March 7, 2006

VIA OVERNIGHT DELIVERY

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Mr. Lawrence C. Eppley, Chair
Board of Trustees
University of Illinois System
506 South Wright Street
Urbana, Illinois 61801

Dear Mr. Eppley:

Please find enclosed a copy of the staff committee's response to the University of Illinois, Champaign, appeal to the NCAA Executive Committee regarding its inclusion on the list of institutions subject to the restrictions on the use of Native American mascots, names and imagery at NCAA championship events.

Pursuant to the appeal process, Illinois may submit a written rebuttal to the staff committee's response. The rebuttal must be submitted within 10 days of the institution's receipt of the staff committee's response and must be confined to the specific matters set forth in the committee's response.

Illinois' written rebuttal and the staff committee's response will be reviewed by the NCAA Division I Board of Directors and the Executive Committee prior to the appeal hearing. The appeal hearing is scheduled for April 28, 2006. The hearing will be conducted as a paper-review process, without comments from the staff review committee.

If you have any questions regarding the appeal process, please do not hesitate to contact me.

Sincerely,

Bernard W. Franklin
Senior Vice President for Governance and Membership

BWF:jw

Enclosure

cc (with enclosure): Selected NCAA Staff Members

MEMORANDUM

March 7, 2006

TO: NCAA Executive Committee.

FROM: Bernard W. Franklin
Senior Vice President for Governance and Membership/
Liaison to NCAA Executive Committee.

SUBJECT: Staff Committee Response to the University of Illinois, Champaign, Appeal.

In response to the appeal initiated by the University of Illinois, Champaign, ("the University") regarding its inclusion on the list of institutions subject to restrictions on the use of Native American mascots, names and imagery at NCAA championship events; the NCAA staff review committee submits this response to the NCAA Executive Committee for consideration.

The response is organized as follows:

A. Introduction and background.

B. Research and analysis.

C. Standard of review.

D. Appeal process.

E. Statement of the case.

F. Issues raised on appeal and committee response.

G. Conclusion.

H. Attachments.

A. Introduction and background.

During its August 2005 meeting, the NCAA Executive Committee adopted a policy precluding the use of hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA championships. The adoption of this policy concludes a four-year review process that was prompted by three key events:

1. The Executive Committee's detailed review of issues related to the Confederate battle flag and its resulting criteria for evaluating NCAA predetermined championship sites. The criteria include, in part "the ability of a site to promote an atmosphere of respect for and sensitivity to the dignity of every person."

2. St. Cloud State University President Roy Saigo's request to the Executive Committee to consider a resolution stating the NCAA does not condone the use of Native American logos and nicknames.

3. The statement from the U.S. Commission on Civil Rights on the use of Native American images and nicknames as sports symbols, stating in part: "Schools should not use their influence to perpetuate misrepresentations of any culture or people. Stereotypes of American Indians teach all students that stereotyping of minority groups is acceptable, a dangerous lesson in a diverse society."

The policy provides that:

- Effective February 1, 2006, institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery will be prohibited from hosting any NCAA national championship competition.

- Effective February 1, 2006, institutions with hostile or abusive racial/ethnic/national origin mascots, nicknames or imagery must take reasonable steps to cover up any of these references at any predetermined NCAA championship competition site that has been previously awarded. The financial responsibility to take reasonable steps rests on each institution and these reasonable steps must be taken in a timely manner.

- Effective August 1, 2008, institutions displaying or promoting hostile or abusive racial/ethnic/national origin references on their mascots, cheerleaders, dance teams, and band member uniforms or paraphernalia are prohibited from wearing this material at an NCAA championship competition site.

- Effective February 1, 2006, institutions with student-athletes wearing uniforms or paraphernalia with hostile or abusive racial/ethnic/national origin references must ensure that those uniforms or paraphernalia are not worn during NCAA championship competition.

B. Research and analysis.

The Executive Committee policy at issue is based on extensive research and analysis summarized in Section F below. Although a comprehensive recitation of all authorities supporting the policy is

unnecessary at this stage and beyond the scope of this response, the staff notes that the policy was adopted after a lengthy deliberative process.

The review process began in April 2001 when the NCAA Executive Committee requested the MOIC and the Diversity Subcommittee to review the use of American Indian mascots, nicknames and logos by member institutions. From that point forward, several NCAA committees and member institutions were involved in the review process and participated in a comprehensive study of the mascot issue. The study included review of numerous articles, consultation with experts and testimonials from tribal groups and members, student-athletes, the NCAA membership and the general public. The Executive Committee also sought comments and input from the Division I Board of Directors, the Division II and III Presidents Councils, and the Management Councils and Championships Committees for each division. The Executive Committee sought specific comments from each institution using American Indian mascots or images, including the University.

After reviewing many studies, resources and comments, the MOIC prepared and presented several reports to the Diversity Subcommittee and Executive Committee regarding the use of American Indian mascots in intercollegiate athletics.[1] On August 4, 2005, the Executive Committee adopted the policy with no dissenting votes.

Application of the policy is supported by the same research and analysis which supported the Executive Committee's original decision to adopt the policy. Application of the policy is also supported by research performed by Dr. Stephanie Fryberg and the American Psychological Association, summarized below.

