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AN HISTORICAL OVERVIEW OF STUDENT-ATHLETE ACADEMIC ELIGIBILITY AND THE FUTURE IMPLICATIONS OF CURETON v. NCAA

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I. INTRODUCTION

From the moment universities began sponsoring intercollegiate athletics, administrators have debated what academic standards, if any, should be implemented to correct the dubious reputation that college athletes are not serious students.1 Beginning with the inception of Proposition 48 in 1983, numerous proposals have been forwarded by an assortment of individuals associated with collegiate athletics to function as benchmarks for freshmen academic eligibility. Since then, the National Collegiate Athletic Association (“NCAA”) has initiated, legislated and enforced these academic measures to silence the growing number of negative perceptions targeted toward student-athletes. In an attempt to eliminate the stereotypical “dumb jock” image, the NCAA has consistently raised the academic requirements for today’s student-athletes competing at major universities. The NCAA’s most recent attempt at legislat-

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** University of Miami, B.A.; University of Florida, J.D.; University of Florida, Ph.D. The author dedicates this article to her husband, John, for his constant encouragement and support during the writing of this article, and to her children, Emily, John and Sarah, who really tried to go to bed on time so she could finish writing.


2. See Harold J. Vanderzwaag, Athletics: Academic Standards for Freshman Eligibility, POLY DEV. IN SPORT MGMT., 1998, at 42. Proposition 48 stated that student-athletes were academically eligible for collegiate athletics if they maintained a minimum grade-point average of 2.0 on a 4.0 scale in eleven academic courses including three years of English, two years of mathematics, two years of social science, and two years of natural or physical science. See id. Student-athletes were also required to achieve a combined SAT score of 700 or a 15 composite score on the ACT. See id. For a discussion of the NCAA’s academic requirements for student-athletes under Proposition 48, see infra notes 19-60 and accompanying text.

(127)
ing academic quality was the passage of Proposition 16 in 1996, increasing the minimum grade-point average ("GPA") and Scholastic Aptitude Test ("SAT") or American College Test ("ACT") score a student-athlete must achieve in order to be academically eligible for collegiate athletics. Proposition 16 involves two of the most passionately contested issues in the history of college athletics, namely, freshmen eligibility and academic standards. Little doubt exists that its implementation will have significant implications for collegiate athletics.

A. History of the NCAA

In response to public criticism of the brutality of football, the NCAA evolved from the Intercollegiate Athletic Association, which was created in 1906 by a group of thirty-eight institutions. The NCAA is a voluntary, unincorporated association of approximately 1200 members consisting of colleges and universities, conferences and associations, and other educational institutions. For purposes of bylaw legislation and competition in intercollegiate championship events, the active members are divided into Divisions I, II and III, with further classification of Division I football members into Division I-A and Division I-AA.

B. History of Academic Eligibility

Academic standards for Division I athletes sharply declined in the early 1970s. Before then, the academic eligibility of a student-athlete was determined by the "1.6 rule," meaning that athletes were required to have a high school GPA and SAT score in a combination that would predict a 1.6 GPA as a college freshman. In addition, some of the conferences, including the Atlantic Coast Conference, required additional minimum scores or standards such as a combined SAT score of at least 800. In 1972, the "1.6 rule" was abolished, and, in effect, this eliminated all academic standards for

3. For a discussion of the NCAA's academic requirements for student-athletes under Proposition 16, see infra notes 61-86 and accompanying text.
6. See id.
8. See id.
9. See id.
entering freshmen athletes.\textsuperscript{10} Essentially, a prospective student-athlete only needed to graduate from high school in order to participate in college sports, doing little to dispel the stereotypical "dumb jock" image associated with the college athlete.\textsuperscript{11} In addition, beginning in 1974, freshmen were allowed to compete in varsity competition in revenue-producing sports such as football and men's basketball.\textsuperscript{12} Concurrently, the first stories about hardship cases, recruitment scandals, and academic exploitation surfaced.\textsuperscript{13}

