

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 13**

NORTHWESTERN UNIVERSITY,)	
)	
Employer,)	
)	
and)	Case 13-RC-121359
)	
COLLEGE ATHLETES PLAYERS)	
ASSOCIATION (CAPA),)	
)	
Petitioner.)	

**BRIEF TO THE REGIONAL DIRECTOR
ON BEHALF OF NORTHWESTERN UNIVERSITY**

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I. INTRODUCTION

This proceeding arises from a petition filed on January 28, 2014, by the College Athletes Players Association (“Petitioner” or “CAPA”) seeking a Board-conducted election in a unit consisting of all football players receiving grant-in-aid scholarships from Northwestern University (“Northwestern” or the “University”). (Board Ex. 1(a).)

A. ISSUES PRESENTED

The contested issues in this proceeding are:

1. Whether the student-athletes Petitioner seeks to represent are employees within the meaning of Section 2(3) of the National Labor Relations Act (“the Act”);
2. Whether Petitioner is a labor organization within the meaning of Section 2(5) of the Act;
3. Even if the Board were to find that the student-athletes Petitioner seeks to represent are employees within the meaning of the Act, whether they are temporary employees;

4. Whether the unit sought by Petitioner is appropriate for collective bargaining within the meaning of Section 9(b) of the Act; and
5. Even if the Board were to find that the petitioned-for unit is appropriate, what is the proper composition of the unit and which student-athletes would be eligible to vote in any election that may be directed.

B. SUMMARY OF NORTHWESTERN'S POSITION

1. Student-Athletes On The Northwestern Football Team Are Not Employees of the University

Northwestern is, first and foremost, a premier academic institution. Its football program is an avocation, not a vocation. Those students who participate in National Collegiate Athletic Association ("NCAA") varsity sports at Northwestern are carrying out the *educational* mission of the school. The University's institutional purpose and athletics philosophy, as articulated by Northwestern President Morton Shapiro, states in part:

The mission of Northwestern University is to pursue the highest order of excellence in its academic and professional programs. Special emphasis is given to quality undergraduate education, research committed to institutional leadership in scientific discovery, intellectual inquiry, and creative performance, as well as a commitment to serve society through teaching and research.

* * * * *

Intercollegiate athletics has long been an integral part of Northwestern University life. The success of the athletic program is inextricably linked to the educational mission of the University, especially with regard to the academic and personal development of student-athletes and the institution's commitment to honoring the highest standards of amateur competition. It is not measured solely by wins and losses.

The well-being of its student-athletes is an integral part of what constitutes success. A truly effective athletic program produces student-athletes who succeed in their academic work as well as in their chosen sport and whose careers after graduation are a tribute both to them and their university. As part of the educational mission of the University, the athletic program should provide student-athletes with the opportunity to exercise leadership, to develop the ability to work with others as a team, to accept the discipline of sustained practice and training, and to realize the value of good sportsmanship.

Observance of rules and awareness of policies are integral to the success of a program. It is the responsibility of the University administration and the Department of Athletics and Recreation to adhere to all regulations promulgated for the governance of intercollegiate athletics by the Big Ten Conference, the NCAA, and other groups to which the University belongs. Beyond these controls, and in the interest of its student-athletes, Northwestern has adopted procedures, guidelines, and policies that are more stringent than those for which it is held accountable externally. The University administration and the Department of Athletics and Recreation are equally responsible for observing these internal standards. Northwestern must have a system that enables it to monitor its adherence to these standards. This system must provide all the assurances necessary to anticipate and prevent any breach of the rules.

The joining of academic experience with athletic performance is the guiding principle behind Northwestern's participation in Division I athletics. To accomplish this goal, Northwestern University offers its student-athletes a comprehensive system of services and resources, including excellent athletic and recreational facilities, high-quality coaching, academic counseling and assistance, first-rate medical care, and highly competitive athletic programs.

(Jt. Ex. 21.) The record reflects that Northwestern's football program exemplifies the University's institutional purpose and stated goals for its athletic programs. For example, Northwestern recruits prospective student-athletes based on their potential to succeed academically, not just their athletic abilities. Its admissions department vets all prospective student-athletes, and no student-athlete is offered an athletic scholarship unless a determination is initially made that the student-athlete will satisfy Northwestern's rigorous academic standards and will be able to successfully graduate from the University.

At Northwestern, academics always trump athletics. The University's student-athletes, even those who are recruited and receive athletic scholarships to participate on the football team, do so in order to receive a world-class education. Northwestern is well aware that a student who chooses to participate in its football program faces challenges on and off the field. But meeting those challenges is part of the education that Northwestern seeks to provide, and part of shaping the class Northwestern aspires to graduate. Northwestern therefore spends substantial resources on activities aimed at promoting the academic success of its student-athletes, including offering

its student-athletes free tutoring services, core academic advising that supplements the advising that the student-athletes receive from Northwestern as enrolled students, as well as personal and career development opportunities. Participation in football, or any varsity sports activity, is part and parcel of the student-athlete's overall educational experience at Northwestern University.

The emphasis that Northwestern places on academic success is borne out by the fact that Northwestern football student-athletes have the highest graduation success rate of the universities comprising the NCAA Division I Football Bowl Subdivision ("FBS")—at 97%—as well as an average cumulative GPA of over 3.0 for the student-athletes in the football program.

Underscoring that participation in athletics is part of a Northwestern education, not employment, the athletic scholarship funds received by the student-athletes on its football team have no relation to the actual performance of any football activities by, or the ultimate quality or skills of, the individual student-athletes. In fact, a Northwestern student-athlete can receive the full benefits of his athletic scholarship even though he never sets foot on the field. Athletic scholarship funds do not bear the hallmarks of compensation, as the funds are not subject to taxes or withholdings. In fact, if the benefits of the athletic scholarships were treated as wages or compensation for services rendered, Northwestern student-athletes would not be able to participate in NCAA football since they would be considered professionals, as opposed to amateurs under NCAA regulations, and thereby barred from participating in Division I FBS football.

Based on the test set forth in Brown University, 342 NLRB 483 (2004), Northwestern's student-athletes in the football program who receive athletic scholarships have a predominantly academic, rather than economic, relationship with the University. Accordingly, they are students as opposed to employees within the meaning of the Act.

There also are substantial policy reasons, as the Board noted in Brown University, for the Regional Director to refuse to extend collective bargaining rights to student-athlete football players at Northwestern. The purposes and policies of the Act are not consistent with a finding that Northwestern student-athletes are “employees” within the meaning of the Act due to the fundamental difference between the university-student relationship and an employer-employee relationship. First, unionization of Northwestern student-athletes would have a chaotic effect due to the wide variation between federal and state labor laws concerning union representation and collective bargaining. Second, many CAPA objectives cannot be achieved by collective bargaining with Northwestern due to NCAA regulations, which Northwestern has no power to change. Third, extending collective bargaining rights to Northwestern student-athletes will have Title IX ramifications and impact the school’s ability to offer athletic opportunities for all student-athletes.

2. Petitioner Is Not A Labor Organization Within The Meaning Of Section 2(5) Of The Act

The uncontested facts show that according to Section 3.01 of the Petitioner’s founding statement, its membership is limited to “scholarship athletes who participate in the Football Bowl Subdivision [of the NCAA] and Division I men’s basketball who share CAPA’s objectives, subject to such membership qualifications as may be set by the future constitution and/or by laws of CAPA.” (Jt. Ex. 1.) Since Northwestern’s scholarship football players are students, as opposed to employees, and Petitioner does not otherwise represent or seek to represent “employees” within the meaning of the Act, it is not a labor organization under Section 2(5) of the Act.

3. The Student-Athletes Petitioner Seeks To Represent Are Temporary Employees Within The Meaning Of The Act

If the Board were to find that the student-athletes Petitioner seeks to represent are employees within the meaning of the Act, they nonetheless would be temporary employees due to the transitory and indefinite nature of their alleged employment and, therefore, are not eligible for collective bargaining under the Act.

4. The Unit Sought By Petitioner Is Arbitrary And Not Appropriate For Bargaining

If the Board were to find that the student-athletes Petitioner seeks to represent are employees within the meaning of the Act, the unit sought by the Petitioner is not appropriate for bargaining because it is an arbitrary grouping that does not include all student-athletes of the University with common interests. Additionally, there is no unit appropriate for bargaining within the meaning of Section 9(b) based on the facts and evidence in this case.

5. If The Board Determines That The Student-Athletes Petitioner Seeks To Represent Are Employees Within The Meaning Of The Act And That The Unit Sought By Petitioner Is Appropriate, Many Of The Student-Athletes Sought By Petitioner Would Not Be Eligible To Vote In Any Election Directed Herein

In the unlikely event the Board were to find that the student-athletes Petitioner seeks to represent are employees, as opposed to students, and the petitioned-for unit is appropriate for bargaining, many of the individuals who allegedly were included in the unit at the time the petition was filed would not be eligible to vote in any election directed in this case. Examples include graduating seniors who have exhausted their eligibility to play football, including Petitioner's witness Kain Colter ("Colter"), as well as high school students who have signed letters of intent to play football at Northwestern and have received tenders of an athletic scholarship, but who are not yet rostered players on the football team and have not yet participated in any football-related activities at the University.

II. STATEMENT OF FACTS

A. NORTHWESTERN UNIVERSITY

1. Northwestern Is A Premier Academic Institution

Northwestern is a premier academic institution recognized among private American research universities for its high quality educational programs. (Tr. 1220; Jt. Ex. 21.) The University has three campuses: a 240-acre campus in Evanston, Illinois; a 25-acre campus in Chicago, Illinois; and a campus located in Education City, Qatar. (Jt. Ex. 28 at NU 002379.) Approximately 20,000 full and part-time students are enrolled at the University, including approximately 8,400 undergraduates enrolled at the University's largest campus in Evanston, Illinois. (Tr. 1178; Jt. Ex. 28 at NU 002379.) The University includes 12 schools and colleges, nine of which offer programs for undergraduates and 11 of which offer graduate and professional programs.¹ (Jt. Ex. 28 at NU 002379.)

By focusing on quality education, research, intellectual inquiry, creative performance, and a commitment to serve society, Northwestern is able to achieve the highest order of excellence in its academic and professional programs. (Jt. Ex. 21.) Northwestern urges its talented and highly diverse student body to develop both in and out of the classroom by sharing common experiences, taking ownership of their education, working closely with faculty, mastering core competencies, and appreciating the social, academic and artistic context in which various disciplines function. (*Id.*) For example, the University's Student Handbook describes the goal of the educational experience as follows:

¹ The schools and colleges are the following: The Judd A. and Marjorie Weinberg College of Arts and Sciences, The School of Communication; The School of Continuing Studies; The School of Education and Social Policy; The Robert R. McCormick School of Engineering and Applied Science; The J.L. Kellogg School of Management; The Medill School of Journalism, Media, Integrated Marketing Communications; Henry and Leigh Bienen School of Music; Northwestern University in Qatar; The Graduate School; The School of Law; and The Feinberg School of Medicine. (Jt. Ex. 28 at NU 002380-2382.)

One goal of a university education is to help you develop as a unique individual – to be educated as a whole person, intellectually, emotionally, socially, ethically and spiritually. Your development and learning as an individual occur, in part, when you engage in relationships with others *and in activities that optimally challenge you. To enhance your growth and learning, become actively involved in the life of the Northwestern community.* Engage your fellow students, faculty, staff and Northwestern’s various communities of interests and form relationships that both challenge and support your growth. Your journey of individual development does not occur in isolation; it takes place within a dynamic learning community.

(Jt. Ex. 19 at 4 (emphasis added).) See also Undergraduate Catalog (Jt. Ex. 28 at NU 002380) (“In its extracurricular offerings as well as in its academic programs, Northwestern encourages its students to develop holistically and to prepare for life in a diverse, interconnected, and rapidly changing world.”); Norris Center For Student Involvement Handbook (Employer Ex. 32 at cover letter) (“Student organizations at Northwestern University are valuable components of campus life, contributing to the development of students and overall campus community.”)

2. Northwestern Offers Intercollegiate Athletics

Intercollegiate athletics is just one of the 480 co-curricular opportunities that Northwestern offers its students for purposes of providing the broadest educational experience available, whether students participate as spectators or athletes. (Jt. Ex. 21; Jt. Ex. 28 at NU 002380.) Indeed, intercollegiate athletics are inextricably linked to the educational mission of the University. (Jt. Ex. 21; Tr. 805.) The success of the athletic program “is not measured solely by wins and losses,” but instead by how well the program produces student-athletes who succeed academically as well as athletically. (Jt. Ex. 21.) Student-athletes are integrated into the University in every way possible and are empowered to take full responsibility for their academic endeavors. (Tr. 805.) Indeed, they are directed and encouraged to prioritize academics over athletics. (Tr. 821.) They are *student*-athletes before anything else. (Tr. 808-809.)

The University's eight men's varsity athletic programs are: baseball; basketball; football; golf; soccer; swimming and diving; tennis; and wrestling. (Jt. Ex. 16 at NU 00038.) The University's 11 women's varsity athletic programs are: basketball; cross country; fencing; field hockey; golf; lacrosse; soccer; softball; swimming and diving; tennis; and volleyball. (*Id.*) For the 2012-2013 academic year, 241 male students and 242 female students participated in at least one of the University's varsity athletic programs. (Ex. Ex. 11.) Northwestern is a member of the Big Ten Conference ("Big Ten") and the NCAA. (Jt. Ex. 21.)

a. *Northwestern's Football Program*

Patrick Fitzgerald has been the Head Coach of Northwestern's football program since 2006.² (Tr. 1018.) Northwestern's football program aims to be the best student-athlete development program in the nation. (Tr. 1023, 1220.) The goals of the football program, in addition to preparing for athletic success, include graduating one-hundred percent of its student-athletes, helping its student-athletes earn a Northwestern degree, and preparing its student-athletes to be champions in life. (Tr. 1023-24.) In fact, in the football program meeting room, a plaque lists "earning a Northwestern degree" as the number one goal for its student-athletes. (Tr. 1278.) Northwestern's football program, as part and parcel of Northwestern, is committed to student-athlete development—academically, socially, and athletically. (Tr. 1021, 1023, 1220.)

This commitment to student-athlete development, and academics in particular, is apparent from the fact that the football program has the highest graduation rate in the country—a remarkable 97% graduation rate—and is a seven-time recipient of the American Football Coaches Association award, which is given to the Division I football program with the highest graduate rate in the country. (Tr. 500-01, 912-13, 1046.) Northwestern currently maintains the

² Coach Fitzgerald reports to Dr. James J. Phillips, the Vice President for Athletics and Recreation, as well as Dr. Morton Shapiro, the President of Northwestern. (Tr. 1022; Jt. Ex. 32.)

highest Academic Progress Rate (“APR”)³ —996 out of 1000 points—among Division I football programs. (Tr. 499-500.)

In addition, Northwestern’s student-athletes in the football program consistently maintain an exceptional cumulative GPA average of over 3.00, and enroll in approximately three to four classes per quarter. (Tr. 176, 499.) This amounts to approximately 20 hours per week of solid class time. (Tr. 176.) In the 2013-14 academic year alone, the Academic All-Big Ten program recognized 36 of the Northwestern student-athletes for their exceptional GPAs and contributions to the football team. (Tr. 1046-1047.)

Student-athletes in the football program pursue more than 20 distinct majors across the various undergraduate and graduate programs. (Tr. 879-882; Em. Ex. 26; Em. Ex. 27.) Since Coach Fitzgerald became Head Coach, Northwestern’s student-athletes on the football team have pursued approximately 35 different professional fields, including law, engineering, medicine, technology, wealth management, consulting, entrepreneurship, secondary education, and the National Football League. (Tr. 1050.)

Not only have Northwestern’s student-athletes on the football team pursued those fields, but they have been incredibly successful in doing so. For example, Patrick Michael Ward (“Ward”), a Northwestern graduate who was a student-athlete on the football team during his undergraduate years, graduated from Northwestern with a degree in mechanical engineering with a 3.94 GPA. (Tr. 1293-1294.) Currently, he works for Boeing Company as a structural engineer and performs strength analysis for commercial airline parts. (Tr. 1294.)

In addition, under Coach Fitzgerald’s leadership, 64 of the student-athletes who participated in the football program have gone on to graduate school. (Tr. 1050.) One such

³ The APR relates to the retention of student-athletes and the eligibility of student-athletes on each team. (Tr. 1025.)

student-athlete is Doug Bartels (“Bartels”), who is currently a second-year medical school student at Rush Medical College in Chicago. (Tr. 1216.) Bartels graduated from Northwestern in 2011, after playing on the Northwestern football team and earning a bachelor’s degree in biological anthropology with a 3.5 GPA. (Tr. 1215.) Another example is John Henry Pace (“Pace”), who pursued a master’s of science in engineering project management after graduating from Northwestern with degrees in mechanical and aerospace engineering, both of which he earned while participating in the football program. (Tr. 1258, 1262.)

b. *Composition Of Northwestern Football Team*

The Northwestern football team is currently comprised of 112 student-athletes, including 85 student-athletes on athletic scholarships, per NCAA regulation. (Tr. 1034-1035.) In addition, at any given time, there are a number of “redshirt” student-athletes: student-athletes who do not compete in a single game during the time period that they are “redshirted.” (Tr. 537.) By virtue of not competing in a single game, the redshirted student-athlete preserves a year of eligibility. (Tr. 733, 780.) Consequently, there are some student-athletes in their fifth year at Northwestern who are on the squad list and continue to receive their full athletic grant-in-aid for five years. (Tr. 932.)

The football squad also includes walk-on student-athletes. Walk-on student-athletes are expected to meet the same requirements as the scholarship student-athletes and are treated the same as the scholarship student-athletes with respect to academic performance, rules and regulations, and practice and travel schedules. (Tr. 1036, 1222, 1228.) Walk-ons receive substantial playing time and frequently serve as starters. (Tr. 1037, 1223.) In fact, following graduation, some of Northwestern’s walk-ons have gone on to play in the National Football

League. (Tr. 1047.) The *only* distinction between walk-ons and student-athletes on athletic scholarship is that walk-ons do not receive athletic scholarships.⁴ (Tr. 1036.)

Lastly, the football team includes “medical non-counters.” (Tr. 1044.) Medical non-counters are student-athletes on athletic scholarship who were injured in the course of participating in football, and are unable to compete due to medical reasons. (Tr. 1043-44.) These student-athletes continue to receive all of the benefits of their athletic scholarship, even if they are unable to set foot on the field. (Tr. 1043-44.)

3. Undergraduate Admissions

As one of the top universities in the nation, admission to Northwestern is highly selective. (Em. Ex. 31.) Christopher Watson (“Watson”) serves as the Dean of Undergraduate Admission and oversees recruiting efforts as well as the entire admissions process, including admission of student-athletes. (Tr. 1178-1179; 1182-83.) Watson and his staff are charged with ensuring that each and every student who is admitted to Northwestern is prepared to thrive on campus.⁵ (Tr. 1190-1191.) Recruiting materials serve as guides for what Northwestern has to offer and what the institution is looking for in its incoming undergraduate class. (Em. Ex. 31.)

a. The Admissions Process

Northwestern’s admission process is very labor and time intensive. (Tr. 1180.) Watson and a staff of 23 individuals review the applications for admission, with a particular focus on each applicant’s academics, extracurricular activities, recommendations, writing samples, and personal statements. (Tr. 1179-1181.) All applicants, including student-athletes, must meet the same standards. (Tr. 1190-1191.) There is no written standard for minimum test scores or class

⁴ Many walk-ons do, however, receive need-based aid. (Tr. 1036.) In addition, walk-ons who stay with the football program often receive some sort of athletic financial aid toward the end of their playing eligibility. (Tr. 1038-1039, 1222, 1264-1265.)

⁵ Watson and his staff recruit students to join the Northwestern community from all over the world. (Tr. 1182-1183.)

ranking for any applicant to be admitted, and Northwestern does not utilize a point system for admissions. (Tr. 1181-1182.) In the absence of specific numerical cutoff criteria, admissions staff conduct a holistic review of all applicants, including consideration of important institutional priorities, like athletics or the arts, as well as diversity factors, family background, geography and socioeconomics. (Tr. 1181-1182.) Each application is reviewed in its entirety twice before a final decision is made.⁶ (Id.)

b. *Pre-Approval Of Prospective Student-Athletes*

Northwestern utilizes a pre-approval process for prospective student-athletes. (Tr. 814, 1189-1190.) The purpose of this process is two-fold: (a) to identify prospective student-athletes who can meet the University's rigorous academic expectations; and (b) to ensure that varsity coaches are expending the University's limited recruiting resources on those prospective students who have the potential to succeed academically at Northwestern. (Tr. 815-16, 1031-32). This process involves not only the Admissions office, but also staff in the Athletic Department. (Tr. 813-17, 1032-33.)