In 2002, Stephanie Fryberg, Ph.D., of the University of Arizona, conducted five studies that examined the psychological impact of social representations on American Indians. Fryberg found that exposure to social representations like Chief Wahoo and other Native American mascots: (1) lowers the self-esteem of American Indian students; (2) reduces American Indian students' belief that their community has the power and resources to resolve problems (community efficacy); and (3) reduces the number of achievement-related future goals that American Indian students see for themselves. She goes on to explain that, while exposure to these social representations lowers self-esteem for American Indian students, it raises the self-esteem of European American students. She hypothesized that European Americans benefit from stereotype lift (i.e., they feel better in the presence of another group's stereotype) when American Indians are used as mascots and, therefore, may be less likely to understand why this image offends the target of the representation.

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[1] The first report, entitled "Report on the Use of American Indian Mascots in Intercollegiate Athletics," was presented to the Diversity Subcommittee on October 30, 2002. The Diversity Subcommittee and Executive Committee accepted that report. After receiving comments from each division of the NCAA and member institutions, the MOIC prepared a second "Report on the Use of American Indian Mascots in Intercollegiate Athletics." The second report was presented to the Executive Committee on or about April 21, 2003. The Diversity Subcommittee then presented a final "Report on References to American Indians in Intercollegiate Athletics" to the NCAA Executive Subcommittee on August 4, 2005.

Additionally, Fryberg researched two specific claims related to the use of American Indian mascots. First, that no particular American Indian mascot is better than another, and, second, that if American Indians support or agree with the use of American Indian mascots, then the mascots must be good.

Examining the first claim, Fryberg tested whether being exposed to: (1) a caricature of an American Indian; (2) a "real person" dressed up as an American Indian; or (3) an American Indian mascot representing an American Indian school differentially influenced the amount of psychological harm incurred by American Indian students. Results found that all three of the American Indian mascot representations were more harmful than not being exposed to an American Indian mascot (the control condition) and there were no significant differences from one mascot to another – they were all equally influential.[2]

Examining the second claim, students were asked whether they agreed or disagreed with the use of American Indian mascots. Students were then tested on whether attitudes about the use of American Indian mascots protected or inoculated participants from the effects of being exposed to the mascot. The results demonstrated that attitudes or preferences for American Indian mascots were problematic. In fact, when not exposed to a mascot, there were no differences in community efficacy[3] between those who agreed or disagreed with the use of American Indian mascots. However, when exposed to an American Indian mascot, it was those who agreed with the use of American Indian mascots who reported depressed community efficacy scores compared to those who disagreed.[4] Responding to the results, Fryberg stated that the use of Native American nicknames and logos creates: (1) a harmful learning environment for American Indian students; and (2) a harmful public accommodation environment for American Indian youth and adults. This harmful education and public accommodation environment negatively affects not only American Indian students and adults who may attend a specific school but also affects American Indian students and adults from schools which interact with the particular institution.

She also suggested that American Indian mascots have negative consequences not because they are inherently negative but because, in the contexts where they appear, there are relatively few alternate characterizations of American Indians. As such, these logos/mascots become powerful communicators, to natives and non-natives alike, of how American Indians should look and behave.

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[2] Fryberg, "This research, therefore, discredits any claims. . . that [a] nickname/logo is harmless on the basis that they (1) do not use a caricature, (2) use a real person, or (3) use a 'respectful' mascot."

[3] Community efficacy is the belief that one's community has the power and resources to improve itself.

[4] Fryberg, "Thus, claims that American Indians like being used as mascots should not be used to justify the use of American Indian mascots in schools. The issue should not be about attitudes or preferences, but about whether their mascot causes psychological harm to American Indian students."

Simply put, they remind American Indians of the limited way in which others view them. This in turn may limit the number of ways in which American Indians see themselves.[5]

Finally, Fryberg concluded that the use of American Indians as logos/mascots is more than an issue of offensive conduct and that previous debate has relied on anecdotal evidence rather than "measurable evidence" or "proof." Fryberg asserts that her research provides empirical evidence that psychological harm occurs through lower self-esteem, reduced community efficacy, and a reduced number of "future selves" or goals envisioned by the students. She states:

> [t]his harm is real and substantive, with the significance rising far beyond the conventional argument related to "offensiveness," especially when it occurs within an educational environment that has consequences for future life. I am not aware of research that provides empirical evidence of American Indian mascots leading to positive psychological benefits for American Indian students.

Subsequently, the American Psychological Association (APA) issued a resolution recommending the immediate retirement of Native American mascots, symbols, images, and personalities by schools, colleges, universities, athletic teams, and organizations. In its justification statement, the APA noted that the use of Native American mascots leads to a devaluing of self and a decrease in self-esteem for Native American peoples, and infringes on their pride and right to self determination. The APA further noted that the use of American Indian mascots, symbols, images, and personalities is a form of discrimination against American Indian people because they are an inaccurate portrayal of a cultural group. The pervasive depiction of cultures in an inaccurate and inappropriate manner promotes a negative perception of those cultures by other groups and creates an environment in which one group may be perceived as less than another group.

Based on this body of research and information, the NCAA has developed a policy which promotes the interests of minority students and student-athletes. Further, in the context of higher education where all student-athletes are students first, the policy properly discourages an environment that teaches majority students that they may be superior to other ethnic groups on a societal level. Through this policy, the NCAA will actively seek to promote an environment that upholds the dignity of all students.