One survey during the 1980s revealed that among one hundred Division I schools, thirty-five institutions reported graduation rates under twenty percent for their male basketball players, and fourteen institutions had the same rate for their football players.\textsuperscript{14} A consensus among researchers developed that student-athletes, especially minority student-athletes, were being exploited for their athletic talent while their academic endeavors were being pushed aside. Other sport researchers identified similar concerns regarding the college's treatment of African-American athletes.\textsuperscript{15}

The NCAA also needed to create a level playing field of student-athletes among the different institutions within the boundaries of the established academic criteria.\textsuperscript{16} The NCAA realized that if athletics were to be mainstreamed in the institution's overall educational mission, trustees, presidents, administrators and faculty shared the responsibility of assuring coherent policy and program integrity.\textsuperscript{17}

\textsuperscript{10} See id.
\textsuperscript{11} See id.
\textsuperscript{12} See Padilla, supra note 7, at 37.
\textsuperscript{13} See id.
\textsuperscript{14} See Douglas Lederman, College Athletes Graduate at Higher Rate Than Other Students, But Men's Basketball Players Lag Far Behind, Survey Finds, CHRON. OF HIGHER EDUC., Mar. 27, 1991, at A1.
\textsuperscript{15} See Douglas Lederman, NCAA Study Compares Records of Black, White Athletes, CHRON. OF HIGHER EDUC., July 10, 1999, at A30. Dr. Richard Lapchick, Director of Northeastern University's Center for the Study of Sport in Society, reported the troubling facts that 42.5% of the African-American athletes left college in poor academic standing; 28.2% dropped out of school in their fourth or fifth year, compared to 10.7% of Caucasian athletes. See id. Lapchick also suggested "that a disproportionate number of black athletes were kept on a non-graduation track, so by the time their eligibility expired, they seemed so far from graduating that they may have chosen to drop out because of a lack of hope." Id.
\textsuperscript{16} See id.; Andrew Bagnato, A ban on male freshmen would mean... The kids can't play, CHI. TRIB., June 23, 1999, at C7.
II. NCAA Academic Guidelines for Freshmen

In order to counteract these negative statistics, a number of university officials, together with and as part of the NCAA, decided to create academic guidelines for the admission of freshmen athletes to colleges and universities. The major reason for enacting these guidelines was to preserve the academic integrity of each institution, and the goal of each school was to enroll student-athletes who were likely to graduate with an academic degree.18

A. Proposition 48

Initially, the NCAA developed the "1.6 rule" requiring universities to regulate athletic eligibility of those student-athletes who were predicted to achieve a minimum 1.6 GPA average during their freshman year of college.19 However, a critical weakness of this subjective benchmark was that the established predictions for each university were profoundly different for each institution.20 Therefore, to eliminate this disparity among universities, the NCAA discarded the "1.6 rule" in 1972 in the hopes of determining more uniform eligibility standards for student-athletes.21

In a dual effort to alleviate the public outcry against academically unqualified athletes participating in intercollegiate sports and to establish an academic platform for freshmen eligibility, the landmark legislation, Proposition 48, was conceived in 1983.22 The intent of this proposal was twofold. First, an emphasis was placed on increasing the graduation rate of those student-athletes specifically competing in the revenue-generating sports of football and