The pre-approval process involves multiple layers of review, culminating in a final decision by Watson. (Tr. 814; Tr. 1032.) First, the coaches for each of the 19 varsity athletic programs review prospective student-athletes. (Tr. 813-15.) Academic credentials are the threshold inquiry for all prospective student-athletes. (Tr. 1026, 1031.) Coaches seek candidates who will fit well into Northwestern, first and foremost, academically, and who will progress to graduation within four years. (Tr. 1031-32, 1162.) During this first level of review, the coaches

⁶ Ultimately, Northwestern admits an annual undergraduate class of approximately 2,025 freshmen and an annual transfer class of approximately 100 students. (Tr. 1178-79.) For the 2013-2014 academic year, Northwestern received 33,600 applications for undergraduate admissions and anticipates receipt of 1,500 transfer applications. (Tr. 1179.)

may determine that a recruit is not up to par academically. (Tr. 814, 816). If so, the pre-approval process ends. (Tr. 814, 816, 1172.)

Second, if the coach determines that the prospective student-athlete has the academic credentials to succeed, the coach brings the candidate's information to Janna Blais ("Blais"), Deputy Director of Athletics for Student-Athlete Welfare. (Tr. 815-16, 1032-33.) Blais receives information on prospective student-athletes whom the coach believes to be capable of achieving academic success and contributing positively to the football program. (Tr. 1031-33.) Blais then makes an independent evaluation as to whether the candidate will be academically successful. (Tr. 816, 1033.) While the coaches are well-informed concerning the academic standards required of all students at Northwestern, on occasion Blais has decided that she will not present a prospective student-athlete to Watson based on her independent assessment that the prospect will not be able to succeed academically at the University. (Tr. 816.)

Third, and only after the potential prospective student-athlete is vetted and approved by both Blais and the respective varsity coach, Blais presents the prospective student-athlete's credentials, including his or her transcript and standardized test scores, to Watson. (Tr. 816; Tr. 1187.) To avoid any appearance of impropriety and to avoid the prospect of a coach pressuring Admissions to pre-approve a prospective student-athlete who is not likely to succeed at Northwestern, coaches do not have direct access to the Admissions Office with respect to prospective student-athletes. (Tr. 816-17.)

Watson's review of prospective student-athletes does not differ from his review of all undergraduate candidates, and his focus remains on determining whether the prospective student-athlete is equipped to succeed academically at Northwestern. (Tr. 1190.) One of three results occurs as a result of Watson's review. Watson may pre-approve the student-athlete for

admission. On occasion, Watson will determine that he needs additional information to make the decision. On these occasions, Watson may suggest to Blais that the prospect strengthen his or her application by providing additional letters of recommendation, sitting for another standardized exam, or enrolling in a heavier course load for his or her senior year. (Tr. 1189.) On other occasions, Watson and his staff may reject the student-athlete because he or she does not satisfy Northwestern's admission standards. (Tr. 1188.) Watson and his staff exercise the veto right with some frequency, and have vetoed potential prospective student-athletes who were being considered for the football program because they did not satisfy Northwestern's admission standards. (Tr. 1034, 1188.)

Ultimately, Watson decides whether to offer pre-approval, after which Blais communicates the decision to the coach. (Tr. 819-820, 1033.) If Watson decides a particular candidate does not satisfy the standards for admission to Northwestern, a coach can request another review, in which case Blais and Dr. James J. Phillips ("Phillips"), the Vice President for Athletics and Recreation can present the candidate to the Provost. (Tr. 1189-1190.) The Provost asks Watson for his recommendation, and Watson remains directly involved in the final decision. (Tr. 1190.)

If Watson pre-approves the candidate, and the student-athlete decides that Northwestern is the right fit, he or she must complete the formal application for undergraduate admission. (Tr. 1033.) The final admission decision, and the ultimate offer of admission, goes through Watson's office, just like all other admission decisions, and the football program has no involvement at that stage. (Tr. 820.)

4. Financial Aid

Northwestern annually provides approximately \$139 million in financial assistance to its students. (Tr. 720.) Of the \$139 million, approximately \$15 million is athletic aid and

approximately \$124 million is need-based assistance. (*Id.*; Em. Ex. 16.) Both need-based and athletic scholarships are funded by direct gifts, endowments, and appropriated funding. (Tr. 723.) During the 2012-2013 academic year, about 60 percent of Northwestern undergraduate students received some form of financial aid. (*Id.*)

In putting together a package for need-based financial aid, and to determine the “cost of attendance,” Northwestern takes into account the cost of tuition, fees, room, board, books, personal expenses, and transportation.⁷ (Tr. 742-43.) Students seeking need-based aid must complete the free application for federal student aid (“FAFSA”) annually to take into account any changed circumstances in the student’s financial profile. (Tr. 724, 736-37; Em. Ex. 17.)

a. *Athletic Scholarships (Grants-in-Aid)*

As a form of financial aid to admitted students, Northwestern also offers athletic scholarships. Northwestern provides its student-athletes with four-year scholarship offers (also known as “tenders”).⁸ The scholarship may also be renewable for a fifth year of academic study. (Tr. 469; Tr. 779.) The 2013 scholarship offer letter from Coach Fitzgerald expressly informs prospective football student-athletes that their scholarships “will be honored for four years with an option for a fifth year.” (Tr. 486; Em. Ex. 5 at NU 00096.)

Under detailed regulations promulgated and enforced by the NCAA, financial aid packages for athletic scholarships cannot cover the full cost of attendance, but can cover the costs of tuition, fees, room, board, and the use of books. (Tr. 729, 730, 743; Jt. Ex. 22 at NU

⁷ Students are provided a need-based financial aid package comprised of federal funding, state funding, loan assistance, work assistance, and scholarship assistance. (Tr. 724.)

⁸ The NLOI and the accompanying scholarship tender is a contractual offer of financial aid that binds the University for the period of the grant, which is now four years for incoming freshman student-athletes being offered aid. (Tr. 487-489, 733-35; Em. Ex. 5 at NU 00969-971.) While the University is committed to the offer once it is made, the student-athlete can unilaterally terminate the contract without penalty. (Tr. 488-489.)

000717-740.) NCAA regulations provide that for student-athletes, personal expense allowances and transportation allowances cannot be taken into account for purposes of financial aid. (Tr. 743.) In addition, the NCAA limits to 85 the number of athletic scholarships that can be awarded to members of Northwestern's football program.⁹ (Tr. 733.)

b. *Non-renewal Or Revocation Of Athletic Aid Is Rare And Subject To Appeal*

Athletic scholarships are not reduced or canceled due to the student's athletic ability, performance, or contributions to the team's success. (Tr. 241, 578-579, 740, Jt. Ex. 11 at NU 001656.) Likewise, the aid cannot be reduced or canceled due to an injury that prevents the student-athlete from participating in athletics, nor can it be reduced or canceled for any other athletic reason. (Tr. 241; Jt. Ex. 11 at NU 001656.) It does not matter if a student-athlete plays in a single football game; if he has a scholarship, he keeps it. (Tr. 493.) Thus, student-athletes who take a "redshirt" season (i.e., do not participate in a game), continue to receive the benefits of their athletic scholarships. (Tr. 537-38, 748-49, 1044-45.)

Under NCAA guidelines, athletic scholarships can be non-renewed or cancelled. (Tr. 239, 739.) NCAA regulations allow the cancellation of a scholarship if a student-athlete deems him or herself ineligible, voluntarily withdraws from the athletic program, engages in misconduct, or engages in fraud during the admissions process. (Tr. 492-93; Jt. Ex. 11 at NU 001656.) At Northwestern, a student-athlete must engage in egregious misconduct to prompt cancellation of an athletic scholarship. (Tr. 1045, 1053.) Head Coaches do not have the independent authority to revoke athletic aid, and since Fitzgerald has been the Head Football Coach, there have been no non-renewals for "abuse of team rules." (Tr. 739-741, 1045-46,

⁹ Student-athletes may receive different amounts of athletic grants due to different costs of on-campus room and board, or if a student is enrolled in a graduate degree program, or if a student-athlete graduates before the final academic quarter of the academic year. (Tr. 533-34.)

1053-54.) During that same time, there have been only two non-renewals of athletic scholarships for student-athletes on the Northwestern football team, and both were the result of flagrant violations of University policy generally applicable to all Northwestern students. (Tr. 739-741, 1045.) One student-athlete had his aid revoked and his status as a student at the University terminated for violating Northwestern policy by shooting a BB-gun in a dorm. (Tr. 1045.) Another student-athlete had his aid revoked because of repeated violations of Northwestern's alcohol and drug policy. (Tr. 740-741, 1045, 1165.) Coach Fitzgerald did not make either one of these decisions. (Tr. 1046.) If athletic aid is not renewed or is revoked, the student-athlete can appeal the decision to a body that is comprised of the director of financial aid, the Big Ten faculty representative, and a representative of the vice president for student affairs. (Tr. 636, 740-742.)

c. *Taxes, Withholdings, And Benefits*

Athletic scholarships are purely that—scholarships—and as such they are not treated as compensation for purposes of income taxes or withholdings. (Tr. 247-248.) Student-athletes at Northwestern do not pay taxes on the athletic grant-in-aid. (Tr. 788.) In addition, student-athletes at the University do not receive W-2's for the athletic grant-in-aid. (Tr. 751, 789.)

Grants-in-aid are not issued to student-athletes through a payroll system, nor does the University give student-athletes personal checks for their tuition. (Tr. 247.) Instead, the portion of the grant-in-aid that covers tuition is applied directly to the student-athletes' student account from the financial aid account. (Tr. 247-248, 649.)

Scholarship student-athletes who live in off-campus housing following their sophomore year receive a monthly stipend for living expenses. (Tr. 145-146.) The stipend is provided to the student-athlete in the form of a personal check to the student-athlete, or, if the student has direct

deposit, the stipend is deposited directly into the student's account. (Tr. 75, 250, 755.) The check is not issued from payroll and has no deductions for taxes or other withholdings. (Tr. 250.) The check does have minimal deductions for meals the team eats together, referred to as "training-table" meals. (Tr. 74-76.) For scholarship student-athletes, training table is part of a student-athlete's cost of "board" or food.¹⁰ (*Id.*) Student-athletes do not participate in any of the benefit plans in which Northwestern University employees participate, such as paid time off benefits, or the retirement plan or life insurance plan. (Tr. 250-251.)

B. NORTHWESTERN EMPHASIZES THE STUDENT-ATHLETE'S ROLE AS A STUDENT FIRST, FOREMOST, AND ALWAYS

Consistent with its educational mission, Northwestern University dedicates resources to ensure the full development of the academic, social and professional pursuits of the student-athlete.

1. Football Program Resources For Empowering Student-Athlete Development

The football program provides a wide array of resources within the framework of the NCAA rules, Big Ten rules, and University rules, to empower its student-athletes to be the best they possibly can be in everything they choose to do. (Tr. 1023.) Coach Fitzgerald and his staff¹¹ utilize a holistic approach to coaching in order to assist the student-athletes academically, socially, and physically. (Tr. 1024, 1064, 1233.) Fitzgerald considers himself an educator and role model for the student-athletes on his team. (Tr. 1062-1063, 1144, 1233, 1310-1311.) As a

¹⁰ Per NCAA regulations, student-athletes cannot receive free meals with any regularity. (Jt. Ex. 22 at NU 745.) For this reason, attendance is taken at training table meals. (*Id.*) Walk-on student-athletes can eat at the training table and pay for meals as they would any on-campus meal. (Tr. 1057-1058; Jt. Ex. 17.)

¹¹ Fitzgerald is supported by nine assistant coaches, four graduate assistant coaches, and three quality control interns. (Tr. 1022.) In addition, there is an operation staff for the football program consisting of director of football operations, director of player development, director of player personnel, five full-time strength coaches, two administrative assistants, two video staff, and a number of interns that work in both recruiting and video. (*Id.*)

former Northwestern student-athlete, Fitzgerald draws on his own experiences and aims to teach life lessons on a daily basis. (Tr. 1150.) Lessons include teaching the players to make good choices about their attitude, investing in being successful, and representing themselves as high character individuals who are honest and respectful. (Tr. 1062-1063, 1310-1311.) The coaching staff emphasizes that its student-athletes are at Northwestern to obtain an education, and that they are *student*-athletes—student bearing the emphasis. (Tr. 1233, 1278, 1310-1312.)

Northwestern offers a variety of resources for its football student-athletes to develop the skills and attributes necessary to earn a Northwestern degree and to prepare to be a champion in life. (Tr. 1024.) Notably, the football team has its own mentoring program. (Tr. 891-92, 1048-1050, 1219; Jt. Ex. 33.) The mentoring program provides an opportunity for Northwestern alumni to offer academic and professional advice, networking strategies, and personal development assistance to current football student-athletes. (Tr. 1048-1049, 1219.) Through this program, student-athletes on the football team have secured internship opportunities in their profession of choice. (Tr. 1231.) For instance, Doug Bartels, who is now a second year medical school student, testified that he interned with an orthopedic surgeon and shadowed an anesthesiologist while he was a student-athlete. (Tr. 1231.)

The football team has a Leadership Council, a group much like a student council, which provides an avenue for student-athletes to discuss issues that affect the team by open communication with the coaching staff. (Tr. 131, 253, 1080.) Student-athletes are voted onto the council by their classmates. (Tr. 305, 1114-1115.) Council members go through leadership development training. (Tr. 1115-1116.) Fitzgerald conducts the Leadership Council meetings, and the members discuss a range of issues, from uniforms to attendance to discretionary

workouts. (Tr. 306-307.) Fitzgerald tries to develop leadership and communication skills among the council members and help them become better peer-to-peer leaders. (Tr. 1115-1116.)

Coaching, mentoring, and leadership council are just part of the equation. Playing football (like any team sport) is, in and of itself, part of the educational process. (Tr. 262-263, 1277-1278.) Playing teaches the ability to critically analyze information. (Tr. 266, 1280, 1298-99, 1312.) Playing also teaches student-athletes the values and rewards of perseverance and dedication. (Tr. 263-264.) In addition, playing the sport teaches time management skills, communication, respect, and focus under pressure. (Tr. 1233-1234, 1277-1278.) The values and skills that football instills are transferable to post-college pursuits and, indeed, have assisted Northwestern alumni and former student-athletes in their endeavors after graduation. (Tr. 174, 1234.) The mantra of the football team—play hard, play smart, play together—is easily transferable to an array of fields. (Tr. 1298-1299.) For example, Pat Ward, who now works as an aerospace engineer, testified that his experience as a student-athlete on the football team better prepared him to take on the responsibilities and high pressure associated with his job at Boeing. (Tr. 1313.) Similarly, Bartels applies the interpersonal communication skills and ability to deal with pressure filled situations that he learned during his time as a football student-athlete to overcome the challenges he faces as a medical school student. (Tr. 1237-1238.)

2. Football Practice And Athletic Competitions Take A Back Seat To Student-Athletes' Academic Schedules

Athletic competitions for the Northwestern football team are typically on Saturday, and therefore there is no need to miss class for games. (Tr. 837-838.) On occasion, a Friday afternoon class might be missed for travel to an away game. (Tr. 838, 1056.) However, student-athletes do not miss Friday morning classes due to travel. (Tr. 841.)

Travel is typically by bus. (Tr. 840-841, 1057.) If the Saturday game is particularly far from Evanston, Illinois, Northwestern charts a flight to allow for a later departure and shorter travel time. (Tr. 837.) The student-athletes are allowed to study while travelling and, in fact, do study while travelling. (Tr. 227-228, 1057, 1060-1061, 1231, 1253.) Typically, three or four football games are played before Northwestern classes start in the fall. (Tr. 223.) Thus, one-third of the season is completed before the academic year starts. (Id.)

During season, football practice usually occurs on weekday mornings, Monday through Thursday, for four hours beginning at 6:50 a.m. (Tr. 842-43, 1041.) Before 2007, football practices were in the afternoon. (Tr. 1039.) However, Coach Fitzgerald realized that most undergraduate classes are offered in the afternoon at Northwestern, so he changed the practice time from afternoon to morning. (Tr. 1040.) This change was designed to minimize the times that practice overlapped with student-athletes' class schedules. (Tr. 842, 1040-41.)

Northwestern provides an early class registration process for its student-athletes, so they have priority to sign-up for the classes they want to take. (Tr. 841.) Athletic Academic Advisors, who know the practice and game schedules, help the student-athletes with registration to ensure that they are able to take the classes they need and want and can also practice with their team. (Tr. 841, 1272.)

There are, of course, times when a student-athlete's class schedule conflicts with team practice. (Tr. 841.) For example, a student-athlete may want to enroll in a course that is offered only once per year, but the class is at the same time as practice. (Tr. 222, 842.) When that occurs, the student-athlete is encouraged to speak with Coach Fitzgerald, who, as history has shown, will allow the student-athlete to miss practice in order to take the course or make other accommodations. (Tr. 1272.) This has no negative impact on the student-athlete's role on the

football team. (Tr. 1273.) For example, John Henry Pace had a conflict between spring practice and a course during the winter quarter of 2011. (Tr. 1302-1303.) Pace told Fitzgerald and, each day, left practice early to go to class. (Tr. 1303.) Pace was competing for a starting position at the time and attained that position despite this practice schedule. (Tr. 1273.)

Alternatively, a student-athlete may want to enroll in a course that is part of a series of classes, but one part of the series is offered at the same time as practice. (Tr. 222, 842.) Again, the student-athlete is encouraged to enroll in the class, and he is permitted to leave practice early in order to attend class. (Tr. 222, 842.) This precise situation occurred multiple times for Doug Bartels, who enrolled in and completed the chemistry series, biology series, and physics series, despite the fact that many of those classes conflicted with football practice. (Tr. 1217-1218.)

Cody Cejda (“Cejda”), the director of football operations, makes sure that football student-athletes get to class on time. (Tr. 843.) If a student-athlete has class that begins at 11:00 a.m. Monday, Tuesday, Wednesday and Thursday, Cejda goes onto the field at 10:35 a.m. and speaks to the student-athletes who need to leave for class. (Tr. 843-844, 851, 1274.) Those student-athletes shower, receive a “to-go” meal, and are driven to class. (Tr. 844.) This situation is not infrequent and the student-athlete is always accommodated, without regard to whether he receives an athletic scholarship or is a walk-on. (Tr. 848-849, 854, 1274.)

There is no evidence that Coach Fitzgerald or any coach has ever told a student-athlete they could not miss practice to attend class. (Tr. 1042-1043, 1272-1273.) Similarly, there has never been a time that Fitzgerald or any of the other members of the coaching staff attempted to persuade a student-athlete not to pursue a particular major. (Tr. 1051.) In fact, Coach Fitzgerald and the other coaches work with their student-athletes to do everything possible to ensure that they can pursue their major of choice. (Tr. 1219.)

Coach Fitzgerald and his staff promote academics in other ways as well. For example, last season, a scholarship student-athlete on the team requested that Coach Fitzgerald relieve him from playing in the upcoming game against Nebraska because he felt he needed to devote additional time to academics. (Tr. 1061-1062.) Fitzgerald and the coaching staff decided that instead of attending practice that week, the student-athlete would study. (Id.) The next week, Fitzgerald spoke with the student and the student returned to practice. (Id.) The student was not penalized for missing a week of practice or missing the Nebraska game and played in the game against Michigan the following week. (Id.)

C. SUPPORT SERVICES FOR ALL NORTHWESTERN STUDENT-ATHLETES

1. Academic Support

The guiding principle behind Northwestern's athletic programming is the merging of academic experience with athletic participation. (Jt. Ex. 21.) This principle is embodied in the Athletic Department's mission statement, which can be found on the department website as well as prominently displayed in every academic advisors' office. (Tr. 805.) The mission statement provides:

Services will be comprehensive and integrated with University resources. Student-athletes will be empowered to achieve academic success and balance demands of athletic participation and college life. Student-athletes will embrace individual responsibility and personal integrity. Student-athletes will be well prepared for successful life after college.

(Emp. Ex. 20; Tr. 807.) Northwestern's athletic program achieves its mission by providing student-athletes with a host of comprehensive services and resources that allow them to find their passion, develop who they are, and feel great about the experiences that they have had before leaving Northwestern. (Tr. 808; Jt. Ex. 21.) Those services and resources fall into three distinct categories—direct support services, monitoring, and career and personal development. (Tr. 809-811.)

a. *Direct Support Services*

(i) Core Academic Advising

At the heart of the services and resources Northwestern provides for its student-athletes is one-on-one core advising with Athletic Academic Advisors. (Tr. 809.) There are seven Athletic Academic Advisors who meet with student-athletes regularly: at least weekly, if not daily in their first years. (Tr. 801, 810-811.) The Athletic Academic Advisors ask how the student-athletes are doing academically and, in particular, what grades they are earning. (Tr. 810.) They also push student-athletes to succeed in their academic coursework and degree progress. (Tr. 1271-1272.) In addition to the Athletic Academic Advisor, student-athletes have college faculty advisors, as do all other students at Northwestern. (Tr. 863-864.) The college faculty advisors assist the student-athletes in selecting classes that will help them progress toward obtaining a degree in a particular major. (Id.)