C. Standard of review.

The position of the NCAA is that there is a rebuttable presumption that the use of Native American mascots, names and/or imagery by member institutions for their athletics teams and programs creates

[5] Native American Logos/mascots provides institutionalized daily reminders to American Indian students (as well as American Indian employees and adult native visitors to the public accommodations of school facilities) of the small number of socially acknowledged ways to be an American Indian in the schools.

or leads to a hostile or abusive environment, inconsistent with the NCAA Constitution, for members of the campus community and/or the general public who are subjected to it and/or the student-athletes involved in the intercollegiate competition. Key to the presumption is the documented and overwhelming indication by Native American leaders and organizations that such usage is stereotypical, psychologically harmful, and generally has the opposite effect to honoring or respecting Native American history and culture. Article 2, Principle 2.6, the principle of non discrimination in the NCAA Constitution states in part: "The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person."

In order to rebut the presumption, the member institution must present evidence that demonstrates clearly its use of Native American mascots, names and/or imagery does not create or lead to a hostile or abusive environment for members of the campus community and/or the general public who are subjected to it and/or student-athletes involved in the intercollegiate competition. The staff committee shall use a preponderance of the evidence standard to determine if the evidence submitted by the member institution is sufficient to outweigh the presumption. The presentations will be limited to written submissions only. In evaluating the submissions, the staff committee shall consider all of the facts, circumstances and contexts surrounding the use of the Native American mascot, name and/or imagery by the institution. The staff committee will consider whether the type of use of mascots, names and/or imagery, including the pervasiveness or degree of the use, creates or leads to an objectively hostile or abusive environment for members of the campus community and/or the general public and/or the student-athletes involved in the intercollegiate competition. An additional consideration will be the response of the Native American community as a whole to the impact of such names and symbols, as well as the impact on local Native American peoples. One primary factor that will be considered in the review is if documentation exists that a "namesake" tribe has formally approved of the use of the mascot, name and imagery by the institution.

Definitions

Although the terms "hostile" and "abusive" have been employed by courts in civil rights cases in decisions regarding discrimination, the courts have not expanded the legal definition of the terms beyond those found in a dictionary of the English language. For purposes of this appeal process, the definitions of "hostile" and "abusive" found in Webster's New World Dictionary Third College Edition will be used, as courts generally defer to that source when seeking definitions of terms not otherwise defined in legislation. They are as follows:

- "Hostile": Of or characteristic of an enemy; warlike; having or showing ill will; unfriendly; antagonistic; not hospitable or compatible; adverse.

- "Abusive": Involving or characterized by abuse or misuse; abusing; mistreating; coarse and insulting in language; scurrilous; harshly scolding.

D. Appeal process.

Member institutions which have requested a review by the staff committee and been retained on the list of institutions subject to the restrictions of the Executive Committee's policy may appeal the decision of the staff committee. The appeal should be filed with the Executive Committee and should include a statement of the institution's position and reasons the staff committee decision should be overturned.

Please note that the NCAA Division I Board of Directors will review the documents submitted by the institution and staff committee and will submit its recommended action to the Executive Committee. The Executive Committee may reverse the ruling of the staff committee only if the institution demonstrates that the ruling clearly was contrary to the evidence considered.

1. Deadline for submission.

Written notice of appeal must be received by the NCAA senior vice president for governance and membership by February 1, 2006, from those institutions that have been initially reviewed by the staff committee.

2. Staff review committee response to the written appeal.

The staff review committee will prepare a response to the institution's written appeal and will forward that response to the institution as soon as it is completed. The response will include:

(a) The standard of review;

(b) A summary statement on the case;

(c) The issue(s) raised on appeal and committee response; and

(d) Any additional information that was reviewed by the staff review committee during its consideration of the case that the committee deems relevant to consideration of the appeal.

3. Institutional rebuttal to the committee's response.

The institution may submit a rebuttal to the staff review committee's response. A rebuttal must be submitted within 10 days of the institution's receipt of the staff committee's response and must be confined to the specific matters set forth in the committee's response.

4. New evidence.

Evidence that was not presented to the staff review committee may not be presented to the Executive Committee unless the evidence was not available at the time the case was presented to the staff committee and is demonstrably relevant to the outcome of the appeal.

The Executive Committee may stay the appeal in the event new evidence is presented, and refer the case back to the staff committee for review of the new evidence.

5. The hearing process.

Depending on an institution's divisional affiliation, appeals to the Executive Committee will be reviewed by the appropriate presidential governance entity for a recommended action. This written recommendation will be presented to the Executive Committee by the chair of the appropriate presidential entity at the meeting in which the appeal is considered. After the Executive Committee has received the recommendation from the appropriate presidential entity, it will proceed with a paper-only review of all documents submitted, without participation from the staff review committee.

In order for the Executive Committee to take action, a majority vote of those members who participate is required. A member of a presidential governance body or the Executive Committee who also is a member of the institution's conference submitting the appeal will recuse himself or herself from participating in any part of the appeals process.

The Executive Committee shall make its final determination based on the factors and criteria described above for the staff review committee as to whether the use creates or leads to a hostile or abusive environment.