20. See id.
21. See id.
22. See Padilla, supra note 7, at 38. This action actually transpired over a decade from 1972 to 1982, as a group of leaders met to initiate the foundations of reform. See id. These efforts ultimately led to the establishment of what is now called the NCAA's President's Commission. The NCAA's President's Commission introduced two initial proposals at the NCAA's January 1983 convention: (1) an initial eligibility standard for Division I intercollegiate athletics commencing in 1986, which would combine a minimum GPA in a core curriculum of high school courses with minimum standardized test scores; and (2) an eligibility standard for varsity competition after the freshman year that to remain eligible, a student athlete would, in addition to meeting all existing NCAA requirements, have to be progressing towards a baccalaureate degree and be in good academic standing, which would have to be certified by appropriate academic authorities. See id.
men's basketball. Second, efforts were made to ensure that student-athletes were not being counseled into courses primarily designed to safeguard their eligibility with little or no concern for their progress toward graduation. Proposition 48, which took effect in 1986, required all prospective high school student-athletes being considered for a college athletic scholarship to possess a 2.0 GPA minimum in eleven high school core classes and a standardized test score above a 700 on the SAT or 15 on the composite ACT. Consequently, if the criteria were not satisfied, the athlete would be ineligible to participate for one academic year.

To understand the NCAA legislation that culminated in 1996 with Proposition 16, it is important to understand some of the reasoning behind Proposition 48's passage. Proposition 48 warned high schools with potential Division I student-athletes to pay closer attention to their students' academic preparation if the students anticipated having maximum eligibility while in college. In addition, this legislation was designed to give these athletes a better chance of obtaining college degrees and to end the exploitation of talented athletes (primarily African-Americans) that was commonplace at so many Division I institutions until this time.

1. **Proponents of Proposition 48**

"In 1985, the year before Proposition 48 went into effect, forty to sixty percent of the freshmen entering the average Division I-A football or men’s basketball programs scored below 700 on the SAT." In 1986, the first year Proposition 48 went into effect, the percentage dropped to nearly zero. In addition, according to NCAA data, while the participation of African-American student-athletes initially declined after enacting Proposition 48, within four years their participation rate increased to the levels previously held

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23. See Letter from Robert H. Atwell, Vice President of ACE on behalf of the President's Committee on Collegiate Athletics, to Chief Executive Officers of ACE Member Institutions 4 (Dec. 22, 1982).
24. See id.
27. See Vanderzwag, supra note 2, at A48.
28. See id.
29. Padilla, supra note 7, at 38.
30. See id.
before the enactment of Proposition 48.  

Supporters of increased academic eligibility standards believed that if the academic standards and expectations of student-athletes were raised, the athletes would meet them. According to supporters, Proposition 48 forced high schools to be more cognizant of preparing students academically. Therefore, if a student-athlete were not sufficiently prepared academically, the result was the loss of one year of athletic eligibility when that student-athlete reached a Division I college or university. Advocates believed that a year of nonparticipation in athletics helped the student-athlete get "seasoned" to college life and gave him or her an opportunity to "catch-up" on courses he or she either lacked or failed in the past.

Another argument in support of increased academic eligibility standards dealt with the increased graduation rates of those student-athletes initially affected by the implementation of Proposition 48. Supporters acknowledged that higher admissions standards did improve graduation numbers. Specifically, according to NCAA statistics for African-American male student-athletes entering college in 1985, thirty-four percent graduated after five years; for those entering college in 1988, the graduation rate rose to forty-two percent—an increase of approximately twenty-four percent. For African-American female student-athletes the graduation rate increases were even higher, from forty-four percent for the 1985 entering class to fifty-eight percent for the 1988 entering class—an increase of almost thirty-two percent.

2. Opponents of Proposition 48

Supporters of the academic eligibility standards, such as the American Council on Education ("ACE"), and the Ad Hoc Committee on the Problems of Major Intercollegiate Athletic Programs, suggested that the dual purpose of the changes in academic standards was to "assert the supremacy of academic values" in college

31. See id.
32. See id.
33. See Vanderzwaag, supra note 2, at 51.
34. See id. at 52.
35. See id.
36. See id.
37. See id.
39. See Padilla, supra note 7, at 38.
40. See id.
sports and to “preserve the integrity of the NCAA and their institutions.” Opponents, however, objected not only to the test score standard, but also to the manner in which the proposal was drafted and the negative effects it had on certain minority groups. Much of the opposition was led by the presidents of predominantly African-American institutions who believed that the proposal was inherently discriminatory. Jesse Stone, Jr., President of Southern University, described the proposal as “patently racist.” These critics pointed to the lack of representation by historically black institutions and African-American representatives on the Ad Hoc Committee that formulated the new eligibility rules. In fact, the decision of the NCAA to adopt the new initial eligibility standards affected a number of different groups, all of which were excluded from the rule development process in the Ad Hoc Committee.

