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The Board of Trustees
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January 30, 2006

VIA OVERNIGHT COURIER

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

Ladies and Gentlemen:

On behalf of the University of Illinois Board of Trustees and the University of Illinois at Urbana-Champaign ("University"), I write to appeal the decision by the National Collegiate Athletic Association ("NCAA") staff review committee to retain Illinois on the list of member institutions subject to the policy announced on August 5, 2005 restricting the use of American Indian "mascots, names and imagery" (the "Policy"). This appeal contends that the Policy, and the decision issued by the staff review committee on November 11, 2005 ("SRC Decision"), violate principles of institutional autonomy and were the product of an arbitrary, flawed process.

I. Introduction

This appeal is about the institutional autonomy of NCAA member schools.[1] It is about flawed rules and process. It is about the association of member schools exceeding its charter. It is about a policy that asks a member institution to decide between abandoning an 80-year old tradition cherished by many or face diminished participation in NCAA championship events by its student-athletes.

This appeal challenges the SRC Decision insofar as it pertains to the "Chief Illiniwek" tradition at the University of Illinois at Urbana-Champaign. We note with approval the NCAA's concurrence with the University's arguments in support of, and the NCAA's acceptance of, the names "Illini" and "Fighting Illini" for the school's athletic teams.[2] The NCAA's reversal of its earlier position in regard to the names provided solace to hundreds of thousands of students, alumni and friends of the University who proudly call themselves Illini in a positive association with the largest public university in the State of Illinois.

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[1] It is also about the sovereignty of the State of Illinois, which passed a law in 1996 declaring that Chief Illiniwek "may remain" the symbol for the University of Illinois at Urbana-Champaign. 110 ILCS 305/1f.

[2] The staff review committee stated, "The nicknames 'Illini' and 'Fighting Illini' are not reasons for including the University of Illinois in the August 2005 policy, and the review committee accepts the university's appeal on this point."

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For the reasons articulated in this letter, the University argues that the NCAA should also reverse its earlier ruling as it pertains to the Chief Illiniwek tradition and, consequently, remove the University from the August 5, 2005 list. The SRC Decision gave short shrift to the University's case regarding its institutional authority over the Chief Illiniwek tradition and the University's concerns about the flawed rules and process that have led to this point. The SRC Decision consisted largely of boilerplate responses heavy on opinion and anecdotes but light on facts and argument. The staff review committee simply ignored some points advanced by the University.

Below are the grounds for the University's second appeal.[3] The University begins by acknowledging that clarity is needed with respect to what "mascots, names and imagery" are at issue with respect to the University. In light of the NCAA's acceptance of "Fighting Illini" and "Illini," there are three remaining issues: (i) the names "Chief Illiniwek" and the "Chief"; (ii) the Chief logo; and (iii) the Chief Illiniwek performance. The University possesses common law trademark rights in all three and a U.S. Trademark registration for the "Chief logo." **This appeal concerns *all three*, and, for simplicity, this appeal refers to them collectively as "Chief Illiniwek" or the "Chief Illiniwek tradition" unless the context indicates to the contrary.**

II. The NCAA Ignored Its Own Rules and Process in Issuing the Policy

The University recognizes that, at least for purposes of this appeal, the NCAA would be deemed a "private organization." As a member, the University may challenge successfully the NCAA's actions by showing that the NCAA breached its contract with the University and other member institutions by failing to follow its constitution and/or bylaws in issuing the Policy. *See, e.g., California State Univ. v. NCAA*, 147 Cal. Rptr. 187 (Cal. Ct. App. 1978).

A. The Executive Committee Exceeded its Authority

Article 4.1.2 lists 13 different duties and responsibilities of the Executive Committee. Only the three duties and responsibilities cited below are relevant to the type of action taken by the Executive Committee in issuing the Policy:

> (d) Identify core issues that affect the Association as a whole and act on behalf of the Association to resolve them;
>
> * * * * *
>
> (i) Forward proposed amendments to Constitutions 1 and 2 and other dominant legislation to the entire membership for a vote;

[3] To some it may seem that an appeal to the Executive Committee is a futile exercise since it was the Executive Committee that unilaterally issued the Policy and "determined" that the University was subject to it. It is worth noting that it is the NCAA's requirement that this administrative "appeal" be addressed to the self-same body that issued the Policy. In addition, the University makes this appeal with the expectation of fairness by the NCAA and in order to exhaust the administrative remedies available to the University.

* * * * *

(j) Call for a vote of the entire membership on the action of any division that is contrary to the basic purposes and policies in the Constitution. [NCAA Manual, Art. 4.1.2].

The latter two provisions would have required a membership vote, while the third would have permitted action only on "core issues." Thus, none of the three justify the action taken by the Executive Committee in issuing the Policy.

A review of other NCAA provisions yields similar results. For example, the Constitution provides the procedures for membership votes on proposed amendments to the Constitution by the Executive Committee (Article 5.3.6.1) and procedures for membership votes on actions that are contrary to the basic purposes of the Constitution (Article 5.3.9.5). However, neither of these duties of the Executive Committee grants the Committee the authority to enact the current Policy. Instead, the Constitution gives the Division I Board of Directors (with recommendations from the Management Council) authority to, among other things:

- Adopt administrative bylaws and regulations;
- Adopt operating bylaws and rules and/or delegate limited legislative powers to the Management Council; and,
- Approve regulations providing for the administration of championships.

Given that the Policy is tailored to what the NCAA terms "championship events," the Policy could be viewed as a regulation providing for the administration of championships, except that its effect is more pervasive. As shown below, the SRC Decision states that the mere existence of Chief Illiniwek triggers the Policy's application to the University, not the presence of the Chief (or logos) at NCAA championship events.

Finally, Article 5.4.1 empowers the Board of Directors and the Management Council (and the appropriate committee for each division in the interim between meetings of the Board of Directors) to make interpretations of the Constitution and Bylaws. This provision references Article 5.2.5 for the "appropriate committee." Article 5.2.5 states that "the divisional presidential administrative committee and management councils per Constitution 4.2 through 4.7, in the interim between conventions, and the Legislation/Review/Interpretations Committee and the Academics/Eligibility/Compliance Cabinet, in the interim between meetings of the management councils, are empowered to make interpretations of the constitution and bylaws." Notably, the Executive Committee, created by Article 4.1, is <u>not</u> included within this provision.

What might a valid enabling provision look like? The Bylaws of the University of Illinois provide an example. Under Illinois law, the governing body of the University of Illinois is the Board of Trustees. 110 ILCS 305/1. That statute specifically authorizes the Board to establish by-laws. [Id.]. The Board's Bylaws establish the manner in which the Board will conduct its business, and prescribe the powers possessed by the Board's Executive Committee:

> The Executive Committee functions as an instrument of the board *and shall possess all the powers of the board when in session*, provided that it shall not

> overrule, revise, or change the previous acts of the board, or take from regular or special committees any business referred to them by the board. [*Bylaws*, Art. IV, Sec. 3][emphasis added].[4]

The NCAA Constitution and Bylaws contain no such provision with respect to the NCAA Executive Committee.