E. Statement of the case.

On October 13, 2005, the University appealed its inclusion on the list of institutions subject to the policy on the use of Native American mascots, names and imagery at NCAA championships (hereinafter referred to as the "policy"). The University outlined four main points as rationale for exemption from the policy.

1. The University argues that the policy conflicts with the Association's established principles of institutional control and autonomy.

2. "Illini," the nickname for the University's athletics teams, derives from the State's name. It is not directly associated with Native Americans.

3. The University argues that the "Chief Illiniwek" tradition is not intended to nor does it in fact create a hostile or abusive environment.

4. The August 2005 action is the result of a "flawed process," in which the Executive Committee exceeded its authority.

The NCAA staff review committee carefully considered the University's request in light of these four issues and determined, based on a preponderance of the evidence, that the University should be retained on the list. However, the staff review committee agreed with the University regarding use of the terms "Illini" and "Fighting Illini."

The only remaining issue involves use of the Chief Illiniwek tradition. Indeed, the staff notes that the University's use of Chief Illiniwek is already in substantial compliance with the narrow scope of the policy at issue. Specifically, it is the staff's understanding that Chief Illiniwek does not travel with the University teams or appear during NCAA championship contests. Furthermore, University uniforms contain no Native American imagery, as demonstrated in the University's participation in the 2005 NCAA basketball tournament, including the Final Four. Accordingly, under the policy at issue, continued use of the "Chief Illiniwek tradition" will only impact the University in connection with championship site selection.

The staff committee's rationale is as follows:

The University argues that the policy conflicts with the Association's established principles of institutional control and autonomy.

As was noted when the August 2005 policy was announced, the Executive Committee is not interfering with member institutions' right to determine what their nickname, mascots or imagery will be. Institutional autonomy continues to be a valued principle. The Executive Committee's policy applies only to the context of NCAA championships. The staff committee understands that the University and its Board are engaged in an effort to find a "consensus conclusion" in the matter of Chief Illiniwek. That effort stands alone from participation in or hosting NCAA championships.

"Illini," the nickname for the University's athletics teams, derives from the State's name. It is not directly associated with Native Americans.

Based on its own research, discussions with relevant Native American groups and information provided by the University, the staff committee concurs that the term "Illini" is closely related to the name of the state and is not directly associated with Native Americans. The nicknames "Illini" or "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. However, because the term "Illini" has become associated with Native Americans through its use in conjunction with Chief Illiniwek, the committee strongly recommends that the University undertake an educational effort to

help those among its constituents and in the general public understand the origin of the term and the lack of any direct association with Native Americans.

The University argues that the "Chief Illiniwek" tradition is not intended to nor does it in fact create a hostile or abusive environment.

The University's October 13, 2005, letter cites a 1995 finding by the U.S. Department of Education Office of Civil Rights (OCR) that the "Chief Illiniwek tradition" did not constitute a "racially hostile environment at the university." Also included in materials previously submitted by the University, and in counterpoint to the OCR letter, is a report from the Higher Learning Commission of the North Central Association of Colleges and Schools in 2004 that called on the Board of Trustees "to recognize the substantial adverse impact of this symbol upon the educational mission and success" of the University.

In the decade between the 1995 letter and the NCAA Executive Committee's action, the volume and frequency of contentiousness around Chief Illiniwek has increased. Those who oppose continued use of Chief Illiniwek have grown in number and have found national platforms for their argument that the broad range of Native Americans perceives the Chief's "fancy dance" a demeaning interpretation of their own customs and traditions. Media accounts, letters and e-mail continue to document instances of hostile behavior toward those who oppose the use of Chief Illiniwek.

Whatever the basis of OCR's decade-old determination that the Chief Illiniwek tradition does not constitute racial hostility on the Illinois campus, there is clearly an environment present that the NCAA does not and will not welcome into its championship competitions. It has not gone unnoticed by the staff review committee that the Board of Trustee's initiative to assume responsibility for this issue, as noted earlier in this letter, does in itself suggest a magnitude of conflict over the Chief Illiniwek tradition that has pushed decision making to the highest possible level.

The August 2005 action is the result of a "flawed process," in which the Executive Committee exceeded its authority.

The NCAA Executive Committee has the clear responsibility for determining Association-wide policy. The August 2005 decision does not constitute the adoption of a bylaw or the consideration of legislation. It is policy regarding all NCAA championships and is clearly within the purview of the committee.

F. Issues raised on appeal and committee response.

In its January 30, 2006, correspondence, the University appealed the decision of the staff review committee to retain the University on the list of those institutions that are subject to the provisions of the policy. In its appeal, the University raises the following points as support for overturning the decision of the staff review committee and the staff committee provides the following responses.

University Argument: The NCAA ignored its own rules and process in issuing the policy.

The University's first argument attacks the underlying policy rather than the weight of evidence submitted to the staff committee. Accordingly, it is beyond the scope of this appeal.[6] However, the staff committee offers the following reply.

The NCAA Executive Committee is not composed of a group of employees from the NCAA national office in Indianapolis, Indiana. Instead, the Executive Committee is a body of representatives (chancellors and presidents) from member institutions. The 16 voting members of the Executive Committee include the following individuals:

- Eight Division I-A chief executive officers from the Division I Board of Directors.
- Two Division I-AA chief executive officers from the Division I Board of Directors.
- Two Division I-AAA chief executive officers from the Division I Board of Directors.
- Two Division II chief executive officers from the Division II Presidents Council.
- Two Division III chief executive officers from the Division III Presidents Council.