Another major criticism of Proposition 48 focused on the controversial issue of whether the academic standard was racially biased. According to a study conducted by the McIntosh Commission for Fair Play, Proposition 48 eliminated a substantial number of student-athletes who otherwise would have graduated from various universities under different guidelines. This research reported that forty-five percent of African-American students who actually graduated would have been subsequently eliminated if adherence to the new stipulations was enforced. Therefore, as a result of the adoption of Proposition 48, the number of African-American freshmen student-athletes participating on Division I athletic teams


42. See Vanderzwaag, supra note 2, at 43.

43. See id.

44. See id.

45. See Greene, supra note 41, at 112.

46. See id. “The groups affected included blacks, who have historically been disadvantaged by standardized testing, the historically black colleges, which have always disproportionately educated young black people as well as afforded them a quality athletic experience, and secondary educational institutions.” Id. In addition, the NCAA affected other groups’ core curriculum requirements, including testing services that design and administer the tests used for determining academic eligibility. See id. at 112-13. The NCAA also affected potential collegiate athletes, including those who may be excluded from competition as well as those who are included but whose competitive and associative opportunities are lessened as a result of the new rules. See id.

47. See MClINTOSH COMMISSION FOR FAIR PLAY IN STUDENT-ATHLETE ADMISSIONS, REPORT 1 (1994) [hereinafter McIntosh Report].

plummeted eighteen percent from the previous year.\textsuperscript{49} Over the same time period, the representation of Caucasian athletes saw a moderate increase.\textsuperscript{50}

However, the focal point of the criticism of Proposition 48 was the use of the SAT and ACT to establish minimum initial eligibility standards.\textsuperscript{51} George Hanford, the President of the College Board, which administers the SAT, stated:

It is an undisputed fact that minority candidates earn significantly lower scores on the average because many of them are less privileged educationally and socio-economically than whites. Proposition 48 will have a differentially severe impact on the aspiring athletes among blacks, but not because of bias in the SAT, but because of the educational deficit that exists in this country. So, it is obvious that the use of SATs to help set minimum academic standards for freshmen is patently discriminatory and racist in its effects. Its use is a disservice to minority athletes.\textsuperscript{52}

A second problem with the use of the SAT minimum test score was that the use of this standard violated the scientific and philosophical principles upon which the SAT was based.\textsuperscript{53} For example, the designation of 700 or 900 as the minimum standard ignored the SAT’s standard deviation of 50 points.\textsuperscript{54} Therefore, statistically speaking, a score of 650 or 750 on the SAT should be treated equally. Despite this, the NCAA treated them vastly different.\textsuperscript{55} Further, the SAT was meant only to help predict how well students would perform academically in the first year of college.\textsuperscript{56} George Hanford again summarized by stating:

Under the NCAA rule, the SAT \textit{is} used for a purpose which it was neither intended nor designed to serve—determining athletic eligibility rather than college admission, and \ldots the way SAT scores are being used in establishing athletic eligibility is contrary to the College

\textsuperscript{49} See McIntosh Report, \textit{supra} note 47, at 1. \textit{But see} Padilla, \textit{supra} note 7, at 38.

\textsuperscript{50} See McIntosh Report, \textit{supra} note 47, at 1.

\textsuperscript{51} See Vanderzwaag, \textit{supra} note 2, at 49.

\textsuperscript{52} \textit{Id}.

\textsuperscript{53} See \textit{id}.

\textsuperscript{54} See \textit{id}.