(ii) Class Attendance Policy

Class attendance for *all* Northwestern students is mandatory, including student-athletes. (Tr. 820-821; Jt. Ex. 16 at NU 000015; Jt. Ex. 19.) The Student-Athlete Handbook provides:

It's imperative that student-athletes attend all classes consistently in order to succeed academically. Student-athletes must maintain their priorities such that academics take precedence over athletics.

(Tr. 821-822; Jt. Ex. 16 at NU 00015.) Coaches emphasize the mandatory class attendance policy with their teams. (Tr. 1025.) On occasion, student-athletes have to miss class. (Tr. 822.) However, student-athletes cannot miss more than five class days in a single quarter. (Tr. 824.) In addition, under Northwestern policy, student-athletes cannot be away from campus 48 hours prior to finals. (Tr. 823.) Northwestern enforces a strict no-competition rule during the week of final exams. (Tr. 826-827.)

(iii) Travel Policies

A student-athlete's travel for athletic competition may conflict with an academic event, such as a test or a quiz. (Tr. 827.) If a student-athlete learns that his or her travel for an athletic competition conflicts with an academic event, he or she must alert the professor to the conflict and make alternate arrangements. (Tr. 827.) The student may take the exam prior to the competition, after the competition, or in a different session of the same class, as decided by the professor. (Tr. 827-828.)

If none of these options is possible, the student-athlete notifies an Athletic Academic Advisor, and the Athletic Department staff will discuss the traveling exam policy with the professor. (Tr. 828.) The traveling exam policy allows for a professor to provide the exam, either by e-mail or by hard copy in a sealed envelope with all of the instructions, including precisely when the student must take the exam and whether the student can have notes during the exam. (Tr. 829.) In the professor's discretion, the exam may be administered by a coach, an administrator, or even a professor at the school to which the student-athlete is travelling. (Tr. 829-830.)

Professors have the right to set their syllabi and handle their classes as they see fit, and athletics cannot trump the professor's authority. (Tr. 830-31.) In 2013, seven student-athletes in the football program were part of a class that had a quiz on a travel day. (Tr. 831.) The class grade was based on grading three of four quizzes given during the quarter—the lowest score was disregarded. (Id.) The professor told the students they could drop this quiz score, but could not utilize the travelling exam policy. (Id.) Rather than force the students to forfeit this quiz, the Athletic Department staff and football coaches made arrangements for the student-athletes to take the quiz on campus, then travel later in the day to the game location, though doing so meant that those seven players did not travel with the rest of the team. (Tr. 832.)

(iv) Scheduling Protocol

There is a multi-layered protocol for scheduling athletic competition at Northwestern. Each coach must complete a scheduling chart, which is submitted to the Committee on Athletics and Recreation (“CAR”).¹² (Tr. 823, 836-837; Em. Ex. 21.) The coaches are asked whether their teams have planned to be away from campus 48 hours prior to finals, whether their teams have any competitions during finals, and whether their teams will be away during Wildcat Welcome Week, which is an all-encompassing orientation that helps new students navigate the University. (Tr. 823.)

The CAR reviews the schedules to ensure that student-athletes miss no more than five classes (a rule imposed by the University) and miss only the classes that they absolutely need to miss in order to travel. (Tr. 824-25.) Janna Blais is a member of CAR, and she meets with faculty to discuss whether certain competitions can be moved, especially if a competition conflicts with an event such as Wildcat Welcome week. (Tr. 834.) Blais and the faculty members also ensure that student-athletes have a full day-off each week. (Tr. 835.) Northwestern does not permit a travel day to count as a day off and instead requires that each student-athlete have a full day off separate and apart from travel. (Id.)

(v) Freshman Study Skills Program

Northwestern provides a freshman study skills program. (Tr. 855; Em. Ex. 23.) The program is an opportunity for Athletic Academic Advisors to spend quality time with each freshman student-athlete and to assist them in learning about Northwestern academics. (Tr. 855-856.) In addition to mandatory meetings with the Athletic Advisors, this program includes study table, also called study hall, which is time set aside for academic study in the undergraduate

¹² CAR is a committee consisting of faculty representatives from Northwestern’s campus who meet quarterly with the Athletic Department and serve as advisors to the Athletic Department. (Tr. 823.)

library. (Tr. 219-220, 856-58.) In the first quarter, freshman must spend at least six hours per week at study table, with time either decreasing or increasing in the following two quarters depending upon academic progress. (Tr. 858-609.) The goal of study hall is to help prepare the student-athletes to become 100 percent responsible for their academic achievement. (Tr. 859.)

(vi) Tutoring Programs

Tutoring for student-athletes is a vital part of academic services at Northwestern, and the tutoring programs provide study skills and tutorial assistance to over 450 student-athletes. (Tr. 171, 869; Em. Ex. 24.) The tutoring program allows student-athletes to use an online system to request a tutor for a particular course, and then work with one of the Athletic Department's 96 tutors. (Tr. 171, 861.)¹³ Tutoring is also done through the Athletic Academic Advisors. If the Athletic Academic Advisor feels the student-athlete is struggling in a course, the advisor arranges for the student-athlete to have an individualized tutor. (Tr. 861-62.) In addition, Northwestern offers Cats Learning Together, which are small group tutoring sessions linked to particularly rigorous courses, and are required for freshman. (Tr. 862.) All of the tutoring programs are available for all student-athletes, regardless of their year. (Tr. 864.)

b. Ensuring Academic Progress

To ensure the academic progress of its student-athletes, the Athletic Department monitors its student-athletes every step of the way, not just to ensure NCAA eligibility but also to ensure that the student-athlete is meeting his or her primary obligation of succeeding academically. (Tr. 810, 870.) Athletic Academic Advisors meet with freshmen at least once a week and check in with them regarding their academic progress. (Tr. 870.) Faculty members speak with the

¹³ The tutors are Northwestern undergraduate or graduate students, and/or other college graduates employed by Northwestern to tutor student-athletes. (Tr. 865.) Tutors must submit an application, be interviewed and, if selected, complete training on issues related to academic integrity and regulatory compliance issues. (Tr. 864-66; Em. Ex. 24.)

Athletic Department following the midterm, and provide information about how the student-athletes are doing academically. (Tr. 870.) Grade reports for each student-athlete are issued on a quarterly basis, and are reviewed by several individuals in the Athletic Department, including Blais' staff, the student-athlete's Athletic Academic Advisor, and the sport administrator who oversees the student-athlete's particular sport. (Tr. 811, 870-71.) The reviewers look at trends in performance to determine whether the student-athlete is performing at a level commensurate with past performance. (Tr. 873.) If any reviewer notes that a student-athlete's grades fell significantly in a particular quarter, the student-athlete may be required to avail himself of additional academic support services. (Tr. 872-873.) Thereafter, the grade report is reviewed for the purpose of determining NCAA eligibility and progress toward achieving a degree.¹⁴ (Tr. 872-873.)

The Athletic Department also compiles GPA information for each team. (Tr. 874-875; Em. Ex. 25.) For example, the 2013 fall report shows that the quarterly GPA for the Football Program was 3.002 and the team cumulative GPA for football was 3.024. (Tr. 876; Em. Ex. 25.) The 2013 fall report also shows that no student-athlete, including those on the football team, had a cumulative GPA under 2.0, and that 25 student athletes, including some on the football team, had a 4.0 GPA that quarter. (Tr. 876-877; Em. Ex. 25.) The reports are submitted to CAR on a quarterly basis, and Blais reviews the results with CAR. (Tr. 874)

Athletic Department personnel not only monitor grades but also monitor student-athletes' majors and minors on an annual basis. (Tr. 877, 879; Em. Ex. 26.) The Athletic Department presents the data to CAR annually as well as the President of Northwestern quarterly. (Tr. 877.) The reason for this is to ensure that student-athletes are pursuing their degree of choice and are

¹⁴ See infra, Section II.D.3.b.

not “clustering” into certain tracks or classes. (Tr. 878.) Student-athletes at Northwestern pursue a wide range of majors and minors across all of the undergraduate schools. (Em. Ex. 26.) For example, in the 2011-2012 year, students in the football program had 20 different declared majors across five of six different undergraduate schools, namely, the School of Education and Social Policy, the Medill School of Journalism, Media, Integrated Marketing Communications, the Weinberg College of Arts and Sciences, the School of Communication, and the McCormick School of Engineering. (Tr. 880; Em. Ex. 26.) Similarly, in the 2012-2013 year, students in the football program declared 22 distinct majors. (Tr. 882; Em. Ex. 27.) Recent Northwestern graduates who received athletic scholarships and participated on the football team have gone on to medical school, law school, and careers in engineering. (Tr. 882-883, 1216.)

c. *Personal Development Programs*

There are three categories of personal development programs offered by the Athletic Department—P.R.I.D.E. Program, community relations, and NU for Life. (Tr. 811-813, 884.) Each of these experiences help develop the student-athlete for life after graduation. (Tr. 813.)

(i) *P.R.I.D.E. Program*

P.R.I.D.E. is an acronym for perseverance, responsibility, integrity, dedication, and education—all words selected by the student-athletes at Northwestern. (Tr. 884.) The mission of the P.R.I.D.E. program is to help student-athletes find personal success through service to the campus and the community while enhancing leadership skills, celebrating diversity, and promoting student-athlete welfare through meaningful programming. (Tr. 885; Em. Ex. 28.) The P.R.I.D.E. program is made up of the student-athlete advisory committee (“SAAC”), the P.U.R.P.L.E. peer mentor program, the First Year Experience program, the Engage program, the P.R.I.D.E. program speaker series, and the P.R.I.D.E. challenge. (Tr. 886; Em. Ex. 28.)

The SAAC is a student-run leadership group of student-athletes, with one to two members from each team, who are the voice of the student-athletes in the Athletic Department. (Tr. 886-87.) Importantly, the Athletic Department looks to the committee to obtain input from student-athletes on a wide array of topics, from exit interview questions to the types of uniforms purchased. (Tr. 887.) In addition, the SAAC allows student-athletes to develop relationships with each other and within the university community as a whole. (Tr. 888.) Engage is a program that is similar to the SAAC but is focused on minority student-athletes. (Tr. 893-94.)

The P.U.R.P.L.E. peer mentoring program stands for “peers urging responsible practices through leadership and education.” (Tr. 889.) Any student-athlete is eligible to participate, and there is at least one student-athlete from each team, including the football team, in the P.U.R.P.L.E. program. (Tr. 889.) Participants are trained in how to be mentors within their team. (Id.) The P.U.R.P.L.E. program is unique because it gives student-athletes an opportunity to act as mentors to other student-athletes. (Tr. 890.) This allows student-athletes to build their confidence and develop inter-personal and communication skills. (Id.)

The Freshman Year Experience (“FYE”) is an opportunity for the Athletic Department to provide guidance beyond core advising and help freshmen understand a host of social topics, from safety and wellness issues, to alcohol issues, to budgeting, to academic integrity. (Tr. 893.) FYE is mandatory and includes nine hour-long programs that span the academic year. (Tr. 893.)

The P.R.I.D.E. challenge is a competition within Northwestern’s 19 athletic programs. (Tr. 895.) Teams compete for points in five component areas, such as highest GPA and community service related activities. (Tr. 895.) At the conclusion of the academic year, a PRIDE challenge winner is named. (Tr. 895.) The “Willie Award” is given once a year to one male and one female student-athlete who maintains academic excellence in the classroom;

displays athletic excellence and sportsmanship in competition; participates in community outreach; shows a commitment to personal and professional development; provides leadership within the athletic community through participation in either S.A.A.C., P.U.R.P.L.E., or team leadership; and actively supports peers throughout the Northwestern community. (Tr. 896-97.) For the 2012-2013 year, a student-athlete in the football program received the Willie Award. (Tr. 897.)

(ii) Community Relations

Student-athletes are encouraged by the Northwestern Athletics Department and their coaches to become actively involved in community outreach. (Tr. 898.) Performing approximately 5,000 hours of community service annually, student-athletes at Northwestern have achieved great success in their community relations efforts. (Tr. 898-899.) The community relations program offers a host of activities, including trips to community hospitals and local elementary schools. (Tr. 898-899.) Recently, one softball student-athlete decided to address bullying and partnered with a parent in the community to create a new program entitled “ROAR,” which stands for reach out and reinforce respect. (Tr. 898-900.)

(iii) NU for Life

To prepare student-athletes for life after graduation, Northwestern offers a program entitled NU for Life. (Tr. 900-901; Emp. Ex. 30.) NU for Life engages student-athletes in professional development opportunities and experiences that help them prepare for their careers. (Tr. 901-902.) Through the NU for Life program, student-athletes explore their passions and identify potential careers. (Id.) Student-athletes also learn networking skills and exercise those skills in networking events with Northwestern alumni and others who are interested in hiring Northwestern student-athletes. (Id.)

NU for Life is a four-year program, with specific components each year. (Tr. 904.) Freshmen participate in NU for Life through the Freshman Year Experience, discussed above. (Id.) Sophomores participate in NU for Life in a one day program about exploration in which the student-athlete is asked to think critically about career possibilities. (Tr. 905-906.) During the sophomore year, student-athletes also begin a mentoring relationship with a former student-athlete. (Id.) At the end of the sophomore seminar, students are challenged to participate in three informational interviews. (Tr. 907.) Junior year is known as the immersion year and includes a one-day Wildcat professional excellence program, which involves 30-35 employers who come to Northwestern for speed-interviewing sessions, followed by a keynote speaker and dinner, and another networking opportunity session. (Tr. 908-909.) Seniors participate in a wrap-up program, in which student-athletes think ahead to their post-college plans, and the NU for Life program helps students obtain the information they need to follow through with those plans. (Tr. 910.) Currently, NU for Life offers 25 internships to student-athletes and has placed student-athletes in internships with top companies, such as Leo Burnett, William Blair, Abbott Labs, Ariel Investments and Deloitte. (Tr. 910-912; Em. Ex. 30.)

D. EXTERNAL REGULATORY REQUIREMENTS AND INTERNAL RULES GOVERNING NORTHWESTERN'S INTERCOLLEGIATE ATHLETICS

1. The NCAA

Established in 1906, the NCAA is a nonprofit association that governs intercollegiate athletic activities for more than 1000 colleges, universities, conferences and organizations in the United States and Canada. (Jt. Ex. 22.) The NCAA regulates the payment of educational expenses for student-athletes; student-athlete eligibility; student-athlete recruiting; and season practice and playing activities, among other activities. (Id.) Approximately 340 schools,

including Northwestern, compete in the NCAA's Division I category of competition.¹⁵ Approximately 126 of those 340 schools are in the FBS. Id. Northwestern is one of 17 private universities in the FBS.¹⁶ As a member of the NCAA, Northwestern is subject to the NCAA's rules, policies, and requirements. (Jt. Ex. 22.)

2. The Big Ten Conference

The Big Ten Conference is a Division I collegiate athletic conference whose teams compete exclusively in the NCAA.¹⁷ The Big Ten Conference is the oldest Division I collegiate athletic conference in the United States. Id. The Big Ten Conference's football teams compete in the FBS, formerly known as Division I-A, the highest level of NCAA competition in football. Id.

The Big Ten Conference includes 12 member institutions located primarily in the Midwestern United States. (Jt. Ex. 20 at NU 000250.) Its current member institutions are: University of Illinois at Urbana-Champaign; Indiana University; University of Iowa; University of Michigan; Michigan State University; University of Minnesota; University of Nebraska-Lincoln; Northwestern University; The Ohio State University; Pennsylvania State University; Purdue University; and, University of Wisconsin-Madison. (Id.) Beginning in 2014, two additional institutions—University of Maryland and Rutgers—will also join the Big Ten Conference. (Id.) Northwestern is the only private institution in the Big Ten Conference and has the smallest undergraduate enrollment of all 12 member institutions.

¹⁵ See THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.com> (last visited Mar. 7, 2014).

¹⁶ The 16 other private schools are Stanford University, Vanderbilt University, Duke University, Boston College, University of Southern California, Texas Christian University, University of Miami, University of Notre Dame, Brigham Young University, Wake Forest University, Tulane University, Syracuse University, Rice University, Baylor University, Southern Methodist University, and University of Tulsa.

¹⁷ See THE BIG 10, <http://www.bigten.org> (last visited Mar. 7, 2014).

3. Compliance With NCAA Regulations

As a member of the NCAA, Northwestern is subject to the NCAA's rules, policies, and requirements. It is the responsibility of Northwestern, its Athletics Department staff and student-athletes to comply with NCAA regulations. (Tr. 478.) Northwestern does not have any singular control over the NCAA regulations, or any authority to deviate from the NCAA regulations, and it could be subject to penalties for non-compliance. (Tr. 478-79.) Possible penalties for non-compliance with NCAA regulations include a reduction in the number of athletic scholarships the University could award, fines, public reprimand, suspension of coaches, personnel limitations, post-season prohibitions for particular sports, cancellation of a season and even loss of NCAA membership. (Tr. 478-80.) Loss of NCAA membership, would preclude Northwestern from competing in Big Ten Conference games. (*Id.*) Loss of Big Ten membership would cause Northwestern to lose revenue sharing from ticket sales and television contracts. (Tr. 480.)

a. *NCAA Regulates Recruiting And Scholarships*

NCAA Bylaw 13 provides detailed regulations regarding the recruitment of prospective student-athletes, including restrictions on the payment of benefits to entice enrollment and communications with prospective student-athletes. (Tr. 461-62, 480-82, Jt. Ex. 22 at NU 000599-659.) The NCAA regulations allow Northwestern to offer athletic scholarships to prospective student-athletes. (Tr. 483.) Division I football programs are permitted to have 25 annual signees and a total of 85 scholarship players on the football team at any given time throughout the five classes of student-athletes—from freshmen to fifth-year seniors. (Tr. 1030.)

Northwestern is allowed to offer athletic scholarships to prospective student-athletes on August 1 of the summer prior to the start of their senior year of high school. (Tr. 483.) After the offer is made, the next official contact with prospective student-athletes is in February of their

senior year in high school, when the National Letter of Intent (“NLOI”) signing period begins for football. (Tr. 483.) The NCAA regulates the content of NLOIs to prospective student-athletes, which must be accompanied by the tender (or offer) of a scholarship. (Tr. 488.) The Big Ten Conference dictates the language of the scholarship tender. (Tr. 488.)

A student-athlete who signs an NLOI and tender has a contractual promise for a four-year scholarship at the University. (Tr. 488, 490, 491-92, 733; Em. Ex. 5 at NU 000969.) Northwestern offers four-year scholarships to all student-athletes, not just its football student-athletes. (Tr. 491.) Once the NLOI is signed, Northwestern is obligated to honor its promise of a four-year scholarship unless the student-athlete fails to meet NCAA eligibility requirements or to gain admission to the University. (Tr. 488-89.) Prospective student-athletes, however, have the option of unilaterally terminating the NLOI even after they sign it. (Tr. 489.) Although NCAA regulations do not require schools to provide four-year scholarships, Northwestern does so because it is committed to the education of its student-athletes. (Tr. 491.)

b. *Regulations Regarding Academics Of Student-Athletes*

The NCAA imposes academic standards for student-athlete eligibility to compete in intercollegiate sports. (Tr. 495; Jt. Ex. 22 at NU 000661-715.) Bylaw 14 of the NCAA Manual provides the floor for student athletes, but Northwestern maintains higher standards than the NCAA minimums. (Tr. 496; Jt. Ex. 22 at NU 000661-715.) The NCAA regulations cover first-year or freshman eligibility to practice, play and receive financial aid; ongoing academic eligibility of upperclassmen based upon the student-athlete’s grade point average and academic progressions; and the eligibility of transfer students, who are required to complete a year-in-residence at the receiving institution before they can compete. (Tr. 497-501.)

c. NCAA Regulates Amateurism, Extra Benefits And Playing Time

The NCAA regulates amateurism of student-athletes in NCAA Bylaw 12. (Tr. 473-74; Jt. Ex. 22 at NU 000581-597.) In order for an individual to participate in intercollegiate athletics, he has to be an amateur in his sport. (Tr. 472.) Student-athletes who lose their amateur status cannot play football at Northwestern, or any NCAA member institution. (Tr. 475.) NCAA's Principle of Amateurism states:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student athletes should be protected from exploitation by professional and commercial enterprises.