In short, the University can find no basis within the NCAA's Division I Constitution and Bylaws to support the proposition that the Executive Committee had the power to do what it did. *Thus, the University asks the Executive Committee to identify specifically: (i) the provision(s) that provide the basis for the Committee's purported ability to adopt the Policy; and (ii) what, if any, limits are imposed upon the Executive Committee's powers.*

The SRC Decision simply asserts that the Executive Committee "has the clear responsibility for determining Association-wide policy." The University disagrees. By that logic, what would prevent the Executive Committee from adopting any number of "policies" pertaining "only" to "NCAA championship events" that are equally intrusive without regard to established procedures? Moreover, if the SRC position is valid, why would the Policy be limited to championship events? A likely explanation is that the Executive Committee knew it was acting outside its authority, so it hedged and limited the Policy's scope.

B. The New Policy is Akin to "Legislation," Requiring a Different Process as Set Forth in the NCAA Bylaws and Regulations

The NCAA Constitution provides a detailed legislative process for all bylaws and regulations that are enacted by the Board of Directors. (Articles 5.01 - 5.3). However, this process makes no mention of policies enacted by the Executive Committee, except for the procedures for proposed amendments to the Constitution by the Executive Committee (Article 5.3.6.1) and procedures for voting on actions that are contrary to the basic purposes of the Constitution (Article 5.3.9.5) mentioned above, which are specific duties of the Executive Committee.

One way to appreciate this point is to look at the NCAA's own website. Listed in the "press room" link are various categories of NCAA announcements and actions, for 2005 and prior years. Even a casual review of those actions listed under "Legislation" suggests that the Policy was, more than anything, a type of special legislation addressing specific member institutions.

A number of judicial decisions involving the NCAA strongly support the University's position. The legislation process has been described concisely by the U. S. Supreme Court:

> The NCAA is an unincorporated association of approximately 960 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States. *Basic policies of the NCAA are determined by the members at annual conventions.* Between

[4] The Board's *Bylaws* are available online at http://www.uillinois.edu/trustees/bylaws.html.

> conventions, the Association is governed by its Council, which appoints various committees to implement specific programs. One of the NCAA's fundamental policies "is to maintain *intercollegiate athletics* as an integral part of the educational program and the athlete as an integral part of the student body, and by so doing, retain a clear line of demarcation between college athletics and professional sports." *It has therefore adopted rules, which it calls "legislation," governing the conduct of the intercollegiate athletic programs of its members.* This NCAA legislation applies to a variety of issues, such as academic standards for eligibility, admissions, financial aid, and the recruiting of student athletes. By joining the NCAA, each member agrees to abide by and to enforce such rules.

NCAA v. Tarkanian, 488 U.S. 179, 183 (1988)(citations omitted)(emphasis added). Similarly:

> The NCAA is a voluntary, unincorporated association of educational institutions dedicated to promoting amateur intercollegiate athletics. Its goals include the promotion of athletic competition, the regulation of eligibility with a view to promoting "scholarship, sportsmanship, and amateurism," *and the legislative regulation of matters of general concern to the membership.* NCAA Constitution, Art. 1.2(c).... The athletic programs of the member-institutions are governed by NCAA regulations, which are adopted by the association through a representative process. The board of directors for Division I, the division to which [the two institutions] belong, is composed of the chief executive officers of member-institutions and is responsible for establishing and directing the relevant bylaws and rules. The board of directors may delegate legislative powers to a Division I Management Council, which comprises athletic administrators of the various member-institutions, including faculty representatives, athletic directors, and senior women administrators. The management council's decisions are subject to ratification by the board of directors. *According to the NCAA's constitution, member-institutions have the power to change rules and influence NCAA policy through this legislative process.... [T]he legislative process creates rules based on the participation of many institutions from many states*, speaking for the collective membership through a non-governmental organization....

NCAA, et al. v. Yeo, 114 S.W.3d 584, 592-93 (Tex. Ct. App. 2003)(citations omitted) (emphasis added), *rev'd on other grounds,* 171 S.W.3d 863 (Tex. Sup. Ct. 2005). *See also NCAA v. Brinkworth*, 680 So.2d 1081 (Fla. App. Crt. 1996)(NCAA "legislation" consists of rules governing the conduct of intercollegiate athletic programs).

Thus, by law and charter the only manner in which the Policy could have been enacted was for the NCAA to have *employed the legislative process from the beginning.*[5] Recognizing this fact (too late), the NCAA has now fashioned an "appeal process," presumably to at least

[5] The University does not concede that had the NCAA employed the legislative process to adopt the Policy, its problems would be over. First, legislation is supposed to concern "basic athletics issues," and it is questionable whether the Policy concerns such issues. [NCAA Manual, Art. 1.3.2]. Second, as shown in the text, the Policy is at war with other core principles of the NCAA. As written, it is unnecessarily broad and invades institutional autonomy and control. The University merely contends that the Policy is akin to the adoption of legislation or bylaws and therefore its creation could not have been achieved by unilateral fiat of the Executive Committee.

marginally involve a "hearing" process (which is actually nothing more than a review of previously submitted written materials) by "the appropriate presidential governance entity." [SCR Decision Letter, Nov. 11, 2005, at p. 3]. The University submits that this is too little too late.

A recent lawsuit in Illinois involving high school athletics further illustrates this point. Last fall a suit was filed challenging action taken by the executive director and board of the Illinois High School Association ("IHSA") altering the manner in which high schools are classified for purposes of Illinois high school athletic championships. *De La Salle Institute, et al. v. Illinois High School Association*, No. 05 CH 16410 (Circuit Court, Cook County; Chancery Division)(filed September 27, 2005). In a strikingly similar situation, the IHSA Executive Director by fiat had changed the way the sizes of high schools were to be calculated for purposes of placing them in classes of competition for state-wide athletic championship competitions. The change then was adopted by the IHSA board. [See news articles attached.] The change adversely affected a relatively small number of private schools. The affected schools protested to no avail. They then filed a lawsuit, seeking declaratory and injunctive relief. The first count of their Complaint alleged that the IHSA had breached its contract with member institutions by failing to follow its own rules, policies and procedures. [Complaint, ¶¶ 62-67].[6] This is the very argument advanced by the University, the University of North Dakota and others.

In a public hearing, attorneys for the IHSA tried to settle the case by offering to conduct a referendum on the new policy of its members. [Id.]. After a series of closed-door meetings with the presiding judge, that offer became the core of the settlement. Ultimately, a consent decree was agreed to by the parties and approved by the judge. It provided that: the new policy would expire at the end of the fall 2005 state football championships; waivers would be granted to affected schools; the IHSA would use the legislative process if it chose to adopt the rejected policy; and, during any future legislative process related to the rejected policy, the IHSA Executive Director and his staff would remain neutral. [Id.]. In late December 2005 the policy was submitted to the membership for a vote and was adopted 450 – 143. [Id.].