\textsuperscript{55} See \textit{id}.

\textsuperscript{56} See Vanderzwaag, \textit{supra} note 2, at 49.
Board’s guidelines with respect to the use of test scores in making college admissions decisions.57

Critics of Proposition 48 cited evidence from a new study that showed there was no statistical or educational rationale for using standardized test scores as an absolute cutoff for eligibility.58 From the outset, advocates of African-American student-athletes have argued that the tests were culturally biased, while testing-company officials have insisted that their tests were never intended to serve as an absolute cutoff.59 Even many of the rule’s supporters acknowledge that the decision to set the eligibility cutoff at 700 was not based on empirical knowledge.60

B. Proposition 16

Proposition 48 was revised at the NCAA Convention in 1989 and became Proposition 42.61 Essentially, Proposition 42 changed Proposition 48 by stating that a “partial qualifier,” a student-athlete who achieved one of the benchmarks, either a 2.0 GPA or a 700 on the SAT or 15 on the ACT, “may receive institutional financial aid that is not from an athletic source and is based on financial need only, consistent with institutional regulations, during the first academic year.”62 A “nonqualifier,” a student-athlete who achieved neither the GPA nor SAT/ACT benchmarks, “shall not be eligible for . . . institutional financial aid during the first academic year.”63 In essence, Proposition 42 changed Proposition 48 by denying athletic-based financial aid to recruited Proposition 48 student-athletes during the freshman year.64

Subsequently, at the 1992 NCAA Convention, Proposition 48 was again revised into what is now known as Proposition 16.65 This change, which took effect in August 1996, strengthened Proposition 48 in two ways.66 First, the required number of core curriculum courses was raised from eleven to thirteen, meaning student-athletes must take two more courses in English, math, or natural sciences, and second, the minimum GPA was raised from 2.0 to

57. Id.
59. See id.
60. See id.
61. See Vanderzwaag, supra note 2, at 44.
63. Id. at 139.
64. See Vanderzwaag, supra note 2, at 45.
65. See id.
66. See id.
The implementation of Proposition 16 in the 1996-1997 academic year introduced an initial eligibility index or "sliding scale," which enabled a student-athlete to remain eligible despite having a GPA below 2.5 if the SAT or ACT was comparatively higher than 700 or 18, respectively. By using the sliding index, the student-athlete could establish academic eligibility with a GPA as low as 2.00, provided the student also achieved a SAT score of 1010 or an ACT sum (as opposed to composite) score of 86. Conversely, a minimum SAT score of 820 or ACT sum score of 68 established the eligibility floor for students with GPAs of 2.50 or higher. Therefore, a student-athlete not qualifying under the standards of Proposition 16 may become a partial qualifier by presenting an SAT score between 720 and 810 (ACT score between 59 and 67) and a core GPA that produces a GPA-test combination score comparable to that required of qualifiers. Although partial qualifiers cannot compete in intercollegiate athletics, they may otherwise be eligible for athletically-related financial aid.

A comparison of the eligibility standards governed by Propositions 48 and 16 is found below.

67. See id.
68. See id.
70. See id. Statistically speaking, the ensuing effect of Proposition 16 was to modify Proposition 48 by increasing the weight assigned to test scores relative to GPAs. See id. While the minimum core GPA of 2.0 was established at two standard deviations below the national mean, the SAT/ACT test cutoff scores were set only one standard deviation below the national mean, resulting in a heavier weighting of the standardized test. See id.
71. See id.
72. See id. In 1995, the NCAA also passed a provision permitting partial qualifiers to receive institutional financial aid, including athletically-related aid, effective in August 1996. See Vanderzwaag, supra note 2, at 45. Another provision was passed that allowed partial qualifiers to practice the sport on campus, but not compete, during their first academic year in residence. See id. A final provision permitted non-qualifiers to receive institutional financial aid based on financial need rather than from an athletic source. See id.
TABLE 1