(Jt. Ex. 22 at NU 000528.) Amateur athletes cannot receive any payment for their participation in athletics, and can lose their amateur status by receiving payment for their athletic participation, signing a contract with an agent, entering a professional draft, playing on a professional team, or making an agreement for future compensation for their athletic performance. (Tr. 472-74.)

The NCAA also regulates awards, benefits, and expenses for enrolled student-athletes. (Tr. 502; Jt. Ex. 22 at NU 000741-752.) Student-athletes cannot receive or be offered *extra* benefits under NCAA regulations, such as free meals beyond what is covered by "board" in a scholarship, free services from a local business; gifts valued above the NCAA limit, sub-market rental agreements for housing, or payment of premiums on health insurance after eligibility expires. (Tr. 477-78, 502-508; Jt. Ex. 22.) The NCAA regulations detail the different types of awards student-athletes can receive and set value limits on the gifts the institution may give to its student-athletes. (Tr. 505.) Northwestern does not have any discretion to give more awards, benefits, extra benefits, or expenses than NCAA regulations allow. (Tr. 508.)

The NCAA also regulates in great detail the amount of time that student-athletes spend on activities related to football, known as Countable Athletically Related Activities (CARA). (Tr. 508-09, Jt. Ex. 22 at NU 000753.) An activity directed by a coach or supervised by a coach that has an athletic purpose is considered a CARA activity. (Tr. 509.) Administrative activities, such as academic meetings and compliance meetings, travel, rehabilitation time, medical care from training staff, eating meals, and voluntary workouts are not CARA under the regulations. (Tr. 510-11.) However, the NCAA also regulates and limits voluntary workouts by student-athletes. (Tr. 511.)

During the playing season for football, the NCAA limits CARA activities to 20 hours per week and four hours per day. (Tr. 513.) The NCAA also requires that football student-athletes be given one day off during the week. (*Id.*) During the non-playing season, the NCAA allows football student-athletes eight hours of CARA per week, but limits the activities to a maximum of four hours per day and requires two days off per week. (Tr. 515-16, 550.) During the spring practice season, CARA activities are limited to 20 hours per week and teams are limited to 15 practices. (Tr. 516.) The NCAA also mandates that schools provide nine discretionary weeks a year where no CARA can take place. (Tr. 517-18.)

The CARA regulations, with which Northwestern complies, are consistent with the University's understanding that athletics is just a portion of the entire student-athlete experience, which also includes academic and social experiences. (Tr. 524-525.) To that end, student-athletes are educated on CARA and voluntary athletic-related activity and instructed to report non-compliance with CARA to Northwestern's compliance office. (Tr. 518.)

4. Title IX

Title IX of the Education Amendments of 1972 ("Title IX") is a federal law that mandates that any university receiving federal funding must provide equal opportunities to male

and female student-athletes. (Tr. 916.) There are 11 areas under Title IX in which gender equality must be met, including recruiting, facilities, locker rooms, travel, per diem, tutors, coaching, equipment and supplies. (Tr. 918-919.) Should student-athletes of one gender be afforded the ability to collectively bargain, the balance in those areas would be offset, and Title IX compliance would be in jeopardy. (Tr. 927.)

Northwestern complies with Title IX, *inter alia*, through a practice called “roster management,” under which there are numerical participant maximums set for each of the varsity teams designed to maintain overall gender proportionality. (Tr. 918, 928.) For example, the football roster is presently capped at 112 student-athletes. (Tr. 918.)

5. Northwestern University Athletics Department Operates At A Loss

As part of its enforcement of Title IX, the U.S. Department of Education requires federally-funded institutions to file an annual Equity in Athletics Disclosure Act (“EADA”) report. (Em. Ex. 10; Em. Ex 11.) Steven Green, Northwestern’s Deputy Director of Athletics for Internal Affairs, oversees the University’s filing of the EADA each year. (Tr. 679.) Green’s staff compiles information from all 19 varsity sports at Northwestern, including eight men’s and 11 women’s programs, and completes the report per the guidance in the “user’s guide” published through the EADA website. (Tr. 650-652; Emp. Ex. 10.)

The EADA report lists the revenues and expenses of the Athletic Department. (Tr. 650; Em. Ex.11 at NU 001957-1966.) For the 2012-2013 reporting period, expenses included over \$16 million in athletically-related student aid, \$945,000 in recruiting expenses, and \$19.6 million in total unallocated expenses, which are expenses related to administration, media, marketing, and sports medicine that are not attributable to any particular program. (Tr. 656, 671-672; Em. Ex. 11 at NU 001916-1962.) These expenses are in addition to the expenses allocated by gender and sport. (Tr. 671-672.) For example, football games create an additional \$3.4 million in

expenses. (Tr. 667-668; Em. Ex. 11 at NU 001961.) Also, these expenses do not include *all* of the expenses associated with Northwestern’s football program. For instance, the EADA does not include the expenses associated with the maintenance of the football stadium, locker rooms, and weight room. (Tr. 672; Em. Ex. 11.)

The EADA requires that the revenues equate to expenses as an accounting matter. (Tr. 651-652; Em. Ex. 8; Em. Ex. 11.) As a financial matter, however, the expenses do not equate to the revenues generated—in fact, there is a significant revenue shortfall on an annual basis. (Tr. 652-653.) Therefore, Northwestern subsidizes its Athletic Department to make up the deficit. (Tr. 651-653.) For example, in the 2012-2013 year, Northwestern subsidized its Athletic Department by \$12.7 million. (Tr. 676-677; Em. Ex. 11.) Northwestern subsidizes its Athletic Department because it has a commitment to offer a world-class experience, which includes a world-class athletic program in addition to premier academics. (Tr. 677.)

6. Internal Rules And Regulations

The Athletics Department publishes its own handbook—the Student-Athlete Handbook—which is designed to reinforce for the student-athletes the regulatory mandates that apply to student-athletes, as well as to notify the student-athletes of additional rules, regulations and programmatic offerings. (Jt. Ex. 160 (noting that the guide is “a great way to learn about the many resources available to...Northwestern student-athlete[s].”).) In his welcome statement to all student-athletes, which serves as the introduction to the Student-Athlete Handbook, Dr. Phillips writes:

Northwestern has a long tradition of excellence in both academics and athletics....Being a student-athlete at the Division I level is very challenging, but rewarding as well. In order to achieve both athletic and academic success, you will have to work hard, be disciplined and learn to manage your time wisely. This planner will assist you with all of these points.

(Jt. Ex. 16 at NU 00004.) The vast majority of the policies set forth in the Student-Athlete Handbook are similar to the rules of conduct for all University students; however, others relate specifically to being part of an intercollegiate team and the obligations associated with the regulatory regimes under which the athletic programs operate, such as the Big Ten and the NCAA regulations.

The football program also publishes its own team handbook, which contains a number of rules that parallel those contained in the student handbook, such as a policy on character. (Tr. 225, 1076, 1166-67, 1228, 1269-1270; Jt. Ex. 17 at NU 000176; Jt. Ex 19 at p. 16.) Student-athletes on the football team also must execute a number of NCAA and Big Ten compliance forms, including drug testing, image and likeness, and car ownership releases and forms. (Tr. 225, 1081-1084; Jt. Ex. 10.)

Discipline for violating these rules varies depending on the type of violation. In cases where the violation is minor, Coach Fitzgerald manages the violation within the team, with insight from the leadership council and Janna Blais if appropriate. (Tr. 1052-1053, 1091-1092.) In cases where the violation is egregious, the sports administrators—staff who are responsible for the administration of each individual varsity program—become involved. (Tr. 1052-1053, 1092.) Even in cases of egregious violations, it is not Northwestern’s practice to cancel a student-athlete’s scholarship or refuse to renew a scholarship. (Tr. 1053.) See also, supra, Section II.A.4.b.

Importantly, all students, including student-athletes, are also subject to University-wide rules and policies, including those set forth in the Student Handbook, as well as rules relating to undergraduate housing and participation in student-run activities. (Jt. Ex. 16; Jt. Ex. 19; Em. Ex. 32.) The Student Handbook and the Student Organization Handbook describe the University’s

expectations for the behavior and conduct of all undergraduate students and student groups (such as fraternities, affinity groups and student government), and outline the procedures to be followed when those expectations are not met. (Id.) These handbooks include academic conduct policies, a student code of conduct that promotes civility, respect and mature behavior, residence hall and housing policies, and general University policies, rules and regulations. (Id.) Should a student violate any of the University's policies, rules, or regulations, Northwestern retains the right to take appropriate legal and disciplinary action, including exclusion, suspension, probation, removal from University housing, warning and reprimands, fines, loss or restriction of privileges or activities, University or community service, educational requirements and restitution, among other sanctions. (Jt. Ex. 19 at 16-18; 56-60; Em. Ex. 32 at p. 40-41, 69-72.)

Similarly, Northwestern's students are required to progress academically in order to remain enrolled and to graduate with a major course of study. Consequently, students are also subject to academic controls, as set by each of the various colleges and programs at Northwestern. (Jt. Ex. 28 at NU 002408-2637.) These mandates relate to required coursework, standards for academic progression and class attendance, among others. Students who fail to maintain satisfactory academic progress may be subject to the revocation of financial aid. (Ex. 28 at NU 002388.) In addition to the formally outlined academic prerequisites, professors and faculty have the authority to control their classrooms as they see fit, consistent with overall University policy. (Tr. 214; Tr. 830-31.)

E. KAIN COLTER

Kain Colter, the sole Northwestern student-athlete called to testify by CAPA, freely admitted that he has "no beef" with the University. (Tr. 195.) Currently, Colter is a full-time undergraduate student and senior at the University scheduled to graduate in March of 2014, which is one full quarter ahead of a traditional four-year schedule. (Tr. 166, 210-211.) Colter

testified he wanted to attend a university that would enable him to graduate with a “good degree,” in addition to providing him the opportunity to participate in his sport of choice. Northwestern offered him just that, along with an athletic scholarship. (Tr. 236-237.) As a student at Northwestern, Colter excelled. Colter has a current cumulative GPA of 3.20 and expects that his GPA at graduation will be around a 3.10 or 3.20. (Tr. 166, 214.) Colter was named to the Academic All-Big Ten team (signifying academic success) for all three years in which he was eligible. (Tr. 294.) Colter testified that he “received a great education” at Northwestern, and recently told a radio show host that the moment of clarity for him with respect to the subject petition for representation came during a class discussion of the labor movement. (Tr. 209; Em. Ex. 1.)

Colter will graduate with a degree in psychology. (Tr. 57, 166.) In order to obtain that degree, Colter, like any other Northwestern student majoring in psychology, had to complete a series of courses that were predetermined by the Psychology Department. (Tr. 231; Jt. Ex. 28 at NU 002513-2514.) He maintained a full course load during his time at Northwestern and will have fulfilled all of the requirements for the psychology major at the time of his early graduation. (Tr. 206.) Notably, he enrolled in and completed Chemistry 101, Chemistry 102, and Chemistry 103, three of the more demanding classes offered within the Weinberg College of Arts and Sciences, and even earned an A in Organic Chemistry for one of the quarters. (Tr. 183-185, 215-216.) He also enrolled in and completed single variable calculus, statistical methods in psychology, accounting and business finance, and introduction to neuroscience. (Tr. 207-08.)

During the summers, Colter participated in various internships outside Northwestern. (Tr. 99, 172, 257.) Colter interned at Goldman Sachs and received course credit for the internship. (Tr. 256.) Although his internship conflicted with the start of the football practice

schedule, Northwestern accommodated Colter's football schedule so that he was able to participate fully in the internship. (Tr. 172.) Currently, Colter has an internship with "Game On!", a consulting firm that includes athletes among its clients. (Tr. 268.) Colter recently underwent ankle surgery after an MRI revealed an injury. (Tr. 278-80.) Colter selected his preferred doctor, and Northwestern agreed to pay for both Colter's MRI and ankle surgery. (Id.)

Colter joined the Northwestern football team as a freshman in 2010 and was a member of the team in each of his four years as a student. (Tr. 57.) Colter played quarterback, wide receiver, and running back. (Id.) As a member of the football team, Colter participated in mandatory football practice, which, pursuant to NCAA rules, did not exceed 20 hours per week. (Tr. 119-120, 508-516.) In addition to mandatory football practice, Colter voluntarily devoted personal time to non-mandatory football activities, such as workouts, running, conditioning, and player-run practices. (Tr. 66-67.) Colter explained that he engaged in these voluntary activities because he wanted to excel on the football field, and acknowledged that he encouraged his teammates to do the same. (Tr. 86, 104-105.) Colter was also a captain of the team in his junior and senior years and applied for and was elected to the leadership council. (Tr. 58-59.)

Colter received an athletic scholarship during all four years he was enrolled as a student at Northwestern. (Tr. 189, 246; Jt. Ex. 11.) For his first two seasons, his aid was granted to him on a one-year renewable basis; thereafter, he was granted aid for two years, as soon as the NCAA authorized multi-year tenders. (Jt. Ex. 11.) Colter's aid was never reduced as a result of his injuries. (Tr. 242-43.) Colter has exhausted his eligibility to play football for the University, and currently is living in Florida, training for an NFL career, with hopes of becoming a professional football player. (Tr. 269-271, 277.) Northwestern allows Colter to "Skype" into his classes while he trains in Florida. (Tr. 270.) At present, Colter does not participate in any

Northwestern football activities. (Tr. 271-272.) However, even though Colter's eligibility is over and even though he does not practice with the football team and lives out of state, Colter continues to receive his full athletic scholarship. (Tr. 239, 271.)

F. COLLEGE ATHLETES PLAYERS ASSOCIATION

CAPA was established in January 2014. (Jt. Ex. 2.) Ramogi Huma ("Huma") is the Founder and President of CAPA. (Jt. Ex. 2.) He established CAPA with Colter and Luke Bonner. (Jt. Ex. 2.) CAPA currently does not have a constitution or by-laws. (Tr. 34.)

CAPA's membership is open only to scholarship athletes who participate in the NCAA Football Bowl Subdivision ("FBS") and Division I men's basketball who share CAPA's objectives, subject to such membership qualifications as may be set by the future constitution and/or bylaws of CAPA. (Tr. 283-284; Jt. Ex. 1.) As such, non-scholarship student-athletes (a.k.a. walk-ons) who participate in the NCAA Football Bowl Subdivision and Division I men's basketball are not eligible for CAPA membership. (Jt. Ex. 1.) In addition, all student-athletes who attend a Division I-Non-FBS school, or a Division II school, or a Division III school are precluded from joining CAPA. (Tr. 284-284.) Also, female student-athletes are not permitted to join CAPA. (Tr. 284-285.)

CAPA's expressed objectives are two-fold. (Jt. Ex. 1.) First, CAPA aims to "become the bargaining representative of scholarship athletes who participate in Football Bowl Subdivision and Division I men's basketball, and to establish before the NLRB that college athletes are employees within the meaning of the NLRA." (Jt. Ex. 2.) Second, CAPA aims to establish an organization that will represent and advocate for college athletes in collective bargaining with respect to health and safety, financial support, and other terms and conditions of employment. (Jt. Ex. 2.) As Colter testified, CAPA aims to help its members bargain "for their protection, their rights, and everything that goes about the football college athlete experience." (Tr. 193.)

CAPA outlines five specific goals on its newly created website. (Jt. Ex. 6.) Some of those goals, however, cannot be achieved through bargaining with Northwestern. (Tr. 539-544; Jt. Ex. 6.) For example, CAPA advocates for an increase in the number of athletic scholarships and compensation for student-athletes for commercial sponsorships. (Jt. Ex. 6.) However, the NCAA regulates the amount of grants-in-aid and prohibits student-athletes from receiving payment for their athletic ability, among other things. (Jt. Ex. 22; Tr. 474.) As a member of the NCAA, Northwestern must adhere to those regulations. (Tr. 478-479.) Similarly, CAPA seeks additional funding for health insurance coverage for sports-related medical expenses for current and former players. (Jt. Ex. 6.) Yet, again, providing funds beyond what is allowed under NCAA regulations is not a subject over which Northwestern has any control.¹⁸ Other of CAPA goals, for example, seeking to improve graduation rates and providing due process to avoid arbitrary revocation of scholarships, simply are not relevant here. (Jt. Ex. 6.) Northwestern has the highest graduation rate among FSB schools (Tr. 500-501; Tr. 912-913; Tr. 1046), and the record is clear that Northwestern has revoked only two football scholarships in the last nine years, both of which involved egregious violations of University, not football program, policy. (Tr. 739-741, 1045; Jt. Ex. 16 at NU 000028.)

¹⁸ Like all Northwestern students, student-athletes must have primary health insurance at the time of enrollment. (Tr. 803-804). Northwestern does, however, provide secondary medical coverage to its student-athletes for athletic-related injuries. (Tr. 804.) For example, if a student-athlete is injured in the course of participating in his or her varsity sport and the primary insurer does not cover the care that the student-athlete needs, Northwestern acts as the secondary insurer. (Tr. 804.) The secondary coverage period begins as soon as the student-athlete is eligible to compete and continues until at least one year post-eligibility. (Tr. 804.) There also have been circumstances in which Northwestern has provided coverage beyond the one-year post-eligibility minimum. (Tr. 278-80, 805.)

III. ARGUMENT

A. THE ACT SHOULD NOT BE APPLIED TO THE ACADEMIC RELATIONSHIP BETWEEN STUDENT-ATHLETES AND UNIVERSITIES

Academic settings differ vastly from industrial settings in structure and purpose, making the application of collective bargaining rights to student-athletes inappropriate and incompatible with the purpose of the Act. Not surprisingly, both the Board and Supreme Court have recognized that the extension of collective bargaining rights to students is inconsistent with national labor policy and ill-suited to decision-making in the academic world. See Brown University, 342 NLRB 483, 487 (2004); NLRB v. Yeshiva University, 444 U.S. 672, 680-81 (1980) (noting that “principles developed for use in the industrial setting cannot be imposed blindly on the academic world”). The Act is fundamentally designed to cover economic relationships between employers and employees. Brown University, 342 NLRB at 488. A central policy of the Act is that the protection of employees to organize and bargain collectively restores the equality of bargaining power between employers and employees and guards against the disruptive strikes, industrial strife, and unrest that preceded the Act and interrupted commerce. Id. at 487-88. Thus, under the Act, “[t]he vision of a fundamentally economic relationship between employers and employees is inescapable.” Id. at 488 (emphasis in original.)

The predominantly academic relationship between student-athletes and universities is a far cry from the employer-employee economic relationship that motivated Congress to pass the Act. See id. at 487. “The ‘business’ of a university is education....” Yeshiva, 444 U.S. at 688. Rather than economic concerns, universities are concerned with providing an atmosphere that is most conducive to speculation, experiment, development and creation. See Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); NLRB v. Lewis Univ., 765

F.2d 616, 625-26 (7th Cir. 1985).¹⁹ Universities are the training grounds for a large number of our Nation’s leaders. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

While the employee-employer relationship is largely predicated on conflicting interests over economic issues, the student-educator relationship is predicated upon mutual interests in the development of the student’s character and advancement of the student’s education. Brown University, 342 NLRB at 489, 490 (citing St. Clare’s Hosp. and Health Ctr., 229 NLRB 1000, 1002 (1977)). The equalization of bargaining power between employer and employee, a goal of collective bargaining, is another concept foreign to the hierarchical structure of higher education. Id. at 488, 490 (“A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees”); Yeshiva, 444 U.S. at 680 (noting “the authority structure of a university does not fit neatly within [the Act]” and “the Act was intended to accommodate the type of management-employee relations that prevail in pyramidal hierarchies of private industry”).

B. THE BOARD MUST EXAMINE WHETHER THE FOOTBALL STUDENT-ATHLETES HAVE PRIMARILY AN EDUCATIONAL OR ECONOMIC RELATIONSHIP WITH THE UNIVERSITY

Given the Act’s fundamental concern with economic relationships, the Board has refused to extend the Act’s coverage to students who primarily have an educational, not economic, relationship with their university. Brown University, 342 NLRB at 487. While the definition of “employee” under Section 2(3) of the Act is admittedly broad, the Board has stated that the broad language cannot be viewed in isolation from the underlying fundamental premise of the

¹⁹ Athletics are an important and essential component of any education program and provide important health and social benefits to students. See U.S. Government Accountability Office, *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics*, No. Gao-10-519, at 1 (June 2010), available at <http://www.gao.gov/assets/310/305781.pdf>.

Act. *Id.* at 488. Namely, the Act is designed to cover economic relationships. *Id.* Accordingly, the appropriate test to apply to determine whether football student-athletes are “employees” under the Act is to determine whether their relationship with the University is primarily educational or economic. *Id.* at 487. Importantly, recognizing that primarily academic relationships are ill-suited for coverage by the Act, the Board has never treated *undergraduate* scholarship recipients as employees under the Act.