C. The Executive Committee's Actions in Issuing the Policy Violated the Core Principle of Institutional Autonomy

The NCAA wants to have it both ways when it comes to institutional authority and its Policy regarding the use of Native American mascots, names and imagery. On one hand the NCAA correctly acknowledges, "We do not have authority to control what institutions do on their own. This principle might be called institutional autonomy." [Walter Harrison, NCAA Executive Committee media conference, 8/5/05]. On the other hand the NCAA issues pronouncements as the dominant institution in intercollegiate athletics: "So we attempted to take these measures which affect NCAA championships, which is what is appropriately within our authority...." [Id.]. In other words, change your policy to suit us, or we will diminish your ability to compete. "In the end, the NCAA's decision is about Illinois' participation in championship competition and its ability to host events where Native American imagery is worn

[6] The inch-thick Complaint and Exhibits from the IHSA case are not attached hereto. The University has a copy of the court file and would be happy to provide a copy to the SRC or Executive Committee.

or displayed," concluded the November 11 letter to the University. [SCR Decision Letter, Nov. 11, 2005, at p. 3].

The University has spelled out in detail for the NCAA the deliberative process in which the Board of Trustees is engaged to resolve issues regarding the nearly 80-year Chief Illiniwek tradition on the Urbana-Champaign campus. Detailed in the University's April 2005 self-evaluation and the October appeal, that process took its current course in June 2004 with the adoption of a resolution by the Board to initiate a process to reach a "consensus conclusion." The outcome of that process would reflect the values espoused by the University, would possess a compelling rationale and would bring finality to the matter. Subsequent actions by the Board further moved the University toward this goal. In September 2004 the Board approved a policy that "the State's heritage and its American Indian culture and traditions shall be preserved, affirmed and publicly celebrated." In July 2005 the Board adopted a set of guidelines to help shape the consensus process. Among them was to "engage American Indian involvement," "recognize the diversity of Illinois' American Indian culture, past and present," "reflect the core values of excellence, integrity and respect," and recognize opportunities to "educate and inform [the University] community and the public about American Indian culture, history and heritage." The Board of Trustees' resolutions were attached to the University's October 13 appeal.

The University's October 13, 2005 appeal letter to the NCAA underscored the Board's intention to make hard choices:

> The Board's actions indicate that the outcome of its consensus process will satisfy neither the most ardent proponents nor the most ardent opponents of the Chief Illiniwek tradition. Its goal is to conclude the matter in a way that serves the best interests of the University and that can be embraced by a majority of the affected constituencies, which include the citizens of Illinois as well as students, faculty, staff and alumni.

In other words, some change in the *status quo* regarding the Chief Illiniwek tradition is possible. The options are limited only by the parameters established by the University's board, whose members are deeply familiar and engaged with the issue. The University's Board of Trustees should be allowed to continue its work unfettered by the NCAA's Policy.

Referring to the Board's progress, the SRC Decision stated: "That effort stands alone from participation in or hosting NCAA competition." The truth of the matter is that the effort is inextricably *linked to* Illinois hosting NCAA competition – something it has done in the recent past. The NCAA has essentially superimposed its policymaking authority over that of the University. Unless the University is found to be outside the Policy, or the Policy is narrowed, the University will suffer serious consequences.

Courts have recognized the significance of institutional control and autonomy, characterized as a core principle. Returning to *Yeo*:

> The NCAA does not directly enforce its eligibility rules on students and coaches; rather, it enforces penalties against its member-institutions, which in turn are responsible for meting out penalties to individual athletes and coaches.... *A core*

principle of the NCAA is "to uphold the principle of institutional control of, and responsibility for, all intercollegiate sports." NCAA Constitution, Art. 1.2(b)....

Yeo, 114 S.W.3d at 592-93 (emphasis added). The principle of institutional control is echoed in Article 2. [See Article 2.1 of 2005-06 NCAA Division I Manual].

III. The Executive Committee's Application of the Policy to the University was Arbitrary and Capricious

The decision by the NCAA Executive Committee to include the University "on the list" of 18 must be rejected if that determination was arbitrary and capricious. *Jones v. NCAA*, 679 So. 2d 381 (La. Sup. Ct. 1996).

Dictionary meanings themselves offer insight: "arbitrary" is defined as "determined by chance, whim, or impulse, and not by necessity, reason or principle." [American Heritage Dictionary (3d ed. 1992)]. Interestingly, the second definition offered for "arbitrary" is "based on or subject to individual judgment or preference." [*Id.*]. "Capricious," meanwhile, is defined as "characterized by or subject to whim; impulsive and unpredictable." [*Id.*]. Courts have interpreted the "arbitrary and capricious" standard to mean whether there existed a satisfactory explanation for an action, including a "rational connection" between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As shown below, the decision to include (and retain) the University in the group covered by the Policy was not born of reason or principle, but instead reflected the Executive Committee's subjective preference.

A. The Circumstances Surrounding the Policy's Issuance Betrayed Its Arbitrariness

The University contends that the Policy itself, and its application to the University, are arbitrary and capricious, as shown below. The University begins simply by recounting what occurred (and, just as illuminating, what did not occur) in the days following the issuance of the Policy:

- Various NCAA representatives practically *admitted* that the decision to include the University on the list was arbitrary.[7] As the University pointed out in its initial appeal, during the NCAA's August 5, 2005, news conference to announce the Policy questions arose on how the "hostile and abusive" determination was made for the affected institutions. Charlotte Westerhouse, NCAA Vice President, explained as follows: "In trying to look at what we're defining as being hostile and/or abusive, we're looking for guidance that we've had in various civil rights cases that deal with discrimination and the educational environment." Later, however, NCAA spokesperson Gail Dent stated that no such determination was made. Instead, she said any reference to American Indians simply was *presumed* to be "hostile and abusive." The University is left to ask: If those comments,

[7] The University does not seek to criticize NCAA representatives. The University cites these comments, however, because its ability to discern the Executive Committee's thought process and rationale is understandably constrained.

uttered by official representatives of the NCAA, don't themselves demonstrate the Executive Committee's arbitrary and capricious methods, what would? The SRC Decision fails to mention, let alone harmonize, these comments.[8]

- No definitions for the terms "hostile and abusive" or "hostile or abusive" were provided.

- In haphazard fashion, the Policy underwent *ad hoc* revisions to "exempt" various institutions. The most famous of these revisions is the "approval of a namesake tribe" rule to avoid a confrontation with Florida State University. As pointed out in its initial appeal, the University lacks an identifiable namesake tribe, another fact ignored in the SRC Decision.[9]

The University also provides the following criticisms of both the initial determination and the SRC Decision.

B. Applying the Policy to the University Ignores Various Legal Precedents

1. The Staff Review Committee Erroneously Trivialized the OCR Decision

As set forth in the University's initial appeal, in 1995 the Office for Civil Rights, U. S. Department of Education ("OCR") conducted a thorough investigation and *concluded that the existence of the Chief did NOT constitute a "racially hostile environment at the University."*[10] The University believes that it is the *only* institution of the 18 initially subjected to the Policy that can point to such a finding by the OCR. This is a striking and distinguishing factor – equal, perhaps, to the "namesake tribe approval" rule hastily added by the NCAA after the Policy was announced. [See Section III A, above]. That unique factor should be weighed carefully by the NCAA, not dismissed out-of-hand.