Bylaw 4.1.1. The four non-voting ex-officio members include the Association's chief executive officer and the chair of each divisional Management Council. Bylaw 4.1.1.

The University argues that the Executive Committee exceeded its authority when it adopted the policy at issue. However, the argument is silent about the Executive Committee's representative makeup. In addition, the argument relies upon select provisions of Bylaw 4.1.2 and misstates the scope of the Executive Committee's authority.

A complete reading of Bylaw 4.1 reveals that the Executive Committee has, and should have, broad authority to act on behalf of the Association. In fact, the Association's members are responsible for

[6] As set forth in a letter to the University dated August 5, 2005, there is a separate avenue available to those institutions seeking to modify or amend the policy itself. To date, the University has not employed that option. Attacks on the policy itself, or requests that it be amended, are improper in this appeal regarding application of the policy to a particular institution.

assigning that authority to the Executive Committee (and all other bodies which act on behalf of the membership). If the membership desired a different structure, the membership has authority to (1) change the NCAA governance, (2) restrict the authority of leadership bodies, including the Executive Committee, or (3) require that all Association-wide decisions be approved by a vote of all member institutions. The current governance structure was designed by member institutions, and may be changed by member institutions, if one or more leadership bodies abuses its authority. Unless and until that occurs, the NCAA Executive Committee has the authority, indeed the responsibility, to fulfill its constitutional obligations.

One of the Executive Committee's express obligations is to "[i]dentify core issues that affect the Association as a whole." Bylaw 4.1.2(d). To that end, the Executive Committee is authorized to appoint subcommittees to study particular issues and report back to the full Committee. Accordingly, the Executive Committee appointed a Subcommittee on Gender and Diversity Issues ("the Diversity Subcommittee") to review and provide recommendations on the following issues: student-athlete welfare, gender issues, minority issues and youth issues. The Diversity Subcommittee consists of 12 college presidents (four from each Division). Employees of the NCAA national office are not members of the Diversity Subcommittee.

The Diversity Subcommittee works closely with the Minority Opportunities and Interests Committee ("MOIC"). The MOIC's purpose is to focus on the education and welfare of minority student-athletes, as well as the enhancement of opportunities for ethnic minorities and women in coaching, athletics administration, officiating and the NCAA governance structure. Bylaw 21.1.4. The MOIC consists of six members from Division I institutions, three from Division II institutions, three from Division III institutions and one student-athlete from each division. Employees of the NCAA national office are not members of the MOIC.

In April of 2001, the NCAA Executive Committee asked the MOIC and the Diversity Subcommittee to review the use of American Indian mascots, nicknames and logos by member institutions. After conducting a preliminary review, the MOIC concluded, and reported to the Executive Committee, that the use of American Indian images in intercollegiate athletics must be a concern of the NCAA. This was consistent with the findings of the U.S. Commission on Civil Rights reported in its "Statement on the Use of Native American Images and Nicknames as Sports Symbols."

Pursuant to Bylaw 4.2.1(d), the Executive Committee satisfied one of its duties and responsibilities by identifying a core issue affecting the Association. Pursuant to Bylaw 4.2.1(e), the Executive Committee had the corresponding duty and responsibility "to resolve core issues and other Association-wide matters." Having identified a core issue through the MOIC and the Diversity Subcommittee reports, the Executive Committee was obligated under the NCAA Constitution to seek resolution of the issue. It did so. The resulting policy supports many of the key principles articulated in Article 2 of the NCAA Constitution. That the University does not agree, or that others may not agree, with the resulting policy does not mean the Executive Committee exceeded its authority.

The University also argues that the policy violates the core principle of institutional autonomy. However, the Principle of Institutional Control and Responsibility (Bylaw 2.1) does not mean that a member institution has the authority to control decisions of the Association or to operate an athletics program in any manner the institution sees fit. Rather, as is clear from the text of the bylaw, institutional control means that members are responsible for assuring "compliance with the rules and regulations of the Association." Bylaw 2.1.1. A decision by an NCAA leadership body does not violate the Principle of Institutional Control just because a particular institution disagrees with that decision. Such a reading would (1) be unworkable in light of the many decisions made every day by NCAA leadership bodies, cabinets, committees and sub-committees; (2) moot the many appellate procedures and other safeguards within the NCAA structure; (3) yield chaotic and inconsistent results between and among diverse institutions.

Accordingly, the argument challenging the policy, even if properly before the Executive Committee, does not support reversal of the staff committee decision.

University Argument: The Executive Committee's application of the policy to the University was arbitrary and capricious.

In this section, the University first argues that the circumstances surrounding the policy's issuance "betrayed its arbitrariness." University Appeal, p. 8. Specifically, the University criticizes comments by NCAA staff members and questions the definitions of "hostile" and "abusive."[7] The University also attacks the NCAA for exempting from the policy those institutions whose namesake tribe granted express approval for using tribal names, images or logos.[8]

While the NCAA staff committee understands and notes the University's concerns, none of these concerns supports a finding that application of the policy to this institution was arbitrary or capricious. In fact, none of these concerns is related to the evidence presented by the institution in support of its initial request or the staff committee's decision denying that request. Even using the University's definitions of "arbitrary" and "capricious" (and assuming the staff committee is subject to such review), the concerns articulated by the University do not demonstrate that the decision was determined by whim, chance, impulse, individual preference or otherwise unsupported by a satisfactory explanation or rational connection. On the contrary, application of the policy to the University is supported by the uncontroverted research and analysis cited above. The University provided no empirical data, no research and no evidence to the contrary. Such information, even if presented, would simply demonstrate that reasonable minds may differ – a conclusion far short of irrational, arbitrary or capricious.