Under this test, the Board has a longstanding policy of declining to extend collective bargaining rights to graduate students under Section 2(3) of the Act. *Brown University*, 342 NLRB at 491 (collecting cases). In *Brown University*, the Board determined that graduate student assistants did not have a fundamentally economic relationship with the university and thus were primarily students and not “employees” under the Act, even though the students performed teaching duties and research for the university and received compensation from the university in the form of stipends or grants and tuition remission. *Id.* at 488-89. Rejecting a wooden application of the common law master-servant test, the Board noted that the concerns raised in the case “forcefully illustrate[d] the problem of attempting to force the student-university relationship into the traditional employer-employee framework.” *Id.* at 487, 490 n.27. Beyond exploring the role that teaching played in their graduate educations, the Board emphasized that the individuals at issue were *students* who were admitted to the university, not hired by it to serve as graduate teaching or research assistants. *Id.* The Board emphasized “the simple, undisputed fact” that all the petitioned-for individuals had to be enrolled students to become and remain graduate assistants. *Id.* at 488. The Board was also influenced in its decision by the fact that the continued receipt of a stipend and tuition remission depended on graduate assistants’ *continued enrollment as students*, and was not dependent upon the nature or

value of the teaching or research services. Id. at 487, 492. Finally, the Board also emphasized that the money received by the students was the same regardless of whether the student had any teaching duties. Id. at 489. Therefore, the Board concluded the money given to students by the university was not consideration for work, but rather financial aid for education. Id. at 488. Just as critical, the Board concluded that even if the graduate assistants could be considered statutory employees, according them collective bargaining rights would not effectuate the purposes of the Act because their status as students took precedence over any arguable economic relationship. Id. at 492.

Similarly, in Leland Stanford, the Board earlier concluded that research assistants were not employees within the meaning of the Act. 214 NLRB 621, 623 (1974). In reaching its decision, the Board first determined that the payments made to research assistants were stipends or grants to permit them to pursue advanced degrees and were not based on the skill or function of the particular individual, the hours spent on research, or the nature of the research performed. Id. at 621, 622. Moreover, the Board emphasized that the payments to research assistants (like athletic scholarships) were tax exempt income. Id. at 622. Research assistants (like student-athletes) also did not share in the fringe benefits university employees received and instead shared in the privileges enjoyed by other students, such as student health care, insurance and student housing. Id.; see also Adelphi University, 195 NLRB 639, 640 (1972) (finding that even though graduate teaching and research assistants had some faculty-related functions, they were “primarily students” and should therefore not be included in a faculty bargaining unit).

Accordingly, the appropriate standard (and the standard overwhelmingly applied by the Board) in determining whether students, such as the football student-athletes, are “employees”

under Section 2(3) of the Act, requires the Regional Director to consider the student-athlete's education relationship with the University in context.

**C. USE OF THE “RIGHT-OF-CONTROL” TEST IN *NEW YORK UNIVERSITY* WAS
ERRONEOUS AND HAS SINCE BEEN OVERRULED**

As the Board recognized in Brown University, New York University, 332 NLRB 1205 (2000) (“NYU”), was wrongly decided and an aberration from decades of Board precedent and therefore cannot provide the standard for this case. In NYU, the Board concluded that the graduate student assistants at issue were employees under Section 2(3) of the Act. 332 NLRB at 1205. In an abrupt departure from its previous decisions, the Board concluded that the students fell within the purview of the Act because they had a conventional master-servant relationship with the university. Id. at 1205-06. Specifically, the NYU Board improperly applied the common law master-servant relationship as existing broadly--“when a servant performs services for another, under the other’s control or right of control, and in return for payment”—to the unique context of the academic setting. Id. at 1206.

Given NYU’s application of a master-servant test that the Board had never previously applied with respect to enrolled students in a university setting, it is not surprising that just four years later in Brown University the Board overruled NYU and expressly stated it was returning to its pre-NYU precedent. 342 NLRB at 487. Indeed, the Board noted in Brown University that the NYU decision had wrongly reversed more than 25 years of Board precedent and was contrary to Supreme Court and Court of Appeals precedent, because it read Section 2(3) out of context. Id. at 483, 491-92. As the Board explained, even assuming *arguendo* that students are employees under a common law definition, “it does not follow that they are employees within the meaning of the Act.” Id. at 491. Rather, the issue of employee status under the Act turns on whether Congress intended to cover the individual in question and cannot be purely decided on

the basis of older common law concepts. *Id.* As the Board reiterated in Brown University, the appropriate test to apply to the student-athletes here is to determine whether they have primarily an educational or economic relationship with the University.

D. APPLICATION OF BROWN UNIVERSITY TEST

1. Student-Athletes In Northwestern's Football Program Who Receive Athletic Scholarships Have A Predominantly Academic Rather Than An Economic Relationship With The University

Northwestern's relationship with its student-athletes, as with all of its students, is primarily educational and lacks the inherent tension characteristic of employer-employee relations. Both Northwestern and the student aim for student growth intellectually and personally; both aim for the student to perform well in his academic and co-curricular activities; both aim for the student to graduate; both aim for the student thereafter to obtain employment and/or pursue further education. Brown University, 342 NLRB at 489, 490 (citing St. Clare's Hosp. and Health Ctr., 229 NLRB 1000, 1002 (1977)). Indeed, Northwestern University stresses these very goals, coupled with student testimonials, in its marketing materials. (Em. Ex. 31, *in passim* ("We owe it to our students *to be obsessed with their experience*, both inside the classroom and also where so much of their education takes place—in the residence halls and at the student center, on the stages and on the playing fields.") (emphasis added)). As a result of this unique relationship between student and educator, common law agency principles cannot be forced onto the enrolled student who engages in voluntary co-curricular activities.

From the very beginning of the high school recruiting process, the signing of national letters of intent and tenders of athletic scholarships, from the practice to the playing field, and throughout the student-athlete's enrollment at Northwestern, a strong emphasis is placed on academic achievement. Like the graduate assistants in Brown University, student-athletes are

admitted into, not hired by, Northwestern. Although the football program becomes interested in potential student-athletes based on their football playing skills, Northwestern's Admissions Department approves the student-athletes who receive athletic scholarships, and the student-athletes must satisfy the University's rigorous admission standards before they are offered a scholarship. (Tr. 1186-1187, 1190-1191.) In fact, Northwestern does not even recruit student-athletes for its football program unless a determination is first made, in a joint process that includes both the Athletic Department and Admissions Office, that a particular candidate not only meets the University's admissions standards but also will be able to successfully graduate from the University. (Tr. 1032-1033.) The Admissions Office makes the final decision on whether a particular prospect for a football scholarship satisfies Northwestern's multi-factor admissions standards. In this process, it can and has vetoed individual prospects based on a determination that the candidate will be unable to succeed academically at the University. (Tr. 1034.)

Northwestern football players are student-athletes in the truest sense of that term. They attend Northwestern to obtain an academic degree, which is reflected in the fact that Northwestern consistently has one of if not the highest graduation rates in the country (97%) for its football student-athletes among NCAA Division I FBS football teams. (Tr. 912-913.) Northwestern's stated philosophy, which is borne out by the various academic and career development programs it provides to its student-athletes, is that varsity athletics, like the hundreds of other extra-curricular programs it offers, are part and parcel of the overall Northwestern educational experience. (Jt. Ex. 21; Tr. 805, 807-808.)

Head Coach Fitzgerald adheres to this philosophy and emphasizes the importance of academic achievement from the beginning of the recruiting process, through the student-athlete's

football playing days, to the time the student-athlete ultimately graduates from the University. Coach Fitzgerald described himself, first and foremost, as an *educator*, whose goal is to instill life skills in the student-athletes on his team. (Tr. 1062-63.) His overall coaching philosophy has three prongs: to develop the student-athletes academically; to develop student-athletes socially; and to develop student-athletes to be the best they can be athletically. (Tr. 1021.) In carrying out that philosophy, Coach Fitzgerald's specific goals are to have 100 percent of the student-athletes on his team obtain a degree from Northwestern (a goal he comes very close to achieving); to prepare the student-athletes on his team for life after graduation; and to prepare them to be the very best they can be on the playing field and ultimately to win a national football championship. (Tr. 1023-24.) To assist the student-athletes in achieving their academic goals, class attendance is mandatory and satisfactory progress toward obtaining a degree is measured by a barometer of maintaining a 3.0 GPA (Tr. 1025), which is well above the minimum GPA required by the NCAA to allow for continued participation in intercollegiate athletics. Northwestern has built its athletic programs, football included, to promote the successful education of its student-athletes, academically and personally.

In his testimony, Coach Fitzgerald also provided examples of situations in which he has modified the football program to accommodate the academic needs of the student-athletes on his team, which were echoed by several of his former student-athletes. For example, when he first became Head Coach in 2006, the football team practiced in the afternoon, which created some class scheduling conflicts. (Tr. 1039-1040.) As a result, beginning in 2007, Coach Fitzgerald moved football practice to the morning, from 6:50 to 10:50 a.m., because fewer class scheduling conflicts occur during that time period. (Tr. 1039-1041.) Additionally, when student-athletes have 10:00 or 11:00 a.m. classes, the coaching staff allows those student-athletes to leave

practice early without penalty. (Tr. 1042.) One of Coach Fitzgerald's student-athletes testified that during spring season while he was competing for a starting position for the upcoming fall season, he had an engineering class that conflicted with spring practice times. (Tr. 1272-1273.) That student-athlete participated in practice with the rest of the team for 15 minutes every morning practice, and then left the field by 8:45 a.m. to attend his 9:00 a.m. class. (Tr. 1272-1273.) That student-athlete won a starting position that fall despite missing most of the team scheduled practices that spring. (Tr. 1273.) Also, student-athletes are allowed to study on the bus or plane when the team is traveling to away games, and in the hotel room the night before the game. (Tr. 1057; 1231, 1236-1237, 1253, 1275, 1276, 1308.) Coach Fitzgerald has allowed a player to miss practice for an entire week, and to miss an away game that weekend, without penalty, to allow the student-athlete to attend to his studies. (Tr. 1061.)

The proof of the emphasis that the University, the Athletic Department, Coach Fitzgerald and his staff place on the primary importance of academics in the football program is self-evident. Ninety seven percent of the student-athletes in Northwestern's football program successfully graduate from the University, and the student-athletes in the program have consistently maintained a cumulative GPA over 3.0 while working toward their degrees. (Tr. 912-913, 1025.) The Northwestern football program has won the AFCA award for having the highest graduation rate in the country a total of seven times. (Tr. 1046.) During the 2013 season, 36 Northwestern football student-athletes were named to the All-Big Ten Academic Team. (Tr. 1047.) During Coach Fitzgerald's eight-year tenure as Northwestern's Head Football Coach, student-athletes from the football program have gone into 35 different professions after graduation, including law, medicine, engineering, the NFL, information technology, wealth management, consulting, entrepreneurship, and secondary education. (Tr.

1050.) In addition, during that same period 64 student-athletes from the football program have entered graduate school after obtaining their undergraduate degrees. (Tr. 1050.) The evidence and record in this case irrefutably establish that, first and foremost, Northwestern is a premier educational institution and that the student-athletes who participate in its football program are predominantly students who are engaged in academic pursuits, as opposed to being in an economic or commercial relationship.

This conclusion is borne out by the many programs Northwestern's Athletic Department offers to assist student-athletes in their academic studies. (Tr. 809-813.) Those programs are not designed solely, or even primarily, for the purpose of maintaining the student-athlete's eligibility to play football, but instead have been implemented to ensure that the student-athletes will *excel* in academics and to prepare them for successful careers after graduation. These many programs within the Athletic Department include specialty advising, tutoring and study hall, NU for Life, P.R.I.D.E., community outreach, work-study, internships, and mentoring, all of which are designed to prepare Northwestern student-athletes for successful careers after graduation. They go far beyond simply ensuring that Northwestern student-athletes maintain a GPA sufficient to satisfy NCAA eligibility requirements.

The purpose of the financial aid received by student-athletes in Northwestern's football program is to fund their education. It is not compensation for playing football. Indeed, the facts in this case are even more compelling than those in Brown University in demonstrating that the scholarship funds received by Northwestern football student-athletes are for the exclusive purpose of providing aid to finance the student's education, as compared to the direct monetary stipends received by the graduate assistants in Brown University for their teaching and research activities. Like the graduate assistants in Brown University, the amount of financial assistance

received by Northwestern's football scholarship student-athletes is not dependent on whether the student-athlete is the starting quarterback or even plays in a game.²⁰

The amount of the athletic scholarship benefits received by Northwestern's student-athletes in the football program is the same, insofar as it covers tuition, room and board, books and fees, and is highly regulated by NCAA rules to ensure the total benefits provided do not exceed the cost of obtaining an education. (Jt. Ex. 22 at NU 000529; Tr. 729, 730, 742-743.) It is no way dependent on athletic prowess or performance. (Jt. Ex. 11; Tr. 241, 493.) In fact, once a four-year athletic scholarship is awarded, the student-athlete continues to receive the benefits of the scholarship even if he never plays in a game, provided that he complies with team and University rules of conduct, remains enrolled as a student, and is making satisfactory progress toward obtaining a degree. (Tr. 493-494, 739-740.)

Like the monetary stipend awards received by graduate assistants in Brown University, athletic scholarship benefits received by student-athletes in Northwestern's football program do not include any benefits, such as vacation and sick leave, retirement, or health insurance. (Tr. 250-251.) In sum, student-athletes in Northwestern's football program, like the graduate assistants in Brown University, are first and foremost students, and their status as members of the football team is contingent upon their continued enrollment as students and maintaining satisfactory progress toward obtaining an academic degree.

²⁰ While it is true that the student-athlete will lose the scholarship aid if he voluntarily quits the football team, that fact does not turn the aid into compensation for services rendered.

2. The Athletic Scholarship Benefits Received By Some, But Not All, Northwestern Football Student-Athletes Are Not Wages Or Compensation For Services Rendered

In NLRB v. Town & Country Electric, 516 U.S. 85, 90 (1995), the Supreme Court, in deciding whether company workers who were also paid union organizers were employees within the meaning of the Act, relied on the following dictionary definition of an “employee.”

The ordinary dictionary definition of “employee” includes any “person who works for another in return for *financial or other compensation*.” American Heritage Dictionary 604 (3d ed. 1992). See also Black’s Law Dictionary 525 (6th ed. 1990) (an employee is a “person in the service of another under *any contract of hire*, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed”). 516 U.S. at 90. (Emphasis added).

In WBAI Pacifica Foundation, 328 NLRB 1273 (1999), the Board adopted this definition and added:

Compensation, in connection with labor or services, is defined in economic terms in Black’s Law Dictionary (6th ed. 1990):

Remuneration for services rendered, whether in salary, fees, or commissions. 328 NLRB at 1274.

Here, the record reflects that there were 113 student-athletes listed at some point on Northwestern’s 2013-2014 football roster, 88 of whom received athletic scholarships.²¹ The remaining 25 players were walk-ons, some of whom received financial need scholarships and others who received no scholarship benefits whatsoever. (Em. Ex. 18.) The evidence is overwhelming that the athletic scholarship benefits received by some, but not all, of Northwestern’s football student-athletes are not wages or compensation for services rendered playing football. Instead, they are grants-in-aid to pay for the student-athletes’ education.

²¹ Per NCAA rules, the total at one time never exceeded 85, but mid-season replacements occur, and thus the total number over the course of the season was 88 athletic scholarship recipients, including seven graduate students. (Em. Ex. 16.)

As a general proposition, employees are usually paid by one of two means: (a) based on the number of hours worked; or (b) based on merit. Neither form of compensation for services exists between the student-athletes and the University. Neither the amount nor the longevity of the aid is dependent in any way upon the amount of time spent in football activities (hours worked) or how well the student-athlete performs those activities (merit). (Tr. 241; Jt. Ex. 11.) The benefits derived from an athletic scholarship are unrelated to the quantity or quality of the student-athletes' performance on the field. The amount of a full athletic scholarship remains constant regardless of the student-athlete's or the team's success. The benefits of the scholarship are paid as long as the student-athlete remains enrolled at the University and complies with team and University rules of conduct. The student-athlete may never set foot on the field during a game, due to lack of ability or injury, but he nonetheless continues to receive the scholarship benefits, currently for a minimum of four years, with an option for a fifth year if the student-athlete sits out of competition for one year as a redshirt.

Just as importantly, neither the University nor the student-athletes treat the financial aid as wages or income. (Tr. 247-248, 751, 788-89.) The University does not issue W-2's for athletic financial aid; nor are the student-athletes required to pay taxes on that aid. (Id.) The University does not remit the financial aid through payroll, and the student-athletes do not receive payroll checks with taxes or other withholdings deducted. (Tr. 247, 250.) Rather, tuition, room and board and fee payments are made directly from the financial aid accounts to the students' accounts. (Tr. 247-248, 649.) If the student-athlete lives off campus, he receives a lump sum payment, which is typically deposited into the student-athlete's personal bank account directly from financial aid, with no taxes or other withholdings deducted. (Tr. 145-146, 250.)

Likewise, student-athletes are not eligible to participate in any of the benefit plans offered by Northwestern to its employees. (Tr. 250-251.) For example, student-athletes do not participate in the employee retirement or life insurance plans. (Id.) On the contrary, student-athletes, like all Northwestern students, are required to carry primary health insurance at their own cost in order to be enrolled at Northwestern. (Tr. 803-804.) Similarly, student-athletes do not receive any paid time off benefits that employees may be entitled to receive. (Tr. 251.)

CAPA's attempt to characterize the scholarship benefits as compensation for services rendered for playing football collapses entirely when the student-athletes who receive athletic scholarships are compared to the walk-on student athletes who comprise almost 25 percent of the football roster at any given time. (Tr. 1035.) It is clear that the walk-ons cannot by any stretch of the imagination be considered employees within the meaning of the Act since they are exclusively students who voluntarily choose to play varsity football for the love of the game with no expectation that they will be remunerated for their services. See WBAI Pacifica Foundation, 328 NLRB 1273 (1999) (unpaid staff who received no compensation for their services are not employees within the meaning of Section 2(3) of the Act). Although some of the walk-ons receive need-based financial aid, that aid has absolutely nothing to do with their participation in the football program, and other walk-ons receive no financial assistance whatsoever from the University. (Tr. 1036.) The evidence clearly establishes that walk-ons are treated no differently in any respect from scholarship student-athletes on Northwestern's football team. (Tr. 1036, 1222, 1228.) It defies logic to conclude that some members of the Northwestern football team are pure volunteers, while others bearing the same responsibilities academically and to the team are employees compensated for their services.

If athletic scholarship benefits were found to be compensation for playing football, the Northwestern scholarship student-athletes on the football team in fact would be disqualified from playing NCAA Division I FBS football since NCAA rules prohibit collegiate players from receiving compensation for playing football, and they would be considered “professional” players as opposed to amateurs. (Jt. Ex. 22 at NU 000528, NU 000581-598; Tr. 472-476.)

Moreover, if the Board were to find that the Northwestern football scholarship recipients are employees within the meaning of the Act, and that the scholarship benefits they receive are a form of compensation for services rendered, that determination in all likelihood would have the unintended result of making the entire amount of the scholarship tuition benefits taxable income to the football players under the Internal Revenue Code. Currently, Section 117 of the Internal Revenue Code excludes scholarship tuition grants from gross income unless services are required as a condition of receiving the grant. 26 U.S.C.A. §§117 (a), (b)(1). See also, Rev. Rul. 77-263, 1977-2 CB 47. There is no indication that the IRS has ever sought to treat athletic scholarship benefits as taxable income. If, however, the Board were to find that the Northwestern student-athletes are employees of the University, and deems the scholarship a form of compensation for services rendered, the possible result would be that the entire amount of the scholarship would become taxable income. See, e.g., Bingler v. Johnson, 394 U.S. 741 (1969) (holding that grants to taxpayers during work-study program, so they would research and write their doctoral theses in engineering, were taxable income, as opposed to excludable scholarships, where there was an employer-employee relationship, employee benefits were continued, topics of theses were required to relate to the laboratory where they were employed, and taxpayers were obligated to return to employer for two years after completion of their leave to engage in work-study). See also Parr v. U.S., 469 F.2d 1156 (5th Cir. 1972); Hembree v. U.S., 464 F.2d 1262 (4th Cir.

1972); Wertzberger v. U.S., 441 F.2d 1166 (8th Cir. 1971) (holding that medical resident salaries were not scholarships or fellowships for purposes of I.R.C. Section 117).