The NCAA's position is that: (i) the OCR decision is 10 years old and "things have changed since then"; (ii) notwithstanding OCR's determination, "there is clearly a hostile environment present" based on "media accounts, letters and email"; and (iii) the OCR finding is offset by a contrary conclusion reached by the North Central Association in 2004. The University addresses each in turn.

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[8] Comments such as these also ignore the intent-based, slippery-slope effect of the Policy, because it disconnects intent from effect. By adopting the Policy in the manner it did, the NCAA has chosen to judge effect rather than intent. The University posits that there is no limit on things some people find offensive.

[9] The University, unlike several others of the 18 listed institutions, has no tribe with the name Illini (or more properly Illiniwek) from whom it could seek approval. "Illiniwek," from which the name Illinois is derived, is a 17th Century Algonquin term for a confederation of Indian tribes that inhabited the region. That confederation no longer exists. The remaining descendant tribe is the Peoria Tribe of Indians of Oklahoma.

[10] The OCR November 30, 1995 Decision was attached to the University's initial appeal and is incorporated by reference herein.

a. The OCR, not the NCAA, has "jurisdiction" over the issue of Chief Illiniwek.

The Office for Civil Rights is an agency of the Federal Government specifically and statutorily charged with enforcing civil rights in the educational environment. Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance. All federal agencies that provide grants of assistance are *required* to enforce the Title VI regulation. The U.S. Department of Education is such a federal agency since it provides grants of financial assistance to schools and colleges, among others. OCR is charged with enforcing the DOE's Title VI regulation. [34 C.F.R. 100].

Here is how the OCR describes its mission:

> The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.... The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964.... These civil rights laws enforced by OCR extend to all state education agencies, elementary and secondary school systems, *colleges and universities*, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries, and museums *that receive U.S. Department of Education funds. Areas covered may include*, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, classroom assignment, grading, vocational education, recreation, physical education, *athletics*, housing, and employment. [http://www.ed.gov/about/offices/list/ocr/aboutocr.html][emphasis added].[11]

In 1995, OCR responded to a complaint originally filed in March 1994 alleging a violation of Title VI of the Civil Rights Act of 1964. Title VI and its implementing regulation prohibit, among other things, recipients of federal funds from subjecting students to a "racially hostile educational environment on the basis of race, color or national origin." The complaint alleged that the existence of the Chief, the name "Fighting Illini" and alleged incidents of verbal and physical harassment did just that.

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[11] Note also that complaints may be brought by individuals other than those directly affected:

> A complaint of discrimination can be filed by anyone who believes that an education institution that receives Federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability, or age. The person or organization filing the complaint need not be a victim of the alleged discrimination, but may complain on behalf of another person or group. [Source: http://www.ed.gov/about/offices/list/ocr/aboutocr.html].

b. Unlike the NCAA's "determination," the OCR's finding was based on an extensive factual investigation.

OCR performed a lengthy investigation that entailed interviewing more than 40 individuals, reviewing voluminous documents, and conducting four on-site visits to the campus; one visit included an observation of the Chief at a University-sponsored event. *OCR concluded that the existence of the Chief, even though perceived as offensive by particular individuals, did NOT constitute a "racially hostile environment at the University."* [OCR Letter, dated 11/30/95][emphasis added].

In this context, it is worth repeating what the NCAA has said about its finding that certain images, etc. were "determined" by it to be "hostile and abusive." During the press conference of August 5, 2005, Charlotte Westerhouse, NCAA Vice President for Diversity and Inclusion, explained that the NCAA's determination was made this way:

> And in trying to look at what we're defining as being hostile, and/or abusive, we're looking for guidance that we've had in various civil rights cases that deal with discrimination and the educational environment. Also balancing that with the NCAA values and regards to cultural diversity, sportsmanship like conduct, and ethical conduct, and also our principle for non discrimination. And balancing all of those things together, we came out with the particular recommendations which will be, once again, limited to what the NCAA has autonomy with and its championships.

Put succinctly, it is difficult for the University to comprehend, let alone agree with, the notion that the unexplained "designation" of an NCAA committee sitting in a conference room outweighs the fact-intensive, well-reasoned opinion of the federal agency with not only the legal authority and responsibility to consider the matter, but with the experience and resources to do so.

2. A Recent State Court Ruling also Upheld the Lawfulness of Chief Illiniwek

A recent ruling from the Circuit Court of Cook County provides additional support to the view that the existence of the Chief is not, as the NCAA suggests, unlawful. *Illinois Native American Bar Association, et al. v. University of Illinois Board of Trustees*, No. 05 CH 4735 (Circuit Court, Cook County; Chancery Division). In that case, three Native American students sued the Board of Trustees, contending that existence of Chief Illiniwek violated the 2003 Illinois Civil Rights Act. That statute prohibits "subject[ing] a person to discrimination under any program or activity on the grounds of that person's race, color, or national origin" or utilizing methods or criteria that have the same effect. 740 ILCS 23/5(a)(1),(2). Under the Act, aggrieved individuals may sue units of State government. The students argued that the Chief's existence violated the Act because it:

- Was offensive to them;
- Was "humiliating" and "harassing" for them;

- Created a "hostile atmosphere"; and,

- "Effectively barred" them and other Native Americans from attending any UI sporting events.

[Amended Complaint, filed June 30, 2005]. Judge Donnersberger disagreed. He noted that before the Illinois legislature had enacted the state Civil Rights Act, it had passed a law declaring that Chief Illiniwek "may remain" the symbol for the University of Illinois at Urbana-Champaign. 110 ILCS 305/1f. Because of this prior legislation, the Judge concluded that it would be illogical to interpret the state Civil Rights Act as intended to prohibit the Chief's existence. The Judge therefore dismissed the suit. [Memorandum and Order, issued Sept. 23, 2005; copy attached]. Plaintiffs filed a motion to reconsider, which, following briefing, was denied. [Memorandum and Order, issued Jan. 3, 2006; copy attached].

The OCR decision and the recent state court rulings have significance beyond their value as legal precedents. They demonstrate that the NCAA's "determination" that Chief Illiniwek is "hostile and abusive" is arbitrary and capricious. In addition, they also exemplify the forums in which such matters should be decided – *and, just as importantly, the forums in which they should not*. The University submits that, in addition to the Policy's other flaws, the NCAA Executive Committee is simply not the proper forum for setting social policy or redressing individual grievances.

3. The NCAA Mischaracterizes the North Central Association Report and Process

In dismissing the 1995 OCR findings and decision, the SRC relies upon a partial quote from a 2004 report by the Higher Learning Commission ("HLC") of the North Central Association of Colleges and Schools ("North Central Association"). By doing so, the NCAA must hope the public believes the opinion of an education accreditation group somehow trumps a ruling by the federal civil rights enforcement agency merely because the HLC recommendation was more recent and appears aligned with the NCAA's position. The NCAA, however, ignores the following:

- The University is a charter member of the North Central Association and has been continuously accredited since 1913.