[7] Those terms are commonly used and understood. As stated in Section C above, the NCAA uses ordinary dictionary definitions for these terms.

[8] Having approval from a namesake tribe is but one ground for relief from the Executive Committee policy. Other factors considered by the staff committee are set forth in Section C above.

In this section, the University next argues that applying the policy ignores various legal precedents. University Appeal, p. 10. Specifically, the University argues that the policy at issue is inconsistent with (1) an OCR opinion, and (2) an opinion of the Cook County Circuit Court.

With regard to the OCR opinion, the University correctly points out that the agency is "charged with enforcing civil rights in the educational environment." University Appeal, p. 10. In furtherance of its mission to "ensure equal access to education," OCR stated in its November 30, 1995 report that "to establish a violation of Title VI, some limitations of students' or employees' educational benefits on the basis of race must be demonstrated." McGovern letter (attached to the University's initial request dated October 13, 2005). It is also important to note that OCR expressly left open the possibility that continuing controversy regarding Chief Illiniwek could lead to a hostile environment.

Here, in contrast, the NCAA is not charged with enforcing, and does not purport to enforce, Title VI or any other civil rights law. Instead, in this instance, the NCAA's mission is to ensure that championship sites promote an atmosphere of respect for and sensitivity to the dignity of every person. That is, the NCAA policy is designed to further the fundamental purposes of the Association, including cultural diversity, and to protect the integrity of collegiate championships. As such, application of the policy is not governed by an opinion from a federal agency charged with enforcing a civil rights law in connection with reported incidents of harassment. While the staff committee assigned significant weight to the OCR opinion, it was simply not bound to reach the same conclusion in a very different context. As the University is no doubt aware, private associations are given great deference in interpreting and applying their regulations and policies. Nothing in the law, the OCR opinion or the Division I Manual dictates a different decision by the staff committee.

With regard to the opinion in *Illinois Native American Bar Assoc. v. University of Illinois Board of Trustees*, the staff committee notes that information about this case was not presented by the University in support of its October 13, 2005 request for relief. Although the opinion dismissing plaintiff's Complaint was dated September 23, 2005, it was not provided to the staff committee. Accordingly, as set forth in Section D.4 above, this evidence may not be submitted for the first time to the Executive Committee.

Even if the court opinion were properly before the Executive Committee, it would not support reversal of the staff committee decision. Like the OCR report, the court opinion was drafted by (1) a government agency, (2) with a unique mission, (3) in the context of civil rights legislation not invoked here. The Circuit Court of Cook County opinion interpreting state statutes does not render a narrow policy of the NCAA Executive Committee (or application of that policy) arbitrary or capricious. Furthermore, unlike the plaintiff in Cook County who sought an Order enjoining further use of Chief Illiniwek, the NCAA does not call the tradition "unlawful" or ask or demand that the University cease use of the Chief Illiniwek tradition. Rather, as stated above, the policy merely qualifies participation in the NCAA's own championship events. Accordingly, like the OCR report, the court opinion is instructive but not dispositive.

Finally, in this section the University argues there has been no fact-based finding that the mere existence of Chief Illiniwek and the logo cause a "hostile and abusive" environment. This argument suffers two fatal flaws.

First, the staff decision was based, in part, on information provided by the University itself, or by those associated with the University (*e.g.*, the Progressive Resource/Action Cooperative), during the Executive Committee's deliberative process leading up to adoption of the policy. The facts showing that the Chief Illiniwek tradition creates or leads to a hostile or abusive environment are documented in the general authorities cited above and in the materials provided by the University in its August 16, 2002 questionnaire responses (including, among others, resolutions by various groups to retire the Chief Illiniwek tradition and the North Central Education Association report). The facts are also documented in materials provided by the PRC.

Second, as stated in Section C above, the staff decision rests on a rebuttable presumption that use of Native American images creates or leads to a hostile or abusive environment. The presumption rests on a large body of factual and academic support. Application of the presumption to this University is proper based on the facts listed immediately above. The University simply failed to present sufficient evidence or information to rebut that presumption. Accordingly, the University failed to meet its burden of demonstrating that the staff decision should be reversed.

University Argument: The new policy is invalid for other reasons.

In this section, the University lists and purports to preserve legal claims challenging the policy itself, application of the policy, or both. To the extent these claims were not presented to the staff committee in the University's October 13, 2005 request, they are improperly raised for the first time before the Executive Committee. To the extent they focus on arguments other than the weight of evidence supporting the staff committee's November 11, 2005 decision, they are outside the scope of this appeal and improperly before the Executive Committee. The University is reminded that this is an administrative proceeding before the leadership body of a private voluntary association. Subject to these objections, the staff committee offers the following brief responses to the University's legal arguments.