Although decided in the context of a Sherman Act claim, the following quote from the Seventh Circuit's opinion in Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992), recognizes that the athletic scholarship benefits received by some of the Northwestern football student-athletes should not be considered compensation for services rendered:

We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in aid athletic scholarships offered to college players when the value of the scholarship is based on the school's tuition and room and board, not by the supply and demand for players.The dissent takes a surprisingly cynical view of college athletics and contends that "colleges squeeze out of their players one or two more years of service" because the no-draft rule forces the player to choose between continued collegiate eligibility and entering the draft. This description of players "selling their services" to NCAA colleges stands in stark contrast to the academic and amateurism requirements of the vast majority of college athletic programs that, in compliance with the NCAA rules and regulations, are foreclosed from offering cash compensation or "non-permissible awards, extra benefits, or excessive or improper expenses not authorized by NCAA legislation....The fact that a minority of schools (such as the University of Houston) "use" athletes rather than encourage and foster their student's academic pursuits, does not negate the fact that all NCAA member colleges encourage and require their student-athletes to carry a minimum number of semester credits and maintain a minimum grade point average equivalent to the academic program the university's non-athletic students follow.

977 F.2d at 1091-1092. In sum, the evidence in this case overwhelmingly demonstrates that the sole purpose of athletic scholarships received by some of Northwestern's football student-athletes is to finance their education.

3. Playing NCAA Division I Football Is Not "Work" Within The Commonly Understood Meaning Of That Term

As noted above, the commonly understood definition of an "employee" contemplates the performance of "work" for another. Here, despite CAPA witness Kain Colter's characterization of playing football at Northwestern as "work" or a "job," and his reference to Head Football Coach Fitzgerald as "bossman," the evidence does not support these characterizations. (Tr. 106,

174, 252-253.) Playing collegiate football, particularly at Northwestern, is an avocation, not a vocation, and is an entirely voluntary activity on the part of the student-athletes who choose to participate while, at the same time, obtain the benefit of a world class education.

Indeed, Northwestern University is a premier institution of higher education. It is in the “business” of providing a world-class education to its undergraduate, graduate and professional school students by offering the broadest range of academic and co-curricular offerings. (Jt. Ex. 19 at p. 4; Jt. Ex. 28 at NU 002379-2380; Em. Ex. 32.) Northwestern is not in the business of football.²² Instead, Northwestern offers football as one of 480 co-curricular activities available to provide its students with the broadest educational experience possible. (Jt. Ex. 28 at NU 002380.) The student-athlete’s participation in the football program is voluntary and contributes to the holistic development of each student-athlete in his academic, personal and career pursuits. (Tr. 1220, 1230-35, 1277-80, 1298-1300.) Moreover, there can be no doubt that other highly-motivated students at Northwestern spend a considerable amount of time in other co-curricular activities, such as debate, marching band, cheer leading squad, student journalism, fraternity leadership, the Dance Marathon, student government and non-revenue generating sports such as Women’s Lacrosse, Men’s Soccer and Men’s or Women’s Golf. (Em. Ex. 32.) Those students are not “working” when enhancing their education through their co-curricular interests; neither are football players.

That the football program may attract more interest, and thus more revenue, than other co-curricular activities at Northwestern does not convert the avocational nature of participation in the program into a vocation. Collegiate football is a uniquely American institution that is a game, a sport, played by amateur athletes under rigorous eligibility rules established by the

²² Significantly, in contrast to the athletic departments at some other universities, the Northwestern Athletic Department is not a separately incorporated entity. (Tr. 681-85.)

NCAA. As the Supreme Court aptly observed in NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984), albeit in the context of a Sherman Act claim:

[T]he NCAA seeks to market a particular brand of football-college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. *In order to present the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.* And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally [restrictions on eligibility rules], its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice-not only the choices available to sports fans but also those available to athletes-and hence can be viewed as procompetitive.

468 U.S. at 101-102. Claims by some that collegiate football has become overly commercialized and generates billions of dollars in revenue for the NCAA, the major football conferences and participating universities, amount to no more than that the NCAA has been successful at marketing its “product.” That success does not alter the fundamental relationship between Northwestern and its student-athletes. Northwestern football remains a sport played by amateurs who are not paid for their participation. That would all change and the underlying premise upon which this institution was founded would be forever altered if collegiate football players at private universities are found to be employees who are entitled to unionize and engage in collective bargaining under the Act. The student-athletes would then truly become employees, workers who are compensated for their services, and “pay for play” potentially could become a bargaining objective of CAPA or other organizations who seek to represent student-athletes who participate in the wide variety of collegiate sports that offer athletic scholarships to those who choose to participate. The Regional Director should not allow that to occur by finding that

Northwestern's football players who receive athletic scholarships are "employees" who engage in "work" within the meaning of the Act.

4. The Modicum Of "Control" Exercised By The Football Program Is Not Dissimilar From The Rules Placed Upon All Students

University students are part of an educational community that is relatively confined. Within that community, there are mores, norms and rules that must be followed in order to foster the most meaningful exchange of ideas and the broadest range of experiential learning, both inside and outside of the classroom. University life is often the bridge between childhood (where children are subject to parental and educational controls) and adulthood (where most adults become subject to rules in an employment setting). Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (noting that universities are the training grounds for the nation's leaders). In the higher education setting—where universities are charged with developing the intellectual, social and personal growth of individuals for future participation in society—students are subject to a number of expectations, and even mandates, related to their participation in university life, and all that comes with it.

The fact that students must follow rules of conduct and even face potential discipline for violating such rules (including the revocation of financial aid) does not convert an educational relationship into an economic one. Students at all levels are subject to controls of one degree or another.²³ Exercising its ability to make sound policy decisions that effectuate the purposes of the Act, the Board has already declined to apply the conventional master-servant model to

²³ Even within the classroom, students must follow the rules of each instructor—which may be set forth in a written document (a syllabus); they must review the material assigned by particular faculty members; must complete assignments by certain dates as dictated by the faculty; must sit for exams on topics chosen by their professors, and so on. (Tr. 231-35.) Failure to follow the rules and dictates of the classroom or to complete the requirements of the college major will be met with consequences, including failing grades, academic probation and academic dismissal. (Jt. Ex. 28 at NU 2394-96.)

enrolled students whose primary relationship with their university was an educational one. Brown University, 342 NLRB 483.

Indeed, while the “right of control” analysis may be helpful in understanding whether an individual is an employee or *an independent contractor*, it is not at all useful in determining whether someone is an employee as opposed to *a student*. New York University, 332 NLRB at 1216, n.37 (citing the *Restatement (Second) of Agency*, Section 720, setting forth test for independent contractor status). Nevertheless, Petitioner spent considerable time at the hearing attempting to develop evidence of extensive control by the University over the lives of student-athletes in an effort to force the student-educator relationship into a master-servant structure. This evidence does not establish, however, that such “control” is the type of control that an employer has over an employee.

First, much of the Petitioner’s evidence of purported control relates to matters over which the University has no singular authority. For example, Petitioner points to the fact that student-athletes in the football program must sign waivers of rights they may otherwise have to their image or likeness to establish that they have relinquished control in the furtherance of service to the University. (Jt. Ex. 10.) However, there is no dispute that the NCAA and the Big Ten – not the University – preclude a student-athlete from earning proceeds from the use of their image or likeness. (Jt. Ex. 22 at NU 000592-595.) Similarly, the types of residential leases student-athletes enter into, the types of outside employment student-athletes obtain, the requirement that attendance be taken at training table, and the requirement that student-athletes submit to random drug testing are all requirements that are implemented and enforced by the NCAA. (Jt. Ex. 10, Drug Testing Consent Forms; Jt. Ex. 20 at NU 000284, 000356, 000407-421; Jt. Ex. 22 at NU 000618, 000744-745, 000591-592, 000534; Tr. at 505-506-542-477-479, 622-623.) Thus, the

requisite control by the purported *employer* does not exist with respect to these types of rules and regulations.

Just as importantly, the rules and regulations that are specific to the football program are not employment rules, but rather are largely the types of rules and regulations that are regularly applied in the student/educator context and, in fact, are similar to the rules applied to all students at Northwestern. For example, all students at Northwestern are required to abide by a code of conduct that promotes civility, respect and mature behavior within the context of the educational community. (Jt. Ex. 19 at p. 12-24.) Similar to the football program’s policy on “Character,” the University code of conduct requires that students at Northwestern “engage in socially responsible behavior, and to model exceptional conduct, character, and citizenship on campus and beyond.” (Compare Jt. Ex. 17 at NU 176 (“If you embarrass our team. . .”) with Jt. Ex. 19 at p. 12.) In the same vein, participants in student-run organizations—such as fraternities, sororities, affinity groups, and student government—must enter into a “behavioral agreement” before being allowed to travel as a representative of the University. (Em. Ex. 32 at 39.)

Like student-athletes, students who fail to maintain satisfactory academic progress may be subject to the revocation of need-based financial aid. (Compare Jt. Ex. 28 at NU 002388 with Jt. Ex. 17 at NU 190-91, 215 and Jt. Ex. 10.) All students are required to attend class, just as the football handbook requires. (Jt. Ex. 28 at NU 002394; Jt. Ex. 17 at NU 000192.) Excessive class absence can result in failure of the course or being involuntarily dropped from the course for non-attendance. (Id.; compare also football handbook, Jt. Ex. 17 at NU 157, 174, 176, 189-190, 209, 210, 230; with student handbook, Jt. Ex. 19 at 9-11, 32, 36-40, 47, 48 for reciprocal policies on hazing, gambling, academic dishonesty, drug and alcohol use, IT systems use, possession or use of weapons.) Violations of these rules subject students to various forms of

discipline, including exclusion, suspension, probation, removal from University housing, warning and reprimands, fines, loss or restriction of privileges or activities, University or community service, educational requirements and restitution, among other sanctions. (Jt. Ex. 19 at 16-18; 56-60; Jt. Ex. 17 at NU 174, 176, 189-190.)

Finally, students who participate in varsity sports at Northwestern, including the football program, are also subject to some additional rules and schedules. Importantly, these rules apply equally to scholarship student-athletes and non-scholarship student-athletes alike. (Tr. 1227-1228, 1269-1270, 1307, 1035-1036.) Some of these rules are academic, such as the rule that freshmen student-athletes are required to attend six hours of study hall per week. Other rules and schedules are directly related to the inherent nature of participating in a team sport. In order for a team to develop cohesion and to be competitive, the team members need to practice together, attend team meetings, travel together, and wear uniforms or other homogenous attire (e.g., suits). (Jt. Ex. 17 at NU 000176, 000233-235, 000237.) Adherence to these rules also assists the student-athletes to develop skills and behaviors that are transferable to the academic and professional setting for life after college, such as time-management skills, punctuality and recognition of obligations to others.

The football program's social media policy (Jt. Ex. 17 at NU 000158-59, 000206-207; Jt. Ex. 10 at 14), which provides guidelines (not prohibitions) for social media use and the monitoring of social media, is not designed to restrict speech or to control every word posted on social media sites, but rather to promote good behavior among student-athletes, some of whom are in the public eye and followed by the media. The fact that this policy is not used to restrict speech is demonstrated by the fact that in over two years of Twitter use, Colter was asked to take down only a single tweet. (Tr. at 153-154.) And that tweet related to a free pair of designer

sunglasses that Colter had received as a gift, which could have been construed as a violation of NCAA rules on the receipt of gifts and benefits. (Tr. at 475-476.)

Finally, some football program rules and regulations are technically “on the books” but are never enforced. For example, restrictions on cell phone use while traveling and “lights out” policies are not enforced, if even monitored by the coaching staff. (Tr. 1275-1276, 1291, 1309-1310.) In any event, the “lights out” policy during travel for games is similar in effect to the “quiet hours” enforced in University residence halls Sunday through Thursday nights, and during finals weeks. (Jt. Ex. 19 at 30.) Similarly, the football program’s policy that student-athletes live on campus for at least two academic years (Jt. Ex. 17 at NU 225) is not unlike the policy that prohibits any student from living in a fraternity or sorority during their first year at the University. (Jt. Ex. 19 at 46-47.)

Quite apart from the fact that student-athletes are subject to rules, and while the prospect of disciplinary action is certainly not unique to the employment setting, Petitioner presented no evidence that the University or the football program issued any significant discipline for violations of the football program rules. While Petitioner focused on the Big Ten-mandated language in the Tender Letter, which provides that financial aid could be revoked as a result of “abuse of team rules as determined by the coach or athletic administration” (Jt. Ex. 23 at NU 0001656), there was no evidence that Coach Fitzgerald or anyone in the Athletic Department in fact revoked funding for a single football student-athlete for such infractions. On the contrary, the University presented evidence that since Coach Fitzgerald has assumed the role of Head Coach, only two football student athletes have had their scholarships revoked (and their enrollment as students rescinded) for rules violations, and those two incidents did not involve violations of the football program’s rules. One student violated the University Student Code of

Conduct by firing a BB-gun on campus. (Jt. Ex. 19 at 14; Tr. at 1045.) The other violated NCAA and Big Ten regulations (as well as the University's) relating to repeated drug and alcohol use. (Jt. Ex. 22 at NU 830, 916; Jt. Ex. 20 at Appendix F; Tr. 1165.)

The reality is that any consequences that have flowed from football program rule violations do not differ in any material respect from the sort of consequences student-athletes may suffer for failing to follow the rules of classroom and/or the rules that govern their status as students at Northwestern. For example, being late for practice is typically met with mandatory study time. (Tr. 297-298, 1091-1092.) Petitioner presented no evidence of any reprimand or consequence suffered as a result of any violation of the football program's social media policy. Many other rules are violated with no consequence at all, such as the travel cell phone policy and the "lights out" policy. (Tr. 1275-1276, 1291, 1309-1310.)

5. The Analysis Of Employee Status Is Not Dependent Upon Hours Spent In The Activity; In Any Event, The Record Does Not Show That Student-Athletes In The Football Program Spend More Time Engaged In Football Activities Than Academic Activities

While there is no dispute that football student-athletes spend a substantial amount of time participating in football program activities—such as practicing, competing, traveling, conditioning, watching film and attending team meetings—as Colter himself acknowledged, more than half of the time he spent in football related activities was entirely voluntary. (Tr. 66-74, 77-85.) In fact, Colter testified not only that he chose to engage in a substantial amount of voluntary activities in order to be as successful in the football program as possible, but that he also encouraged other student-athletes likewise to volunteer their time. (Tr. 80, 83-84.) Even so, the amount of time spent on football has no bearing on employee status under the Act where the

football activities are inextricably intertwined with the educational experience. Brown University, 342 NLRB at 489.²⁴

Significantly, a full-time student enrolled at Northwestern spends at least 20 hours a week attending class, and students like Bartels and Ward spent far more than that amount of time pursuing their academic studies. (Tr. 176, 1236-1237, 1276, 1320.) Of course, this does not account for the amount of time the student spends studying and preparing outside of class. Indeed, published empirical data from the National Survey of Student Engagement (NSSE)²⁵ reflects that undergraduate students spend, on average, between 14 and 19 hours per week studying and preparing outside of class. Due to Northwestern's rigorous academic standards, the average hours per week devoted to academic studies in the NSSE survey undoubtedly are on the conservative side. In other words, student-athletes at Northwestern on average likely spend more than 40 hours per week in purely academic activities during the academic year.

Like the pure class time of 20 hours per week, the time commitment to mandatory football activities is similarly capped at 20 hours per week during season and during spring practice.²⁶ (Tr. 118-120, 513-515.) At other times of the year it is far less than that, and during at least nine weeks a year, there can be no mandatory football activities. While the student-athletes in the football program may spend more *voluntary* time in football-related activities during the football season, the mere investment of time does not convert a voluntary activity into

²⁴ Although the Board in Brown University noted that the time the graduate assistants spent working on their degrees outweighed the time spent serving as graduate assistants, the Board did not enunciate a bright line test or any kind of requirement that time spent in academic study must be greater to preclude a finding of employee status. 342 NLRB at 488.

²⁵ See National Survey of Student Engagement. (2012). *Promoting Student Learning and Institutional Improvement: Lessons from NSSE at 13*. Bloomington, IN: Indiana University Center for Postsecondary Research.

²⁶ See, *supra*, Section II.D.3.c. for an explanation about "countable" hours (CARA) capped by the NCAA regulations as compared to voluntary hours, which are regulated but not capped under NCAA regulations.

“services performed for another,” particularly where participation in the activity enhances the student-athlete’s overall educational experience through competitive sportsmanship, which necessarily involves the exercise and development of discipline, time management skills, leadership skills, team dynamics skills and critical thinking in high-pressure situations. (Tr. 1220, 1230-35, 1277-80, 1298-1300.) The record does not establish that, over the course of the entire year, student-athletes spend predominantly more time engaged in football-related activities than they devote to class time, study and other academic pursuits.

6. Colter’s Contentions Are Not Representative Of The Typical Experiences Of Student-Athletes On The Northwestern Football Team

Colter’s characterization of his experience as a student-athlete at Northwestern is not representative of the sentiment of other student-athletes on Northwestern’s football team. According to Colter, his participation in the football program dictated his academic pursuits. (Tr. 166-167.) In particular, Colter asserted that he had to change his major from a pre-med course of studies to psychology²⁷ in order to keep up with his commitments to the football team. (Tr. 187.) Yet, Northwestern presented the testimony of three other student-athletes who participated in the football program at Northwestern—Bartels, Pace, and Ward—pursued the major of their choice during their time at Northwestern. (Tr. 1215, 1258-1259, 1293-94.) Notably, Bartels (now a medical student) graduated with a degree in biological anthropology, Pace graduated with bachelors of science degree in mechanical engineering, and Ward graduated with a degree in mechanical engineering. (Tr. 1215, 1270, 1293-94.)

²⁷ Incidentally, there is nothing that precludes a psychology major, or a student with any other major, from pursuing a medical degree, so long as the student has taken the requisite courses to be considered for admission to medical school. (Tr. 1217; Jt. Ex. 28 at NU 002513.)

Colter also contended that he was steered away from enrolling in courses in the pre-med track because those classes conflicted with practice, and went so far as to say that his advisor, Betsi Burns, offered him little help in navigating the balance between academics and football. (Tr. 167-168, 178-179.) However, Bartels, who also pursued a pre-med track and is now in medical school, asserted that the very same coaches and advisors encouraged him to enroll in pre-med classes and helped him to participate in football while also competing at the highest level academically. (Tr. 1229-1230.) Likewise, Ward, who studied mechanical engineering, was encouraged by his coaches and advisors to take engineering courses, even if those courses sometimes conflicted with practice. (Tr. 1301-1303.) Similarly, the same advisor who purportedly steered Colter away from pre-med science courses – Betsi Burns – went out of her way to assist Pace in pursuing an engineering degree while he was a starter on the football team. (Tr. 1271-1272.)

In addition, Colter implied that the scholarship student-athletes were treated differently from walk-ons in terms of attendance at football practice. (Tr. 169.) According to Colter, he was advised that as the starting quarterback, he could not miss practice due to a class conflict, but walk-ons were permitted to miss practice for academic reasons. (Id.) Again, Colter's contention is contrary to the experiences of other former student-athletes on the football team. For example, Bartels, who was a walk-on, non-scholarship student-athlete for his first two years at Northwestern and a scholarship student-athlete for his last three years at Northwestern, stated that he was subject to the same rules and expectations regarding attendance at practice and class attendance throughout the entire five-year period. (Tr. 1228.) Similarly, Ward, who was a scholarship student-athlete on the football team from 2009 to 2012, noted that there were no differences in the way Coach Fitzgerald treated walk-ons and scholarship players in terms of

practices, meetings and games and that everyone on the team was held to the same standards. (Tr. 1307.) Similarly, Pace was a walk-on for all but his final season at Northwestern; nevertheless he was a starter on the team for his final two seasons and had to leave practice early for academic reasons while competing for a starting position. (Tr. 1273.) He was not penalized for his early dismissals; on the contrary, he was awarded a starting position and also awarded athletic aid thereafter. (Tr. 1222, 1273.) Finally, Coach Fitzgerald relayed the story of another scholarship student-athlete, who was also a starter. (Tr. 1061-62.) This particular student-athlete approached Coach Fitzgerald because he was falling behind in a class and needed help. (Id.) Coach allowed him to miss an entire week of practice and to miss a game so that he could focus on catching up academically. (Id.) Far from being penalized as a result, the student-athlete, after attending to his academic concerns, returned to practice and played in the very next game. (Id.)