- The focused-visit and ensuing report had no bearing on the University's accreditation and no sanctions were imposed. The findings and recommendations of the HLC "consultation" were advisory and non-binding.

- In "an important footnote to the team's visit," the report complimented the Board's of Trustees' June 2004 resolution calling for a consensus conclusion process: "The team is encouraged by the Board's stated willingness to end the symbol (Chief Illiniwek tradition) controversy and urges timely resolution. Because any symbol serves many constituencies, the team wishes to underscore the point that consensus resolution of the issue must have positive impact upon

the University of Illinois' educational programs and public presence locally and nationally."

- Although the HLC team clearly was predisposed to favor elimination of the Chief Illiniwek tradition, it recognized the importance of institutional self-determination. The HLC report declared that "the discussion of this matter calls for the University to insist upon logical and collegial ways of examining issues and resolving controversy."

4. There Has Been No Fact-Based Finding that the Mere Existence of Chief Illiniwek and the Logo Cause a "Hostile and Abusive" Environment

The NCAA did not conduct any thorough fact finding necessary to support its "hostile and abusive" conclusions about our names and our Chief Illiniwek tradition. This is self-evident. Moreover, with all due respect, given the work previously performed by the Office for Civil Rights, it strains credulity for the SCR to rely upon "media accounts, letters and email" to support the NCAA's alleged "finding" that the Chief Illiniwek tradition has created a hostile and abusive environment. It is cavalier and arguably unconscionable for the NCAA, without process and factual support, to brand as "hostile and abusive" the Chief Illiniwek tradition, which was born of earnest and honorable intent and which has served to remind many generations of Illinoisans of the state's American Indian heritage. University alumni and supporters, and citizens of the state, feel betrayed by the NCAA's treatment of them as an accomplice.

IV. The New Policy is Invalid for Other Reasons

The NCAA's action also runs afoul of established legal principles recognized by courts in this state and others. They are summarized below.[12]

A. Implied Duty of Good Faith and Fair Dealing

For the reasons set forth above, the NCAA's failure to follow its own rules and process constitutes a breach of its contract with all member institutions, not just those included within the Policy. Under basic contract law in Illinois, Indiana and elsewhere, every contract contains an implied covenant of good faith and fair dealing. *Hall v. NCAA*, 985 F. Supp. 782, 794 (N.D. Ill. 1987). That duty requires a party vested with contractual discretion to exercise that discretion reasonably, not arbitrarily or capriciously. *Id.; In re Clark Retail Enterprises*, 308 B.R. 869, 888 (N.D. Ill. 2004)(party with discretion must use it "reasonably and with proper motive, and may not do so arbitrarily, capriciously or in a manner inconsistent with the reasonable expectations of the parties"). Here, the NCAA, through its Executive Committee, has exercised its discretion unreasonably by subjecting the University to the Policy in an arbitrary and capricious manner, violating the NCAA's duty of good faith and fair dealing.

[12] The University presents these arguments in summary fashion and reserves all rights, recourse and remedies available to it

B. First Amendment

The Policy obviously raises issues under the First Amendment to the United States Constitution. The only defense against a direct First Amendment challenge is the fact that courts generally have held that the NCAA is not a "state actor" for First Amendment purposes. But that does not end the analysis. Member institutions are obligated to comply with the Policy. They presumably would be expected to enforce the Policy. Many of the member institutions, like the University, *are* viewed as state actors. Thus, First Amendment principles apply to their actions. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977).

C. Antitrust

The NCAA is no stranger to antitrust suits challenging some of its practices. Several of those suits either were successful or were settled prior to trial. It is likely that the Policy at issue could be challenged as an illegal restraint of trade in violation of Section 1 of the Sherman Act. *E.g., NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998). The University reserves its rights in this regard.

D. Equitable Estoppel

The Chief Illiniwek tradition has existed in substantially the same form since 1926. The current form of the logo has been used since 1994. The NCAA did nothing about this issue for decades. It had every opportunity to participate in various venues to challenge what it now has determined by fiat to be a "hostile and abusive" practice by the University. To cite but one example, the NCAA could have opposed the University's registration in 1999 of the Chief logo before the United States Patent and Trademark Office. It chose not to do so.[13] Under such circumstances, the NCAA cannot now reverse field and penalize the University for the Chief's mere existence. *Shockley v. Ryder Truck Rental, Inc.*, 392 N.E.2d 675, 678-79 (1st Dist. 1979). The University is entitled to rely upon the NCAA's conduct and take numerous actions to protect and market intellectual property interests relating to Chief Illiniwek and the logo; that reliance is now proving to have been detrimental to the University's interests since according to the NCAA the continued use of Chief Illiniwek or the logo will carry a penalty.

V. The University Requests a Stay Pending the Final Outcome of this Appeal

The University recognizes that the appeals process for the University of Illinois at Urbana-Champaign will not be completed by February 1, 2006, one of the Policy's relevant dates. Recent media reports suggest that the previously announced effective date for the Policy – February 1, 2006 – would be postponed for "schools involved in the Native American imagery appeal process."[14] The University therefore requests that it be granted a "stay" of the Policy

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[13] To the contrary, the NCAA actively participated in, and profited from, the use of Chief Illiniwek and the logo on merchandise. The official NCAA website for years featured merchandise that included both.

[14] While this appeal contends that the University should be deleted from the NCAA's list of schools subject to the Policy, it is worth noting that, as a policy or rule that requires compliance, the Policy provides such little guidance for member schools that compliance becomes an ethereal notion. To date, it has announced one exception to the Policy – the support of the namesake tribe. What if the namesake tribe revokes its prior approval? Surely other

until May 15th, which is the close of the academic year for the University. Such an extension would eliminate potential problems caused by applying the Policy during the remaining portion of the spring semester.

VI. If Retained, the Policy Should be Narrowed

The combination of NCAA clarifications, re-statements, corrected determinations and contentious appeals all demonstrate one fact: the Policy has been less than a rousing success. The University suggests that this is largely due to the fact that the Policy's stated rationale and the Policy's scope and impact do not mesh. Accordingly, the University proposes that if the Policy is to continue in some fashion, it should be narrowly tailored to match the NCAA's jurisdiction and purported goal of regulating the "environment" at NCAA championship events *and nothing more*. Thus, the mere existence of a Native American symbol or mascot itself should not be found to be impermissible *so long as no University-sponsored athletic appearance or performance occurs at NCAA championship events*. This is equally true for images or logos *displayed by the University during NCAA championship events, i.e., displayed on uniforms worn by student-athletes or band members.*[15] In that manner, the NCAA would *truly* be regulating the conduct of its championship events instead of inserting itself into the internal matters of a small number of its 1,200+ member institutions. Being an effective advocate for change is not achieved through poorly reasoned, unilateral edicts.

For the reasons stated in this letter and in the interests of institutional autonomy, due process and fair dealing, the University of Illinois respectfully requests that it be removed from the list of member institutions subject to the Policy.

Regards,

Lawrence C. Eppley
Chair, Board of Trustees

Cc: B. Joseph White, President, The University of Illinois
Richard H. Herman, Chancellor, The University of Illinois at Urbana-Champaign

Enclosures

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solutions will be offered. What will be the process and what entity within the NCAA would address such issues? What does the NCAA consider to be its jurisdictional boundaries?