1. Implied Duty of Good Faith and Fair Dealing.

The University argues in part that 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." Even if properly before the Executive Committee, the argument is incorrect and does not support reversal of the staff committee decision.

The implied duty of good faith and fair dealing "limits the manner in which a party who is vested with discretion under the contract may exercise it by requiring that party to exercise that discretion

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reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Abbott v. Amoco Oil Co.*, 619 N.E.2d 789, 795-96 (Ill. Ct. App. 1993). This duty is designed to protect the reasonable expectations of parties to a contract. *Continental Mobile Tele. Co., Inc. v. Chicago SMSA Ltd. P'Ship*, 587 N.E.2d 1169, 1174 (Ill. Ct. App. 1992).

Here, as set forth above, the policy and its application to the University are not arbitrary or capricious. To the contrary, the policy and its application are supported by uncontroverted research, data, studies and even by information presented by the University itself. That opinions regarding the use of Native American imagery in athletics vary only shows that reasonable minds may differ; not that the staff committee acted arbitrarily, capriciously or with an improper motive. The University has not provided any empirical data or other research to (1) establish that application of the policy to it would be arbitrary or capricious, (2) rebutting the presumption that the use of Native American images creates or leads to a hostile or abusive environment, or (3) showing that the staff committee had an improper motive when it denied the University's appeal. Accordingly, the University's claim that the staff committee breached an implied duty of good faith and fair dealing would fail as a matter of law.

In addition, application of the policy to the University does not frustrate the reasonable expectations of the NCAA or the University. Rather, the policy and its application further the express expectations of the parties. As explained above, some of the fundamental purposes of the Association are to promote cultural diversity and preserve the integrity of intercollegiate athletic championships. Also as explained above, pursuant to Bylaw 4.2.1, the Executive Committee has both the duty and the responsibility "to resolve core issues and other Association-wide matters." At the request of the Executive Committee, the MOIC and the Diversity Subcommittee began reviewing the use of Native American imagery and concluded that the use of American Indian images must be a concern of the NCAA. At that point, the Executive Committee had a duty under the NCAA Constitution to resolve that issue. The Executive Committee fulfilled its obligation by enacting and enforcing the policy.

As a member institution, the University was aware of the Association's fundamental purposes and was aware that the Executive Committee had authority to act for the Association in resolving core issues in furtherance of those fundamental purposes. Therefore, the University should foresee, or reasonably expect, the promulgation and application of policies like the one at issue. Indeed, the policy concluded a four-year study in which the University participated. Because application of the policy promotes rather than frustrates the expectations of the parties, any claim that the NCAA breached an implied duty of good faith and fair dealing would fail if asserted. *See First Nat'l Bank v. Sylvester*, 554 N.E.2d 1063 (Ill. Ct. App. 1990).

2. First Amendment.

As the University noted, it is well-settled that the NCAA is not a state actor. *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988); *Hall v. NCAA*, 985 F. Supp. 782, 1799 (N.D. Ill. 1997). Because the NCAA is not a state actor, it is not subject to the constraints of the First Amendment. *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1109 (7th Cir. 1986) (stating that "the First Amendment restricts only state action, and not private action"); *People v. DiGuida*, 604 N.E.2d 336, 343-44 (Ill. 1992) (recognizing that the state action requirement is present in both the United States and Illinois Constitution). The Executive Committee promulgated the policy under its authority created by the NCAA Constitution. Therefore, the University's argument that enforcement of the policy would trigger the state action requirement is simply misguided.

Even if a state actor were involved, it is well-settled that the right to free speech is not absolute. *See Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 853 (Cal. 1999). In varying contexts, courts have repeatedly held that racial or other harassing speech is not entitled to protection under the First Amendment. *See, e.g., Jarman v. City of Northlake*, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997). Creating a hostile or abusive environment through the use of American Indian mascots should similarly not be afforded protection.

Moreover, and as discussed throughout, the policy only applies to the University to the extent NCAA championship competition or events are involved. It does not dictate that any university change its nickname, change its mascot or take any action which would subject it to First Amendment liability.

3. Antitrust.

The University opines that "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." University Appeal, p. 14. The University, however, is unable to (1) state conclusively that it believes the policy violates the Sherman Act, or (2) identify facts which support a finding that the federal antitrust laws are applicable in this situation. For at least three reasons, the policy does not violate the Sherman Act, either on its face or as applied.

First, to show an antitrust violation, an entity must prove there was "anticompetitive conduct" which caused it to suffer an "*antitrust* injury." The injury must be of the type the antitrust laws were intended to prevent and must flow directly from that which makes the conduct illegal. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977). Here, the University does not argue or present information showing that the policy is anticompetitive conduct resulting in an "antitrust injury." Stated simply, any purported economic costs are not antitrust injuries, nor can the University point to any antitrust injury which would directly result from the policy.

Second, the policy is *noncommercial* in nature. Accordingly, antitrust laws are not at issue. For example, in *Smith v. NCAA,* the Court noted that rules defining organized competitions are "not

related to the NCAA's commercial or business activities." *Smith*, 139 F.3d 180, 185-86 (3d Cir. 1998). "Rather than intending to provide the NCAA with a commercial advantage," such rules are aimed at ensuring the "character" and "integrity" of these "products." *Id.* at 185-86; *see also Adidas Am., Inc. v. NCAA*, 40 F. Supp. 2d 1275, 1284 (D. Kan. 1999).