Colter also portrayed the football program as having a large degree of control over his daily activities. For example, Colter stated that he was required to perform football related activities on bus trips to and from athletic competitions, and only after completing those activities was he permitted to study. (Tr. 227-228.) Bartels, Pace, and Ward, however, all asserted that they frequently used travel time to study. (Tr. 1231, 1253, 1308.) They also noted that they were allowed to use their cell phones on the bus without penalty if they desired to do so. (Tr. 1309.) In another example, Colter referred to the “lights out” policy during travel, implying that the Football Program dictated when he was required to sleep. (Tr. 114.) Yet, Pace and Ward recalled that “lights out” time was truly personal time, and they were able to do whatever they desired at that time, including study, without issue or even monitoring by the coaching staff. (Tr. 1291, 1309-1310.)

Colter also denied that Northwestern's football program assisted him in securing internships. (Tr. 255-256.) Yet, his teammates testified that the program provided multiple internship opportunities, which they were able to use to further their career aspirations. (Tr. 1231.) In a similar vein, Colter denied that the football program helped him obtain a degree and that, instead, his sole purpose for being at Northwestern was to play football. (Tr. 170, 174.) This is directly contrary to the testimony of his teammates, who articulated just the opposite, and even noted that the football team meeting room had a plaque that identified "earning a Northwestern degree" as the number one goal for its student-athletes. (Tr. 1278.) It is also contrary to Colter's actual experience, given that he is graduating early with a degree in Psychology. (Tr. 57, 206.)

Tellingly, Colter is completing that degree while in Florida, where he is training for what he hopes will be a career in the NFL. Colter's career aspiration to play in the NFL surely colored his experience at Northwestern, the same way any other student-athlete's ultimate career aspirations would color his or her experience. That *Colter* may have believed that earning his degree was subordinate to his development as a football player, that *Colter* may have viewed all of his football time, including the extensive voluntary hours he put in, as work, and that *Colter* may have concluded that the rigors of certain classes were inconsistent with his football aspirations, says nothing about the operation and values of the Northwestern program as a whole, or the experience of the numerous other football student-athletes who pursued their widely varying academic interests while participating in the football program.

Colter steadfastly refused to give credit to Northwestern's football program for helping him grow and develop in realms other than football. (Tr. 177, 253.) Although he served on the leadership council for three years and was a two-time team captain, Colter denied that those

opportunities helped him to develop leadership skills, contending instead that he had mastered such skills, evidently as a high school student, before even enrolling at Northwestern. (Tr. 253.) His peers, however, attributed much of their personal growth and development to the football program's focus on developing the student-athlete as an all-around person, including emotional health, social life, and professional aspirations. (Tr. 1219-23.) These former student-athletes went on to note that playing football is, in and of itself, an educational process which teaches skills, such as perseverance, dedication, time management, communication, respect, and focus under pressure, that are easily transferable to a wide array of professions. (Tr. 1233-1234, 1277-1278.)

The proposition that football, and intercollegiate athletics in general, fosters skills-development that promote success after college and outside of the sports arena is bolstered by empirical data. Published articles indicate that student-athletes who participate in intercollegiate athletics are more successful in their post-graduate years than the student population at large. See James L. Shulman and William G. Bowen, *The Game of Life: College Sports and Educational Values* (Princeton University Press, 2000).

Tellingly, in a survey of male former student-athletes, conducted by scholars James L. Shulman and William G. Bowen, empirical data collected over multiple decades and across private and public four-year institutions with intercollegiate athletic programs, showed that student-athletes consistently earned higher incomes than their non-athlete counterparts. Id. at 95-96. Shulman, Bowen, and other scholars reason that this statistical pattern reveals that experiences gained through playing college sports gives former-student athletes an earning advantage. Id. Although Colter refused to attribute any degree of personal growth and development to the variety of experiences and opportunities that were made available to him as a

result of his membership on Northwestern's football team, the testimony of his peers and the scholarship on point shows that just the opposite is true.

7. The Board Has Never Found Dual Employee/Student Status And The Regional Director Should Refrain From Doing So Here

Petitioner contends that a student-athlete can simultaneously be a student and an employee. However, Petitioner cannot cite a single Board decision that supports this proposition, and the Regional Director should refrain from making such a finding here. By way of example, in Saga Food Service of California, Inc., the Board refused to direct an election among students employed by the company that operated their dormitory cafeteria at the University of California at Davis. 212 NLRB 786, 787 (1974). Without deciding the issue of "employee" status under Section 2(3), the Board concluded that the status of the workers as students was primary. In rejecting the petition, the Board concluded that the employment was "incidental" to their academic objectives, and reasoned that "in view of . . . our conclusion that their primary concern is their studies rather than their part-time employment, we find that it would not effectuate the policies of the Act" to direct an election of student workers only. Id. at 787, n.9. In San Francisco Art Institute, the Board reached the same conclusion where the students were enrolled at the college and also employed directly by the college as janitors. 226 NLRB 1251 (1976). In refusing to assign "dual status" to the student-workers, the Board again reasoned that the students were "concerned primarily with their studies." Id. at 1252. Significantly, the Board found it "critical" that the student janitors were enrolled in the institution where they were also employed, noting that such arrangement "brings into sharp and special focus the very tenuous secondary interest" the students had in their employment, even

though some of the student janitors worked full-time hours.²⁸ Id.; see also St. Clare's Hosp., 229 NLRB 1000, 1001 (1977), overruled on other grounds (noting that in cases involving students employed by their own university, the Board has historically not afforded the privilege of separate representation because “employment is merely incidental to the students’ primary interest of acquiring an education, and in most instances is designed to supplement financial resources.”); Brown University, 342 NLRB at 483 (refusing to afford employee status to graduate assistants enrolled in the university).

In the absence of any authority, the Regional Director should refrain from veering from this well-established law to make a finding of dual student/employee status here.

E. THE TESTIMONY OF PETITIONER’S “EXPERT” IS IRRELEVANT TO THE ISSUES IN THIS CASE

Although CAPA claims that the relationship between Northwestern and its football players who receive athletic scholarships is an economic one, and called Dr. David Berri, a sports economist, as an expert witness who testified about the commercialization of collegiate football to support that contention, Dr. Berri’s expertise with respect to the economics of collegiate football is dubious at best. Dr. Berri’s area of expertise focuses on the economics of sports (Tr. 320; Pet. Ex. 4), but he has not performed any independent research or published a single scholarly article on the economics of collegiate football. (Pet. Ex. 4.) Instead, Dr. Berri’s “expertise” on this subject is derived from reading articles and publications from other sports economists. (Tr. 347-348; 350-351; 378-380; 394-395.) Accordingly, the opinions Dr. Berri expressed during the hearing in support of CAPA’s argument that there is an economic

²⁸ In Saga Foods and San Francisco Art Institute, the Board was also influenced by the inherently “temporary” nature of the student’s tenure as student-workers in refusing to direct an election among the students. See infra, Section III.I.

relationship between the universities that participate in NCAA Division I FBS football and the student-athletes on their teams are questionable at best.

The central theme espoused by Professor Berri is that collegiate football at the Division I FBS level is a commercial enterprise that generates significant amounts of revenue and profits for the NCAA, athletic conferences, and participating schools. (Pet. Ex. 5.) However, whether or not an organization generates revenue or profit from the activities in question is wholly irrelevant to the question of employee status under Section 2(3) of the Act. Even so, Dr. Berri's method and conclusions are fundamentally flawed.²⁹

Using select data from Equity in Athletics Data Analysis ("EADA") reports filed by Northwestern with the U.S. Department of Education over a 10 year period from 2003 through 2012, Professor Berri posits that Northwestern has derived many millions of dollars in positive revenue from its football program, including almost \$8.5 million in 2012. (Pet. Ex. 5.) Based on this data, Professor Berri compares NCAA Division I FBS football programs with the National Football League to support his ultimate assertion that there is an economic relationship between the participating universities, including Northwestern, and the players on their football teams. (Pet. Ex. 5.)

However, there are a number of fundamental flaws in Professor Berri's analysis. First, the analogy he draws between the so-called business model of NFL football and NCAA Division I football ignores the fact that the teams that comprise the NFL are for-profit organizations whose underlying business purpose is to generate profit for their owners, whereas the approximately 120-125 universities that participate in NCAA Division I FBS football are either public institutions or, like Northwestern and 16 other universities, private non-profit entities

²⁹ Even the hearing officer recognized this fact. (Tr. 340-341.)

whose overarching purpose is to educate their students, not to engage in the business of football. Second, Professor Berri ignores the fact that NFL players are, and always have been, professional athletes who are paid for their services, whereas Division I FBS collegiate football players are unpaid amateurs, some of whom receive financial aid in the form of athletic scholarships and others who receive no financial assistance whatsoever. Third, the comparison that Professor Berri makes between the NFL and Division I FBS football teams is flawed in that he completely ignores the fact that in collegiate football, unlike the NFL, there is a governing structure, the NCAA, and to a lesser extent the athletic conferences such as the Big Ten, that comprehensively regulate recruiting, eligibility, scholarships, and virtually every other facet of the athletic programs sponsored by participating universities. Fourth, Professor Berri assumes, incorrectly, that the athletic scholarships received by collegiate football players are a form of compensation for services rendered, an assumption that begs the threshold issue in this case. Finally, while Professor Berri attempts to portray Division I FBS football as generating huge profits for participating universities while, at the same time exploiting the players on their teams, at Northwestern the positive revenue generated by its football program is insufficient to offset the cost of its non-revenue-generating sports. This is important because Title IX prohibits a University from offering *only* a Division I FBS football program among its intercollegiate athletic programs; the law requires parity for men and woman in intercollegiate sports. Professor Berri's suggestion that the Board should treat Northwestern's football program as an isolated, revenue generating program is thus without any foundation; it cannot happen. In fact, Northwestern must subsidize its Athletics Department, approximately \$12.7 million in 2012-2013, to offset the expense of its non-revenue generating sports. (Tr. 676-677.)

Ultimately, Professor Berri’s testimony has no relevance to the issue whether there is a predominantly economic, as opposed to a predominantly academic, relationship between Northwestern and its student-athletes who receive football scholarships.

F. IMPOSING COLLECTIVE BARGAINING ON FOOTBALL STUDENT-ATHLETES IS NOT CONSISTENT WITH THE FUNDAMENTAL PURPOSE AND POLICIES OF THE ACT

In Brown University, 342 NLRB 483 (2004), the Board took into account the fundamental purpose and policies of the Act, which were a crucial underpinning in its decision that graduate student assistants were not employees within the meaning of Section 2(3) of the Act. Because Section 2(3) contains no detailed provisions for determining statutory employee status, that issue must be examined in the context of the Act’s overall purpose, being mindful of “the problem of attempting to force the student-university relationship into the traditional employer-employee framework.” Id. at 487. The Brown University decision noted that “the underlying fundamental premise of the Act ... is designed to cover economic relationships [and the] Board’s longstanding rule that it will not assert jurisdiction over relationships that are ‘primarily educational’ is consistent with these principles.” Id. at 488.

CAPA’s promise to “not demand wages for play” rings hollow because, as discussed in Brown University, the broad power to bargain over all Section 8(d) subjects would, in the case of student-athletes, “carry with it the power to intrude into areas that are at the heart of the educational process.” Id. at 492. There are important policy reasons, explained below, why the Regional Director should “decline to take these risks with our nation’s excellent private educational system” and should not extend collective bargaining rights to student-athlete football players at Northwestern. Id. at 493.

1. Unionization Of Northwestern Student-Athletes Will Create Chaos Due To The Wide Variation Among Federal And State Labor Laws Concerning Union Representation and Collective Bargaining

The Brown University decision noted that some states permit collective bargaining at public universities but decided “to interpret and apply a single Federal law *differently* to the large numbers of private universities under our jurisdiction.” Id. at 493 (emphasis added). This policy choice is all the wiser here because, among the NCAA Division I FBS schools, only 17 private universities are subject to the Board’s jurisdiction. (Tr. 439.) The public universities, more than 100 in FBS alone, are governed by the state labor law in the state where the university is chartered, if such a law allowing collective bargaining even exists in a given state. If football student-athletes are allowed to unionize, the patch-work of labor laws that govern colleges playing Division I FBS football would have a chaotic impact on the sport and the respective universities’ administration of the sport.

The chaos that would inevitably result from this varying legal landscape is illustrated by simply looking at the present members of the Big Ten Conference. The Act applies to just one Big Ten school—Northwestern. State labor laws apply, in widely varying degrees, to eight Big Ten Schools—Illinois, Iowa, Michigan, Michigan State, Minnesota, Ohio State, Penn State, Wisconsin. Three other Big Ten schools are governed by no state or federal collective bargaining law—Indiana, Nebraska, and Purdue. In states that have applicable laws, wide variations exist. Wisconsin law, for example, prohibits public-sector unions from bargaining over workplace safety, pensions, health coverage, hours, sick leave or vacations,³⁰ so University of Wisconsin student-athletes would have no right to bargain with their employer about these issues. In Illinois, two different laws apply to public sector employees. The Illinois Public

³⁰ See 2011 Wis. ACT 10 (March 11, 2011).

Labor Relations Act³¹ and the Illinois Educational Labor Relations Act³² legislate collective bargaining rights for public sector employees. Both statutes, or neither, could apply to student-athletes at the University of Illinois.

Looking beyond the Big Ten, even more variation exists. For example, there is no public-sector collective bargaining in Virginia.³³ Thus, even if student-athletes at the University of Virginia were somehow deemed “employees” of the State, they would be prohibited from collective bargaining. And some states have local labor relations laws. For example, the State of Arizona has no collective bargaining law for public employees, but the City of Phoenix does.³⁴

The point is that a variety of state and local laws define mandatory and permissible bargaining subjects, economic weapons and dispute resolution procedures, many of which differ dramatically from the Act and from each other. Some student-athletes would be able to unionize while others competing in the same sport and within the same organized structure of competition would not. Some schools would be forced to bargain over wages and deal with the consequence of having athletic scholarships taxed as income to the students. Some schools would not. No uniform law would apply to the student-athletes, and the rules would be dramatically different depending on what school the student chose to attend. No legitimate interest is served by compelling a student-athlete to choose a college based on labor laws.

If Northwestern student-athletes are deemed “employees” within the meaning of the Act, and if CAPA is certified as their bargaining representative, *inevitably CAPA will demand bargaining over economic issues, including pay*. It is folly to think otherwise. Wages are a

³¹ 5 ILCS § 315/1 *et seq.* (West 2014).

³² 115 ILCS § 5/1 *et seq.* (West 2014).

³³ In 1993, Gov. Doug Wilder signed into law HB1872 and SB 962, which prohibited collective bargaining by public sector employees in Virginia.

³⁴ See e.g., City of Phoenix v. Phx. Employment Relations Board, 86 P.2d 917 (Ariz. Ct. App. 2004).

mandatory subject of bargaining and at some point “pay for play” will be demanded under threat of economic action by the union. No credence can be given to CAPA’s claims that it has no current objective to bargain over economic issues. Nothing stops those demands, and full use of the tactics permitted by the Act, if the student-athletes at private universities are allowed to unionize.

Indeed, a ruling that football student-athletes are “employees” within the meaning of the Act will have far-reaching consequences potentially impacting scholarship athletes at private institutions throughout the nation. Although CAPA may seek to represent only Division 1 football and men’s basketball players, there is no reason to distinguish, based on the union’s argument here, the scholarship student-athletes who play volleyball, tennis, golf, lacrosse, swimming, field hockey, ice hockey, rowing, water polo, or any other sport. Nor is there any distinction for Division II scholarship student-athletes. All of these student-athletes receive athletic scholarships to help to off-set the cost of their education while they participate in inter-collegiate sports subject to the regulations of the NCAA and any athletic conference to which their school belongs. Moreover, as the Hearing Officer herself pointed out, whether a sport actually creates *positive revenue is irrelevant*. (Tr. 658-659, 662.) The Board’s ruling applies with as much force to the 17 varsity sports at Northwestern that lose money as it does to the football program. The same would be true at every private university that offers a sports program. Whether it loses money or not, the school could be forced to collectively bargain with a representative for every scholarship student-athlete. It is not hyperbole to state that the impact of a ruling that student-athletes are “employees” under Section 2(3) would be felt at hundreds of private colleges and universities and impact tens of thousands of student-athletes who receive athletic scholarships.

The professional sports unions are totally different. In the pro leagues, the players' union negotiates on behalf of *all players* with the *collective ownership of every team in the league*. In no professional sports league in North America do players negotiate on a team-by-team basis. (Tr. 417-418.) Yet, that is what CAPA seeks here—to negotiate directly with one university: Northwestern. This fundamental difference renders useless any comparison to professional sports unions. Indeed, Professor Berri's entire model for competitive balance rests on the notion that all colleges would pay student-athletes in a free-market environment. But if that is the goal, then forming a union of football players at one school is not the solution. Northwestern does not set the rules regarding what schools can and cannot provide to attract student-athletes. The NCAA does. Professor Berri's hypothetical free market does not and cannot exist in college sports under the current NCAA framework. Instead, chaos would exist under a regime where some football teams are unionized and some are not. There would be no level playing field. One does not have to be an economist to appreciate the complete unraveling of the student-athlete experience if private school student-athletes are unionized but some or most public school student-athletes are not, or are unionized under different legal structures.

Historically, it is for Congress to decide when and if it was appropriate to expand collective bargaining rights into uncharted territory. Never before has the Board imposed collective bargaining on student-athletes. If Congress decides to alter the Act's coverage or application in such a dramatic fashion, it will amend the Act or enact new legislation. The Brown University case was decided nearly a decade ago, and since then it has not been successfully challenged in court or changed by Congress. Deviating from Brown University here would be inconsistent with the purposes and policies of the Act, and the Board would be creating

a chaotic environment without any indication of Congressional intent to permit collective bargaining where it has never occurred before.

2. CAPA Objectives Cannot Be Achieved By Collective Bargaining With Northwestern Due To NCAA Regulation, Which Northwestern Has No Power To Unilaterally Change

CAPA's desire for a "voice" on behalf of student-athletes cannot be achieved by forcing a collective bargaining relationship upon Northwestern and its football student-athletes. The goals CAPA seeks are simply not attainable through bilateral negotiation with Northwestern because Northwestern has no authority to deviate from the rules set by the NCAA and the Big Ten Conference.

The record contains extensive facts describing the regulation by the NCAA and the Big Ten Conference of academics, scholarships, eligibility, awards and benefits, payments for playing sports, medical insurance, recruiting and playing/practice time for student-athletes. Northwestern cannot negotiate with a union over these subjects, many of which are mandatory subjects of bargaining under the Act, without severe penalties including the extinction of its inter-collegiate athletic program. Board law is clear that refusing to bargain over mandatory subjects leads to severe sanctions for the employer. It is equally clear that NCAA rules forbid a university from even offering the prospect of economic gain to recruit or retain student-athletes. As the Supreme Court recognized, the NCAA mandates amateurism, which means student-athletes cannot be paid for participating in a college sports program. NCAA v. Bd. Of Regents of Univ. of Oklahoma, 468 U.S. 85, 88-89 (1984). NCAA regulations make clear that athletes may not be "paid to play" and courts have regularly upheld NCAA bylaws protecting amateurism in college athletics. See, e.g., Banks v. NCAA, 977 F.2d 1081, 1089-90 (7th Cir. 1992) (NCAA rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a

position with a professional team); McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (NCAA rules limited compensation for football players to scholarships with limited financial benefits).

Thus, Northwestern would be in a classic “Catch-22” situation. Northwestern would face unfair labor practice charges for refusing to negotiate over mandatory subjects of bargaining, and yet incur drastic NCAA sanctions for *even offering* any economic benefit that is prohibited by the NCAA. Forcing a university into this position is unprecedented and should not be done here.

Thus, beyond the chaotic and potentially destructive impact of finding that Northwestern’s Division I scholarship football players are “employees” under the Act due to the myriad of labor laws impacting NCAA schools, such a finding would be a *fruitless endeavor*. The very discussion of most mandatory subjects of bargaining is strictly prohibited by the fact that Northwestern offers a Division 1 scholarship football program. Northwestern’s hands are tied, and no amount of bargaining with a labor union can change that. Put simply, the effort to force collective bargaining over issues controlled by the NCAA is self-defeating: Northwestern’s scholarship student-athletes might have a union, but in the process, they would lose their football team because the NCAA would likely ban Northwestern from participating in games for giving benefits to student-athletes that are prohibited by the NCAA’s rules.

3. Extending Collective Bargaining Rights To Northwestern Football Players Will Have Title IX Ramifications And Impact The Institution’s Decision To Offer Athletic Opportunities For All Student-Athletes

Title IX of the Education Amendments of 1972 (“Title IX”) is a federal law that requires colleges and universities who receive federal funding to afford equal opportunities in varsity sports to female students. Title IX represents a clear national policy to protect the educational interest of all students regardless of gender. Title IX provides, in relevant part, that “[n]o person

in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity* receiving Federal financial assistance.” 20 U.S.C. §1681(a) (emphasis added). Although the statutory language makes no mention of athletics programs, the former Department of Health, Education and Welfare and its successor agency, the Department of Education, have interpreted Title IX to require recipients of federal financial assistance operating or sponsoring “inter-scholastic, intercollegiate, club or intramural athletics” to “provide equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(c).