[15] Currently no University of Illinois team uniforms display the Chief Illiniwek logo.

Newspaper Articles re: IHSA Suit

CHICAGO SUN-TIMES
suntimes.com

Agreement likely on multiplier status

Author(s): Michael O'Brien **Date:** October 1, 2005 **Page:** 83 **Section:** Sports

Circuit Court Judge Julia M. Nowicki said Friday that both sides have reached the outline of a brilliant agreement" in the aftermath of the Illinois High School Association being sued by 37 schools to prevent it from using an enrollment multiplier.

I don't want to go over the details so no one is influenced," Nowicki said.

However, according to the public-address announcer at the Bishop McNamara-Providence game Friday in New Lenox, the multiplier is probably out for this year."

The PA announcer's statement was the only clue that leaked out about the possible agreement.

Nowicki's announcement came after a meeting in her chambers with lawyers from both sides that lasted approximately an hour.

A hearing is scheduled at 9 a.m. Monday. Nowicki said that if the first part of the proposal is not agreed upon at that time, a hearing will proceed on the temporary restraining order the plaintiffs have requested to delay the start of the boys state golf tournament. The tournament was supposed to begin Monday, but already is pushed back to Tuesday.

At the start of Friday's hearing, Peter Rush, representing the schools that filed the suit, said his clients had rejected the **IHSA**'s proposal on a binding referendum to decide the fate of the multiplier.

CHICAGO SUN-TIMES
suntimes.com

volleyball Winning suits St. Francis just fine // Multiplier question not a concern after strong Nike showing

Author(s): Phil Brozynski **Date:** October 2, 2005 **Page:** 84 **Section:** Sports

The St. Francis girls volleyball team does not concern itself with what happens in court. The Spartans focus on what happens on the court.

Saturday at the Nike Challenge hosted by Mother McAuley, St. Francis demonstrated that it will be a force to reckon with no matter what the outcome of the lawsuit filed by 37 private schools that seeks to overturn the **IHSA** enrollment multiplier.

St. Francis got nine kills from Kate Rodriguez, eight kills from Megan Boken and 18 assists from Michelle Kocher to defeat Bellevue (Neb.) West 25-23, 25-20 for third place in the Gold division.

Bellevue West was ranked seventh in the nation by Prepvolleyball.com entering the tournament.

"This really prepares us for down the road," said Boken, a 5-11 junior hitter. We're going to see some tough competition in the regional and sectional."

The only tournament loss for St. Francis (24-1) came in the semifinals against Mira Costa (Calif.), the No. 2 team in nation.

Mira Costa, which features 6-4 junior outside hitter Alix Klineman and 6-3 senior middle Lindsay Gardner, defeated the Spartans 25-16, 25-18.

It looked like they moved the Sequoia National Forest here for the weekend," St. Francis coach Peg Kopec said. That's a very tall team. I think the kids were a little in awe in the first game. I just told them to have a good time and play your hearts out."

If the lawsuit is successful, St. Francis could have an opportunity to extend its streak of Class A state championships to four. If not, the Spartans figure to face some pretty stiff competition in the Class AA Neuqua Valley Sectional, but nothing like Mira Costa.

We're not going to see Mira Costa in the state tournament," Kopec said. But we haven't played the greatest competition this season. We needed this."

Mother McAuley (18-4), which lost to St. Francis 17-25, 25-12, 25-19 in the quarterfinals, came back to beat Wahlert (Dubuque, Iowa) 25-18, 22-25, 25-18 for fifth place behind 10 kills apiece from Kate Corbett and Kim O'Brien.

We're just working at getting better," Mother McAuley coach Jen DeJarld said. I'm really satisfied with our defense and our fight. That's always a positive."

The area's other quarterfinalist, Stagg (11-4), finished 0-3 Saturday with a 25-20, 25-21 loss to Sacred Heart Academy (Ky.) in the seventh-place match.

CHICAGO SUN-TIMES
suntimes.com

Multiplier suit still doesn't add up

Author(s): Steve Tucker **Date:** October 4, 2005 **Page:** 96 **Section:** Sports

The case of De La Salle vs. the Illinois High School Association was continued again Monday. Judge Julia M. Nowicki came out after attorneys met for about an hour and said, Both sides negotiated at a very high level. I am going to keep it confidential. We'll come back Wednesday at 10 a.m. I want both sides to continue to negotiate to get this settled."

The case, which at last count had 37 private schools suing to stop the implementation of the multiplier for schools with an enrollment of 450 or more and no boundaries, had its third day in court on Monday.

The first **IHSA** state tournament with more than one classification, boys golf, started Monday.

We [the privates] felt that we did not want to inconvenience all the schools in the state tournament and we are mindful of what goes into it," said attorney Peter Rush, representing the 37 private schools. "We reached an understanding with the **IHSA** to go forward [with golf] without prejudice."

Most of my legal education came from watching Perry Mason on Sunday nights when I was growing up. But I don't like the multiplier and I don't like the lawsuit from the private schools.

First of all, the multiplier is for schools without boundaries. When I attended a news conference at De La Salle announcing the lawsuit, the position of some private schools was that they have boundaries -- a 30-mile radius.

Sorry, but that's ridiculous. When you have a school, like Montini, which can draw kids from 85 public high school districts, that raises questions. A 30-mile radius encompasses 2,826 square miles. The entire city of Chicago is 228.5 square miles.

Another thing brought up was Illinois state law allows a student to attend any school in the state -- if they pay tuition and live outside of that school district.

So how does that differ from paying tuition at a private school?

If a student pays tuition to attend a school out of the district he or she lives, that student is not eligible for sports," **IHSA** assistant executive director Anthony Holman said.

Not all small schools sued

My other real issue with the private schools is that of the 37 schools suing, 36 are Catholic schools and the other, Providence-St. Mel, has the appearance of being a Catholic school.

There are public schools and Lutheran schools and others that did not join the lawsuit. It would seem to me that a school like Hope, on the city's South Side, would add to the plaintiff's case.

On the other hand, the multiplier itself really rubs me the wrong way. I heard every argument imaginable, including how they used to count slaves as three-fifths of a person in the country before the Civil War.

Sr. Sheila Megley, the president of St. Francis in Wheaton, came up with this analogy just in case the White Sox play the Yankees

in the ALCS.

For the record, the Yankees have won 26 World Series, all since they purchased Babe Ruth from the Red Sox in 1918. In that span, the White Sox have won zero and only played in one since 1919.

Maybe the White Sox should get five outs an inning and the Yankees three," she said. And maybe every White Sox batter should get five strikes for the Yankees' three."

Hmmm.

I'm a Sox fan and it sounds good to me.

One solution would be, as a friend put it, to reward success and not punish it.

Why not let a school that reaches a certain level of success in a sport be moved up.

IHSA executive director Marty Hickman talked about a model that will be presented at **IHSA** town meetings beginning early next month. Sports with more than 600 participating schools -- boys and girls basketball, girls volleyball, baseball and softball -- would have four classes. Sports with 450-599 schools -- boys and girls track and boys golf -- would have three.

