-based system prior to NCAA enrollment. Because language barriers can and do exist between ISAs and the NCAA, existing NCAA rules allow for language to be added, and the NCAA's allowance of similar such paybacks before Bylaw 12.2.3.2.1 should be amended to include a provision to guarantee a right to pay back any expenses received beyond what is deemed necessary. Such a provision creates a more equitable system for ISAs and domestic student athletes alike.

C. Application of Proposed Rules to Enes Kanter

Through the lens of story of Enes Kanter, it is evident that the proposed amendments to Bylaw 12.2.3.2.1 represent a valuable step toward equitable treatment of ISAs. The NCAA ruled Kanter ineligible for accepting \$33,033 beyond his actual and necessary expenses for participation with Fenerbahçe.¹⁹⁷ Of this, approximately \$20,000 went toward education expenses, leaving just over \$13,000 unaccounted for.¹⁹⁸ An application of this Note's proposed Bylaw

194. In 2011, University of Maryland freshman Alex Len, who is from Ukraine, was suspended for a violation of NCAA amateurism rules, but his situation was classified as "unique" and details were not released. It is possible that Len's situation may have involved payment, but no indication beyond amateurism issues was given. Liz Clarke, *Maryland Unlikely To Appeal Alex Len's 10-Game Suspension*, WASH. POST (Nov. 3, 2011), http://www.washingtonpost.com/sports/colleges/maryland-unlikely-to-appeal-alex-lens-10-game-suspension/2011/11/03/gIQAQ5JvjM_story.html ("[Coach] Turgeon wouldn't specify how Len ran afoul of the NCAA's rules on amateurism other than to say that his situation was unique.").

195. I do not advocate for this position but realize that it may be necessary in order to bring the proposed changes in line with past NCAA actions.

196. See *supra* Part III (comparing and contrasting the U.S. and European sports systems).

197. See Press Release, NCAA, *supra* note 20 (discussing the reinstatement committee's ruling).

198. *Enes Kanter Ruled Permanently Ineligible*, *supra* note 53.

12.2.3.2.1 amendments to these figures reveals that Kanter would have likely been eligible had further equitable standards been implemented with Proposal 2009-22.

First, nearly two-thirds of the expenses deemed excessive by the NCAA received by Kanter went to education.¹⁹⁹ These expenses were undoubtedly necessary if Kanter were to be eligible academically to compete at the NCAA level. Kanter's season with Fenerbahçe spanned from mid-October until the end of April.²⁰⁰ This almost entirely overlapped with the traditional school year in Turkey.²⁰¹ In order to compete at a level commensurate with his abilities while at the same time exercising his Bylaw 12.2.3.2.1 rights, Kanter required private schooling. Such schooling was necessary in order to meet educational requirements for NCAA eligibility.²⁰² As advocated above, the NCAA should consider education expenses as necessary. Under this Note's proposed solution, \$20,000 of Kanter's expenses would be allowed under NCAA bylaws.

This leaves \$13,033 that must still be accounted for before one could argue that Kanter should be eligible. This is where the proposed pay-back provision is important. If such a provision existed, Kanter would have been able to pay back these expenses and retain his eligibility. In light of the factors discussed above regarding language barriers, it is probable that Kanter received much of this excess compensation by mistake.²⁰³ This Note's proposed pay-back provision would allow this mistake to be rectified to the benefit of both parties. In light of the situations involving players such as Josh Selby and others, and more notably Ryan Boatright, such a provision would be equitable.²⁰⁴ If Kanter were guaranteed this same right in light of the special circumstances surrounding ISAs, he could have paid back the \$13,033 plus interest and maintained his eligibility.

It is evident that, had equitable standards been included in Proposal 2009-22 to protect ISAs in the same way domestic student athletes are protected, Enes Kanter would have likely been eligible to play basketball at the University of Kentucky. When this is taken together with the evidence of Kanter's attempts to maintain his NCAA eligibility and his desire to compete at the collegiate level, it is clear that these changes are fair, equitable, and necessary.

199. See *id.* (noting that \$20,000 out of the \$33,000 went toward educational expenses).

200. *Turkish Basketball Games/Schedule*, *supra* note 93.

201. See Robb, *supra* note 89 (showing a Turkish school year that begins in mid-September and ends in mid-May).

202. See NCAA DIVISION I MANUAL, *supra* note 11, art. 14.02.11.1 (requiring that a student athlete must graduate from high school to be eligible); INTERNATIONAL ACADEMIC STANDARDS, *supra* note 86, at 150 (specifying what meets the high school graduation requirements for Turkish schools).

203. See *supra* Part III.B.

204. See *supra* notes 194–201 and accompanying text.

V. CONCLUSION

ISA participation in NCAA athletics has risen over the past decades and will likely continue to rise.²⁰⁵ Their participation not only enhances opportunities given to student athletes from around the world, but also contributes greatly to the culture of collegiate athletics. Steps have been taken to make the eligibility process more equitable for ISAs, but more must be done. Proposal 2009-22's changes mark a significant first step in ensuring equitable treatment of ISAs. The NCAA should build on this foundation by making further changes to its bylaws. Education expenses should be determined to be necessary expenses in light of the importance of education generally and more specifically to NCAA participation. In a global culture, communication issues are likely to exist. An inclusion of a provision that allows an ISA to pay back any expenses beyond those which are actual and necessary would allow for mitigation of such issues. If such changes are made, ISAs will be placed on a more even playing field with domestic student athletes. Only then can the Enes Kanters of the world be assured their efforts to maintain their eligibility will not be in vain.

*Zachary R. Roth**

205. See *supra* notes 1-3 and accompanying text.

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