Federal law makes varsity sports at Northwestern an “education program or activity.” Title IX requires equality in: (1) effective accommodation of student interests and abilities (participation), (2) athletic financial assistance (scholarships), and (3) other program components (the “laundry list” of benefits to and treatment of student-athletes). The “laundry list” includes equipment and supplies, scheduling of games and practice times, travel and daily per diem allowances, access to tutoring, coaching, locker rooms, practice and competitive facilities, medical and training facilities and services, publicity, recruitment of student-athletes and support services. See 34 C.F.R. § 106.41(c).

Blais testified that if Northwestern were to provide through collective bargaining to a male student-athlete or team an enhancement to any item from the “laundry list” of Title IX, Title IX would require Northwestern to offer the same for female student-athletes and teams. (Tr. 918-920.) This view is supported by federal court decisions reaffirming the mandate that universities provide equal opportunity for women’s athletic programs. See e.g., Biediger v. Quinnipiac Univ., 928 F. Supp. 2d 414 (D. Conn. 2013) (enjoining university from eliminating women’s volleyball team due to financial constraints and noting that “Title IX has not ended the

long history of discrimination against females in sport programs,” as quoted from Parker v. Franklin Cnty. Cmty. Sch. Corp., 667 F.3d 910, 916 (7th Cir. 2012)); Mansourian v. Bd. Of Regents of Univ. of Calif. at Davis, 816 F. Supp. 2d 869, 874 (E.D. Cal. 2011) (“the opportunity for students to participate in intercollegiate athletics is a vital component of educational development.”).

Thus, Northwestern, and any school in its position, must consider Title IX as a serious impediment when bargaining with a football players’ union. Paying some participants in a men’s sport, whether in cash or other economic benefits, but not participants in a women’s sport, would violate the equal treatment requirement. To put it bluntly, if collective bargaining is imposed for football student-athletes, every dollar of economic benefit to a male would have to be matched proportionately for female student-athletes to comply with Title IX.

A union of football student-athletes would also impact the student-athletes who participate in the non-revenue sports at Northwestern. Although the Northwestern football program generates income above its direct expenses, the overall revenue of Northwestern athletics is far less than its expenses and would not balance but for a \$12.7 million subsidy from the University. (Em. Ex. 11; Tr. 652-653.) Other than football and men’s basketball, every varsity sport offered to students at Northwestern, including all 11 of the women’s teams, loses money. The football program revenue is an essential part of Northwestern’s ability to offer varsity sports to its men and women student-athletes. Northwestern is not unique in this regard.

The reality is that a union of football players can and would bargain for compensation and other economic benefits. It is naïve to presume otherwise. Indeed, the Act mandates it. Eventually, the male football players will achieve an economic benefit. Those economic benefits must then be provided to female student-athletes. Title IX mandates it. CAPA may pretend that

only student-athletes in profitable men's sports will be paid, but the legal reality is that all student-athletes and every private university in the country offering varsity athletics will have to deal with ramifications that go far beyond what CAPA acknowledges.

G. CAPA'S PETITION MUST BE DISMISSED BECAUSE THERE IS NO APPROPRIATE UNIT FOR BARGAINING

The unit sought by Petitioner—all football players receiving athletic scholarships from Northwestern University—is not appropriate for collective bargaining under the Act for two primary reasons. First, the petitioned-for unit is not appropriate because it consists entirely of students, who are not employees, in clear disregard to the plain language of the Act. Second, the petitioned-for unit is not appropriate because it is an arbitrary, fractured grouping that excludes other student-athletes at Northwestern—the walk-ons—who share an overwhelming community of interest with the petitioned-for unit and yet cannot, under any interpretation of the Act, be deemed employees as opposed to students. Accordingly, there is no appropriate unit for bargaining and the petition must be dismissed for this additional reason.

1. The Petitioned-For-Unit Does Not Include Employees Under The Act

Section 9(a) of the Act dictates that a bargaining unit can only include “employees” within the meaning of the Act. The Act further provides that “the Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.” 29 U.S.C. §159(b); Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011).

Here, CAPA seeks to establish a bargaining unit of all Northwestern football players receiving grant-in-aid athletic scholarships. Since scholarship student-athletes on the Northwestern football team are not “employees” within the meaning of the Act, the petitioned-for unit is not an appropriate unit within the meaning of Section 9(b) of the Act.

2. There Is No Appropriate Unit Of Northwestern Football Players Because Non-Scholarship Student-Athletes Cannot Be Legitimately Excluded From The Petitioned-For-Unit But With Their Inclusion The Unit Is Inappropriate

Even if the Regional Director finds that the scholarship football student-athletes are employees within the meaning of the Act, the petitioned-for-unit is nevertheless inappropriate because it is arbitrary, fractured and lacks cohesion. Specifically, the petitioned-for unit excludes the non-scholarship walk-ons on the Northwestern football team despite the fact that walk-ons share an overwhelming community of interest with their teammates who receive athletic scholarships. There is no legitimate basis upon which to exclude walk-on football players from the petitioned-for unit, and yet, their inclusion renders the unit inappropriate because they receive no aid and cannot under any scenario be considered employees.

Under existing Board precedent, a petitioned-for unit is not appropriate if it excludes individuals who have an “overwhelming community of interest” with the employees who are in the petitioned-for-unit. Specialty Healthcare and Rehabilitation Center of Mobile, 357 NLRB No. 83 (2011) (articulating the Board’s present standard for dismissing a petition that excludes necessary individuals); Odwalla, Inc., 357 NLRB No. 132 (2011) (finding that petitioned-for unit was not appropriate because it excluded merchandisers who shared an overwhelming community of interest with the employees in the recommended unit); Wheeling Island Gaming Inc., 355 NLRB 637 (2010) (concluding that the petitioned-for unit, which included only poker dealers and excluded all other dealers in the casino, was not appropriate).

In the words of the Board’s decision in Specialty Healthcare, “A petitioner cannot fracture a unit, seeking representation in ‘an arbitrary segment’ of what would be an appropriate unit.” (supra, at p. 18, citing Pratt & Whitney, 327 NLRB 1213, 1217 (1999)). In Specialty Healthcare, the Board specifically stated that a petitioned-for-unit of “only selected CNAs”

would likely be a fractured, and thus inappropriate, unit. Id. Here, too, the Petitioner has arbitrarily fractured the petitioned-for-unit by seeking to represent only selected football student-athletes. By excluding walk-on football players, who share an overwhelming community of interest with scholarship football players, the petitioned-for-unit is inappropriate. See Saga Food Service of California, Inc., 212 NLRB 786 (1974) (in excluding student employees from a unit of non-student cafeteria workers at the University of California-Davis, the Board found that the student employees were treated markedly different than non-student employees in the areas of compensation, supervision, work schedules, and fringe benefits).

The following facts introduced at the hearing show that walk-on student-athletes participate in the football program in the same manner and subject to the same requirements as those who receive grant-in-aid athletic scholarships:

- Walk-on student-athletes have the same role as every other student-athlete on the football team. (Tr. 1035, 1222);
- Walk-on student athletes are expected to meet the same requirements as the scholarship student-athletes and are treated precisely the same as the scholarship student-athletes. (Tr. 1036, 1222, 1228);
- Walk-ons receive substantial playing time and have served as starters. (Tr. 1037, 1223);
- In fact, some of Northwestern's walk-ons have gone on to play in the National Football League following graduation. (Tr. 1047);
- The only distinction between walk-ons and student-athletes on athletic scholarship is that walk-ons do not receive athletic scholarships. (Tr. 1036); and
- Every student-athlete on the football team, regardless of whether they are scholarship or walk-on, must follow the rules set by the NCAA, the Big Ten, Northwestern University, and the Northwestern football team rules contained in the team handbook. (Tr. 225, 1076, 1166-67, 1228, 1269-1270; Joint Ex. 17.)

There is no legitimate basis on which to exclude walk-on student-athletes because the traditional community-of-interest factors overlap almost completely. However, the walk-ons cannot be included in *any* unit by virtue of their indisputable non-employee status.

Moreover, there is no way Petitioner can establish a non-arbitrary unit of football student-athletes. It makes no sense to create a unit limited to Northwestern football players who receive athletic scholarships. Under this definition, the unit would be limited to the 85 students who receive athletic scholarships. However, the Northwestern football roster typically includes up to 112 student-athletes, including walk-ons, some of whom receive need-based financial aid from Northwestern and others who receive no financial aid whatsoever. There simply is no way that the Petitioner can explain why the walk-on football student-athletes do not share a community of interests with the student-athletes receiving athletic scholarships, yet the Petitioner obviously has to concede that walk-ons are not employees by any stretch of the imagination. It is illogical to suggest that two Northwestern football players who line up side-by-side in a football game (such as the guard and tackle on the right side of the offensive line), who share the same team, the same uniform, the same practice and pre-game preparation, and the same goals during the game, do not share an overwhelming community of interest. And yet, if the guard is a non-scholarship student and the tackle receives an athletic scholarship, the petitioned-for-unit would exclude the student who plays the guard position.

Thus, Petitioner's exclusion of walk-on football players from its requested unit demonstrates that its gerrymandered unit is arbitrary, fractured and not appropriate for bargaining under the Act. As a result, the petition must be dismissed.

H. THE PETITIONER IS NOT A LABOR ORGANIZATION WITHIN THE MEANING OF THE ACT

At the hearing, Northwestern stipulated that CAPA is a labor organization within the meaning of the Act subject to two conditions. First, CAPA is a labor organization *only if* the student-athletes CAPA seeks to represent in this case—members of Northwestern’s football team who receive athletic grants-in-aid—are ultimately found to be employees within the meaning the Act. Second, CAPA is a labor organization *only if* the petitioned-for-unit CAPA seeks to represent, which is narrowly limited to the Northwestern football student-athletes who receive athletic scholarships, is found to be an appropriate unit within the meaning of the Act. The record evidence makes clear that CAPA cannot satisfy either of these necessary conditions and, therefore, fails to qualify as a labor organization within the meaning of Section 2(5) of the Act.

When an entity, such as CAPA, exclusively seeks to represent non-employees, whether they are students, volunteers or other non-employees, the entity does not qualify as a labor organization within the meaning of the Act. The term “labor organization” is defined in the Act as “any organization of any kind, or any agency or employee representation committee or plan, *in which employees participate* and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (emphasis added). Thus, it is paramount to meet the definition of “labor organization” that the entity in question represents *employees*.

Because the student-athletes CAPA seeks to represent in this case are not employees, and because CAPA’s founding statement reveals that its membership is limited to scholarship athletes who participate in NCAA Division I FBS football and Division I men’s basketball (Joint Ex. 1), CAPA is not a labor organization within the meaning the Act. The Leland Stanford Junior University, 214 NLRB 621 (1974) (finding that physics department research assistants are

not “employees” and since petitioner did not seek to represent any other category which may be “employees,” the petitioner was not a labor organization within the meaning of the Act).

Even if the Regional Director finds that the student-athletes CAPA seeks to represent are “employees” under the Act, CAPA is nevertheless not a labor organization because the petitioned-for-unit is not an appropriate unit within the meaning of the Act, as explained above in Section F.

I. IN THE ALTERNATIVE, THE PETITIONED-FOR UNIT WOULD BE MADE UP OF TEMPORARY EMPLOYEES WHOSE REPRESENTATION WOULD NOT EFFECTUATE THE PURPOSES OF THE ACT

Even if the Board were to conclude that scholarship student-athletes in the football program meet the definition of “employee” in the Act, it is undisputed that their relationship with the University is not permanent. Indeed, there is no evidence that the student-athletes stay at the University beyond the period of time it takes them to receive their degrees, and in fact NCAA regulations limit the number of years a student-athlete is eligible to participate in athletic competition. Just as importantly, some student-athletes in the football program receive athletic aid for only a portion of their time in the program (i.e., walk-ons who later receive athletic aid and/or transfer students on athletic aid), and thus have an even more transitory allegedly “economic” relationship with the University. Consequently, the student-athletes in the football program who receive athletic aid cannot be represented for purposes of collective bargaining under the Act.

The Board has long taken the view that employees who lack “continuity of employment” are not entitled to collective-bargaining representation in light of the lack of any expectancy of continued employment. See, e.g., San Francisco Art Institute, 226 NLRB 1251 (1976); Owens-Corning Fiberglass Corp., 140 NLRB 1323 (1963); Indiana Bottled Gas Co., 128 NLRB 1441, n.4 (1960); E.F. Drew & Co., 133 NLRB 155 (1961); Sealite, Inc., 125 NLRB 619 (1959). In

the educational context, the Board has repeatedly recognized that students enrolled at institutions of higher education who perform services for the institution cannot be included in bargaining units with other non-student employees precisely because of the fleeting nature of the relationship between the student and the respective university. See Georgetown University, 200 NLRB 215 (1972); Cornell University, 202 NLRB 290 (1973); Barnard College, 204 NLRB 1134 (1973); cf. Boston Medical Center Corp., 330 NLRB 1152 (1999) (concluding that medical interns, residents and fellows employed by teaching hospital, not institution awarding medical degree, were not temporary employees).

Subsequent to that line of cases, the Board went on to hold—without answering the question of whether they were employees under Section 2(3)—that a unit consisting of *students only* was inappropriate given the temporary nature of their relationship. In San Francisco Art Institute, the employer was a private, nonprofit educational institution. 226 NLRB 1251 (1976). The Operating Engineers had sought to represent a unit of student and non-student janitors, or in the alternative, to represent a unit of student janitors only. The student janitors were enrolled at the school, worked at the school between 20 and 35 (full-time) hours per week and some were paid through tuition scholarship. Id. at 1251, n.2. Even though the student janitors remained employed by the school for as long as three and one-half years, the Board concluded that given the “brief nature” of the students’ tenure as employees, the purposes of the Act would not be effectuated if it were to direct an election consisting of student janitors only, who the Board likened to “temporary or casual” employees. Id. at 1252. Consistent with its long-standing views regarding representation of students, the Board noted “[t]he fact that the student janitors who presently seek representation attend the institution for which they work brings into sharp and special focus the very tenuous secondary interest that these students have in part-time

employment.” Id. Based on that secondary interest, coupled with regular and rapid turnover among students, the Board refused to direct an election of student janitors.³⁵ See also Saga Food Service of California, Inc., 212 NLRB 786, 787 n.9 (1974) (rejecting proposed unit of student-only cafeteria workers)

The analysis in San Francisco Art Institute is directly applicable to facts of this case. Here, the student-athletes must be enrolled at Northwestern in order to participate in the football program. (Tr. 497-99.) They are not paid wages for their time spent in football-related activities, but instead receive financial aid in the form of tuition, room and board, books and fees. (Tr. 730.) Their time at the University and in the football program is necessarily narrowly limited. Indeed, pursuant to NCAA regulations, student-athletes are not eligible to participate in the football program for more than five seasons, and if they do participate for five seasons they cannot actually participate in games for one of those seasons. (Jt. Ex. 22.) Still, other student-athletes in the football program at Northwestern have an even more tenuous financial interest in their relationship with the football program. Some student-athletes begin their participation as a walk-on in the football program and only later are awarded athletic financial aid. For example, one student-athlete did not even receive athletic aid until he was in his final year of the football program at Northwestern. (Tr. 1269.) Similarly, other student-athletes who receive athletic scholarships transfer out of Northwestern before their eligibility is exhausted, while others transfer in after having spent one or more seasons at other institutions. (Tr. 1263-1264.) Given the lack of continuity in the petitioned-for bargaining unit, along with the temporary nature of the relationship between the student-athletes and the University, the purposes of the Act would not

³⁵ Boston Medical Center, 330 NLRB 152 (1999), does not require a different result. There, the house staff and medical residents were not enrolled as students at Boston University Medical School during the period of time they performed post-degree training duties at the hospital.

be effectuated by allowing representation of the petitioned-for unit. Just as the Board pointed out in San Francisco Art Institute, by the time an election were to be conducted and the results certified, the composition of the unit would have changed substantially. Indeed, the primary proponent of the petitioned for unit, Colter, has exhausted his eligibility and is expected to graduate from the University this month. Consequently, the unit is not appropriate for purposes of collective bargaining.

J. VOTER ELIGIBILITY ISSUES FURTHER DEMONSTRATE THAT NO ELECTION CAN BE CONDUCTED WITHIN AN APPROPRIATE UNIT OF SCHOLARSHIP FOOTBALL STUDENT-ATHLETES

Even if the Regional Director finds that the petitioned-for unit is appropriate for bargaining under Section 9(b) of the Act, there are substantial issues regarding the eligibility to vote of a substantial percentage of the individuals who would comprise the unit. The general rule regarding eligibility to vote in an election is that “employees” must be both “employed” and “working” on the established eligibility date. See Ra-Rich Mfg. Corp., 120 NLRB 1444, 1447 (1958). More specifically, eligible voters are those employees in the unit who are “on the payroll” as of the “payroll period” immediately preceding the date of the Direction of Election. See Excelsior Underwear, 156 NLRB 1236, 1240 n. 5 (1966).

The fact that it will be virtually impossible to apply the Board’s eligibility principles to scholarship student-athletes is a compelling reason to dismiss the petition. For example, it is impossible to apply a rational standard, under Ra-Rich Mfg. Corp., for the Regional Director to determine who is “employed” and “working” on the established eligibility date. If merely being enrolled as a student at Northwestern were sufficient, then it should be manifestly clear that the threshold question of “student” versus “employee” status has been wrongly decided. Conceptually, a student-athlete who is not engaged in a required team activity cannot possibly said to be “working” for the University. Moreover, a student-athlete at any time during the year

can be engaged in various voluntary activities, such as studying, running, lifting weights, watching film, eating healthy meals, or sleeping well. None of these pursuits can be considered “working” for the University under any definition of the word. Indeed, depending on the date of the putative Direction of Election, the football team may not have any formal activities for several weeks. After the conclusion of Spring Practice, a number of discretionary weeks and voluntary off-season workouts fill the calendar. (Tr. 517-518, 522.) No student-athlete is engaged in any “work” for the University during these periods.

Nor do the eligibility standards of Excelsior provide any better guidance. There is no “payroll” for student-athletes at Northwestern nor is there anything analogous in concept to a “payroll period.”

Additionally, some student-athletes (a) have exhausted their eligibility and will never again play football at Northwestern yet remain on scholarship, or (b) have accepted a scholarship from Northwestern, enrolled in school for classes, but have not participated in a single official football activity. The record shows that Petitioner’s witness, Kain Colter, falls into category (a) because he exhausted his football eligibility when he played in the final game of the 2013 season, but still receives the benefit of his athletic scholarship as a student until he graduates in the spring of 2014. In fact, there are seven student-athletes on the Northwestern Squad List as of February 14, 2014 who have exhausted their playing eligibility and yet still receive the benefits of their scholarships. (Tr. 537.) Presumably, these student-athletes, despite being in the purported unit, have no basis to claim that they are “working” on the established eligibility date. Similarly, there are student-athletes in category (b)—some of the 15 incoming freshmen who signed a National Letter of Intent on February 5, 2014—who will enroll in summer classes at Northwestern and yet will not participate in any official football activity until preseason practice

starts in August, 2014. (Tr. 489-490, 520-521, 1030.) Presumably, these student-athletes (whose identity cannot be known until the start of summer classes), despite meeting the definition of the approved unit, would not be eligible to vote in any election that is directed until they actually begin participating in football related activities at Northwestern.

In sum, these voter eligibility issues underscore the fact that a union election is not appropriate for Northwestern student-athletes who receive athletic scholarships and participate in its football program.

IV. CONCLUSION

Based on the foregoing and the entire record, the evidence overwhelmingly demonstrates that Northwestern's student athletes who receive football scholarships are students as opposed to employees within the meaning of the Act. For that reason, as well as the additional reasons set forth above, the petition should be dismissed.

Dated: March 17, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alex V. Barbour", written over a horizontal line.

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CERTIFICATE OF SERVICE

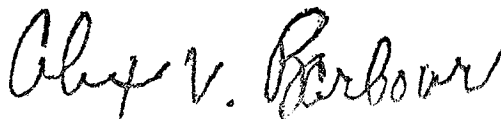
I, Alex V. Barbour, an attorney, state under oath that I caused a copy of the foregoing **Brief To The Regional Director On Behalf Of Northwestern University** to be electronically served upon the Regional Director for Region 13 of the National Labor Relations Board and the following attorneys on this 17th day of March, 2014.

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