My idea is that if a school finishes in the top four in the state twice within five years, it would move up a class for at least five years.

With eight classes in football, schools that win with great regularity -- like Joliet Catholic, Mount Carmel and Providence -- would move up, and at some point all could wind up in Class 8A.

People have questioned why athletes at St. Francis have to play up in Class AA because of the success of the school's girls volleyball team (seven state titles since 1988).

So volleyball could move up.

The membership didn't want that," Holman said. When soccer had a different cutoff and schools were Class A in soccer and Class AA in other sports, it created havoc with scheduling. Our survey of the member schools showed they didn't like the idea."

Well, they don't like that idea. And many would have you believe they don't like the multiplier.

No shortage of sour grapes

At last year's Class 6A state football final, players from Bloomington, which lost to Providence 40-0, wore T-shirts that said, Public School 6A State Champions." My argument is they would have had little chance to beat Richards. But because of geographic quadrants, Richards played Providence one round earlier.

If you look at the way the football classes appear to be breaking down, Joliet Catholic, the Chicago area's top-rated football team, is in Class 6A. Does anyone in Bloomington think they have a better chance to win against JCA?

I think what you have to do is look at teams' success and how they got it," Fenwick principal and **IHSA** board member James Quaid said. I think a lot of the success a lot of the schools have had is because of feeder programs. It's no different with Providence football or St. Francis volleyball than York cross-country."

But the **IHSA** is right. The playing field is nowhere close to level, and someone should come up with something.

CHICAGO SUN-TIMES
suntimes.com

IHSA will do away with multiplier after fall // Consent decree ends lawsuit; new proposals on way

Author(s): Steve Tucker **Date:** October 6, 2005 **Page:** 111 **Section:** Sports

The lawsuit filed by 37 private schools against the Illinois High School Association ended Wednesday in Cook County Circuit Court with a consent decree.

The agreement was that the multiplier shall expire and cease to exist at the conclusion of the fall 2005 state championships."

The decree also allows **IHSA** member schools to submit legislative proposals through Oct. 24, regarding the subject matter of the lawsuit. It also said **IHSA** executive director Marty Hickman and his staff shall not voice support or opposition to any legislative proposal."

Waivers that were granted to schools will still be in effect. In volleyball and soccer, any school with a record of .500 or below is granted a waiver from the multiplier. That will also be the case in cross-country for schools whose average placement in all its meets through Wednesday is at the middle or lower 50 percent.

In football, all schools that qualify for the playoffs that are 5-4 and did not make the state semifinals in 2003 or 2004 will also be granted a waiver.

Schools not entitled to a waiver can apply to the executive director on a sport-by-sport basis.

I want to congratulate you on getting this done," Cook County Circuit Court Judge Julia M. Nowicki said. I think it is a good compromise."

Hickman said that he already has some proposals and that with one we could have implementation by Feb. 1 and the multiplier could be back for winter sports, or the membership could not choose to.

I was disappointed to be here to begin with. This is just a process, and at the end of the day, a solution was put on the table, and that's all that matters."

Both sides and their attorneys appeared in court at 10 a.m. at the Daley Center. Then both went into separate rooms with the judge, and at times, the attorneys went back and forth.

The agreement is mutually beneficial," Providence principal Don Sebestyen said, speaking for the plaintiffs. We got rid of the multiplier for two-thirds of the school year, and the other third, we got an equitable plan for both sides.

From the beginning, one of our major contentions was that the multiplier was put in place by the executive director and his staff and did not follow legislative procedure. The real victors are the kids. This recognizes the multiplier as bad educational policy. If they come up with a new proposal, so can we. We're looking for benefits for student-athletes."

I was very pleased with the result and the **IHSA**'s willingness to compromise," said Peter Rush, the plaintiffs' attorney.

A number of boys golf regionals are slated for today. One of the state's top programs is at Bishop McNamara in Kankakee, which tees off today in the Minooka Class AA regional at Heritage Bluffs Golf Course in Channahon.

I've been talking to the kids, and they've been preparing all season," McNamara principal Jim Laurenti said. They've been thinking Class AA all the time."

CHICAGO SUN-TIMES
suntimes.com

Multiplier returns for winter, spring sports: IHSA brings back controversial plan, effective Feb. 1

Author(s): Steve Tucker The Chicago Sun-Times **Date:** December 30, 2005 **Page:** 137 **Section:** Sports

The multiplier is back. The Illinois High School Association announced Thursday that its enrollment multiplier would be put back into effect Feb. 1 for winter and spring sports.

The multiplier, spawned from the **IHSA**'s football advisory committee, multiplies the enrollment of non-boundaried schools by 1.65. For single-sex schools, the enrollment is doubled before it is multiplied. The **IHSA** said that among its 752 members, it has 118 private schools and 27 public schools, mostly magnet schools in Chicago, that have no boundaries.

The measure was approved by a vote of 450-143.

``Our membership felt that something had to be done to level the playing field,'' **IHSA** executive director Marty Hickman said.

Anthony Holman, an **IHSA** assistant executive director, said the multiplier ``will be in effect until another proposal passes for all sports.'' That will include football.

The multiplier was instituted after the **IHSA** announced at the Class AA boys basketball tournament in March that it would put in an enrollment multiplier for the 2005-06 school year.

There had been a growing feeling that non-boundaried schools were winning a disproportionate number of championships, particularly in Class A in two-class sports and in the middle classes in football, which has eight classes.

The issue also has been at the forefront of an ongoing debate between public and private schools.

In the summer, an appeals process was put in place so that schools could request a waiver from being multiplied. Several appeals were granted.

Thirty-seven private schools filed a lawsuit in Circuit Court to have the multiplier abolished based on the fact it was put in without membership approval. None of the affected public schools joined the lawsuit.

A consent decree was signed Oct.5 which abolished the multiplier after fall sports but allowed the **IHSA** membership to put it back in if that was what the membership wanted. It also allowed 5-4 football teams that had not been in the state semifinals the previous two seasons to be waived from being multiplied, as well as teams with losing records in two-class fall sports.

``All schools with no boundaries will be multiplied,'' Hickman said. ``There will be no waivers.''

According to the **IHSA** Web site, 16 schools -- Bishop McNamara, Rock Island Alleman, Quincy Notre Dame, Breese Mater Dei, Bronzeville, Gordon Tech, Ag. Science, Normal U-High, Illiana Christian, Belleville Althoff, Montini, Hope, Jones, Marian Central, Wheaton St. Francis and Chicago Notre Dame -- will move from Class A to Class AA.

One view of the multiplier from its conception was that it targeted three area football powers -- Joliet Catholic, Mount Carmel and Providence.

Another theory was that Class A boys basketball, considered a sacred cow in Downstate Illinois, was not happy when Hales Franciscan and Leo won the last three state championships. But Hales and Leo remain in Class A.

``If we have four more kids, we'd be in Class AA,'' said Hales assistant coach Derrel Sanders, a graduate of St. Patrick. ``I understand that they think we have an advantage when we win and then Leo wins and then we win again.''