Finally, the Supreme Court has held that NCAA rules which maintain the character or integrity of its competitions are pro-, not anti-competitive. For example, in *NCAA v. Board of Regents*, the United States Supreme Court noted that "myriad of [NCAA] rules" are necessary because they "preserve [the product's] character." *NCAA v. Board of Regents*, 468 U.S. 85, 101-02 (1984). Accordingly, the Court ruled that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics . . . ." *Id.* at 117. The Executive Committee policy maintains the integrity and character of NCAA events. A rule which fosters respect and tolerance is good for intercollegiate athletics, good for the public's perception of and interest in them, and thus procompetitive. The Supreme Court expressly recognized that such rules do not violate the Sherman Act. Therefore, the University's antitrust arguments, if properly before the Executive Committee, would not support reversal of the staff committee decision.

4. Equitable Estoppel.

Finally, the University contends that it is "entitled to rely on the NCAA's conduct" and that its reliance "is now proving to have been detrimental." The University's equitable estoppel argument does not support reversal of the staff committee's decision and, if filed in court, would fail as a matter of law.

As an initial matter, the NCAA informed the University that it is not required to change its nickname, logo, images or mascot. Instead, the policy affects the University only to the extent NCAA championship competition or events are involved. Any intellectual property rights owned by the University are not implicated by the policy and do not support reversal of the staff decision. Moreover, even if the University has intellectual property rights relating to Chief Illiniwek, such rights do not negate a finding that its use is hostile or abusive.

In addition, a party asserting a claim for equitable estoppel bears an onerous burden. Specifically, a party must demonstrate that (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time he or she made the representations that they were untrue; (3) the party claiming the estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other party intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith, to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other party is permitted to deny the truth thereof. *Geddes v. Mill Creek Country Club, Inc.*, 751 N.E.2d 1150,

1157 (Ill. 2001). To succeed on such a claim, the University would have to establish each element by clear and convincing evidence. *Cosgrove Distrib. Inc. v. Haff*, 798 N.E.2d 139, 142 (Ill. Ct. App. 2003).

Here, the University cannot establish any of the foregoing elements. For example, with respect to the first two elements, the University would have to demonstrate that the NCAA misrepresented or concealed material facts and knew that its representations were untrue. *Geddes*, 751 N.E.2d at 1157. The University did not even summarily address these basic elements. It identified no misrepresentation or concealment and certainly did not hint that the NCAA knowingly misled the University. Indeed, there are no facts supporting such a position.

Sadly, during most of the 20th Century, Native American images in intercollegiate athletics were generally accepted by most in the United States. However, as understanding of the Native American culture and history continues to develop, many find stereotypical images of Native Americans to be inaccurate, offensive, demeaning, hostile or abusive. What was once accepted and tolerated is no longer acceptable or tolerable.

The NCAA commenced its first official review of Native American images in intercollegiate athletics in 2001. The NCAA membership was aware of this review as it took place. In fact, those institutions using some form of Native American imagery, like the University, were involved in the process. After the lengthy review described more fully above, the NCAA Executive Committee adopted a policy in 2005 regarding Native American images in its championship events. Once the NCAA concluded that the use of Native American images created a hostile or abusive environment, it immediately determined that the use of those images should cease at its championship events. In other words, the NCAA Executive Committee acted quickly upon determining that the use of Native American images at its championships was hostile or abusive. Contrary to the University's argument, the NCAA did not "reverse field." University Appeal, p. 14. The NCAA has never condoned mistreatment or discrimination based on, among other things, racial or cultural grounds. The policy at issue is consistent, not inconsistent, with that historical position.

Finally, the University is precluded from arguing that it reasonably relied on any representations or concealments because none occurred. Furthermore, were such reliance possible, it could not be detrimental. Even if the University were required to change its nickname, mascot or imagery (which it is not), ceasing use of imagery which is hostile or abusive to large populations is not a detriment to institutions of higher education.

University Argument: The University requests a stay pending the final outcome of this appeal.

Enforcement of the policy will be stayed for those institutions who filed an appeal with the Executive Committee on or before February 1, 2006. Here, the policy will not apply to the University until all administrative appeal options are exhausted. In other words, the provisions of the policy will be stayed until the Executive Committee renders it decision.

University Argument: If retained, the policy should be narrowed.

As set forth in footnote six above, the University's request to amend or modify the Executive Committee policy is improper in this appeal. Instead, such requests must be lodged by an institution as outlined in the NCAA's August 5, 2005 correspondence.

G. Conclusion.

For the reasons set froth in this response, the staff committee submits that the decision to retain the University of Illinois, Champaign, on the list of those institutions subject to restrictions on the use of Native American mascots, names and imagery at NCAA championships should be upheld.

H. Attachments.

- University of Illinois, Champaign, October 13, 2005, review request.
- Staff Review Committee November 11, 2005, response.
- U.S. Commission on Civil Rights Statement on the use of Native American images and nicknames as sports symbol.
- Dr. Stephanie Fryberg Affidavit in support of Native American complainants in a potential lawsuit vs. the Osseo-Fairchild School Board of Wisconsin.
- American Psychological Association Resolution and Justification Statement.