The multiplier will have a big impact in wrestling and girls basketball. Montini has been the dominant force in Class A wrestling for years and moves up.

And the teams that finished 1-2-3 in Class A girls basketball last season -- Alleman, Hope (which had to forfeit for playing one game too many during the regular season) and Althoff -- move up.

So do Montini, which made the Sweet 16, and Bishop McNamara, which Montini defeated in a sectional title game.

``As our wrestling coach, Mike Bukovsky, says, if you want to be the best, you have to play the best,'' Montini girls basketball coach Jason Nichols said. ``We welcome the challenge.''

It should create some interesting situations in girls basketball when powers such as Hope, Montini and McNamara are added into Class AA sectionals.

The other major issue on the **IHSA**'s plate is more classes. Earlier this month, a survey showed that 64 percent of the 426 schools responding favored an expansion to four classes for baseball, boys and girls basketball, softball and girls volleyball.

stucker@suntimes.com

Judicial Rulings in
IL Native Am. Bar Ass'n v. U.I. Board of Trustees

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ILLINOIS NATIVE AMERICAN BAR ASSOCIATION, et al.,	)	
Plaintiffs.	)	
v.	)	05 CH 4735
UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES, et al.,	)	
Defendants.	)	

ENTERED
JUDGE DAVID R. DONNERSBERGER-1541
SEP 23 2005
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

4680
8024

MEMORANDUM AND ORDER

This cause comes before the court on Defendants' motion to dismiss pursuant to 735 ILCS 5/2-615. The court has been fully advised of the premises herein.

Plaintiffs have filed an Amended Complaint for Declaratory and Injunctive Relief against the University of Illinois's Board of Trustees, and the individual Trustees, seeking a declaration that the use of Chief Illiniwek as a sports mascot by the University of Illinois constitutes a violation of the Illinois Civil Rights Act of 2003. Plaintiffs further seek an order enjoining the University from the continuing use of Chief Illiniwek and awarding damages.

Defendants seek to dismiss the Amended Complaint pursuant to §2-615. Defendants first argue that, as a matter of law, the University's use of Chief Illiniwek as a mascot is not in violation of the Illinois Civil Rights Act because the Illinois legislature has specifically approved the continued use of Chief Illiniwek by the University.

On June 1, 1996, the following statute became effective:

> Consistent with a long-standing, proud tradition, the General Assembly hereby declares that Chief Illiniwek is, and may remain, the honored symbol of a great university, the University of Illinois at Urbana-Champaign.

110 ILCS 305/1f (2005).

On January 1, 2004, the following section of the Illinois Civil Rights Act of 2003 became effective:

> Discrimination prohibited. (a) No unit of State, county, or local government in Illinois shall:

M.C.

(1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, or national origin; or
(2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin.

(b) Any party aggrieved by conduct that violates subsection (a) may bring a civil lawsuit . . . against the offending unit of government. . . .

740 ILCS 23/5 (2005).

"Courts presume that the legislature envisions a consistent body of law when it enacts new legislation." Lily Lake Road Defenders v. County of McHenry, 156 Ill. 2d 1, 9 (1993). "When an apparent conflict between statutes exists, they must be construed in harmony with one another if reasonably possible." Knolls Condominium Ass'n v. Coalition to Let People Decide, 202 Ill. 2d 450, 459 (2002).

Plaintiffs allege that the University's use of Chief Illiniwek as a mascot violates the Illinois Civil Rights Act of 2003, but the legislature specifically authorized the use of Chief Illiniwek by the University several years before the passage of 740 ILCS 23/5. Section 305/1f of the University of Illinois Act has not been expressly repealed. Nor has it been impliedly repealed by the passage of the Illinois Civil Rights Act because "[a]n implied repeal results only when the terms and necessary operation of a later statute are repugnant to and cannot be harmonized with the terms and effect of an earlier statute." Lily Lake, 156 Ill. 2d at 9. Both §305/1f of the University of Illinois Act and §23/5 of the Illinois Civil Rights Act can be given effect without rendering any provision of either statute inoperative by simply interpreting the Illinois Civil Rights Act as not applying to the use of Chief Illiniwek as specifically authorized by the state legislature. Moreover, specific statutes control over general statues. Knolls, 202 Ill. 2d at 459.

Because our state legislature has chosen to approve the University of Illinois's use of Chief Illiniwek, the Plaintiffs' Amended Complaint fails as a matter of law. It is therefore unnecessary to consider Defendants' additional arguments for dismissal. It should be noted, however, that Defendants are correct that Plaintiffs cannot bring suit pursuant to the Illinois Civil Rights Act against the individual Trustees. 740 ILCS 23/5(b)(2005).

IT IS HEREBY ORDERED that Defendant's motion to dismiss is granted with prejudice.

Judge David R. Donnersberger

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ILLINOIS NATIVE AMERICAN BAR ASSOCIATION, et al.,	)	
Plaintiffs.	)	
v.	)	**05 CH 4735**
UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This cause comes before the court on Plaintiff's motion to reconsider this court's order of September 23, 2005 granting Defendants' motion to dismiss with prejudice. The court has been fully advised of the premises herein.

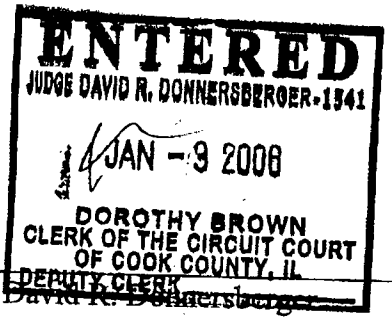
Plaintiffs have filed an Amended Complaint for Declaratory and Injunctive Relief against the University of Illinois's Board of Trustees, and the individual Trustees, seeking a declaration that the use of Chief Illiniwek as a sports mascot by the University of Illinois constitutes a violation of the Illinois Civil Rights Act of 2003. Plaintiffs further seek an order enjoining the University from the continuing use of Chief Illiniwek and awarding damages.

Defendants filed a motion to dismiss the Amended Complaint pursuant to §2-615. Defendants argued that, as a matter of law, the University's use of Chief Illiniwek as a mascot is not in violation of the Illinois Civil Rights Act because the Illinois legislature has specifically approved the continued use of Chief Illiniwek by the University.

This court agreed with Defendants and granted the motion to dismiss with prejudice. Applying the rules of statutory construction, the court found that 110 ILCS 305/1f (2005) specifically authorized the University's use of Chief Illiniwek and that there was no conflict between §305/1f and §23/5 of the Illinois Civil Rights Act. Under §305/1f, the University is unambiguously allowed to use Chief Illiniwek as a mascot.

Plaintiffs are now before the court seeking reconsideration. Plaintiffs offer no newly decided case law or new evidence. They simply assert that this court's decision was in error. It was not. The decision was based upon the plain language of the statutes and the well established rules of statutory construction. Plaintiffs have presented no basis for granting their motion.

IT IS HEREBY ORDERED that Plaintiffs' motion for reconsideration is denied.



Judge David R. Donnersberger