Eligibility Standards of Propositions 48 and 16

<table>
<thead>
<tr>
<th>GPA</th>
<th>Proposition 48</th>
<th>Proposition 16</th>
</tr>
</thead>
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<tr>
<td>2.5</td>
<td>700</td>
<td>820</td>
</tr>
<tr>
<td>2.4</td>
<td>740</td>
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<td>1010</td>
</tr>
</tbody>
</table>

A comprehensive research project conducted by The National Center for Education Statistics examined how Proposition 16 academically impacted high school seniors. The primary purpose of this report was to observe high school seniors and then identify the number of students who met the new NCAA requirements. This report highlighted both senior athletes and non-athletes from the 1992 graduating class to compare how their eligibility would be affected by implementing these new academic standards. These requirements were applied to the transcripts of a sample of 1992 high school seniors who: (1) had graduated with their respective high school class on schedule; (2) had applied for college admission; and (3) had previously taken the SAT and/or ACT college entrance examinations. Students who met these three conditions were referred to as “college-bound.” Subsequent findings from this study revealed that:

- A majority (83.2%) of 1992 college-bound high school seniors who met the NCAA Proposition 48 freshmen eligibility requirements for athletic participation as freshmen would have been reduced to approximately two-thirds (64.7%) when the rigorous Proposition 16 standards were invoked.
- Approximately one-half of the African-American (46.4%) and Hispanic (54.1%) college-bound high school seniors met the Proposition 16 requirements, as compared to ap-

73. See David Folkenflik, Test Still Takes 3 Hours, But Has Some New Looks, BALTIMORE SUN, Dec. 12, 1995, at D1.
75. See id.
76. See id.
77. See id.
78. See id.
proximately 67% of Caucasian and Asian college-bound high school seniors.

- College-bound high school seniors from the lowest socio-economic status levels were least likely to meet the Proposition 16 requirements, with only 42% qualifying to participate in varsity sports as freshmen.
- College-bound high school athletes met the requirements at the same rate as non-athletes.\(^7\)**

Nearly all college bound seniors (96.1%), fulfilled the eleven core class requirement of Proposition 48.\(^8\) However, under the more rigorous stipulations of Proposition 16, the number of required English classes increased from three to four, the mathematics requirement was revised to explicitly include algebra, geometry, or a higher-level mathematics course, and another additional academic elective course was also needed.\(^9\) Once these variables were included, only seventy-five percent of the college bound seniors in 1992 met the requirements; thus, under the standards of Proposition 16, nearly twenty-five percent of the 1992 college bound seniors would have been excluded from participating in freshman athletics based on the core course requirement.\(^10\)

In terms of fulfilling Proposition 16, more than two-thirds of Caucasian and Asian college-bound seniors met the NCAA’s academic requirements, compared to approximately one-half of African-American college-bound seniors.\(^11\) Similar results were also reported regarding socio-economic status (“SES”).\(^12\) Students entering universities from higher SES groups were eligible to participate in sports in greater proportions than those students coming from lower SES groups.\(^13\) Lower proportions of minorities, including African-Americans, Hispanics, and low SES college-bound students, met the eligibility requirements for freshman varsity athletics participation under Proposition 48, and the percentages dropped even further under the academic requirements of Proposition 16.\(^14\)

\(^7\) See Nat’l Ctr. for Educ. Stat., supra note 74, at 1-2.
\(^8\) See id. at 3.
\(^9\) See id.
\(^10\) See id. at 4.
\(^11\) See id.
\(^12\) See Nat’l Ctr. for Educ. Stat., supra note 74, at 4.
\(^13\) See id.
\(^14\) See id. at 5. In separate commentaries, both Burwell and Gough addressed the impact of socio-economic status on SAT scores. See id. Extrapolating from 1995 data, students with family incomes of $70,000 or more averaged 1004 on the SAT, while those students from families with annual incomes of less than $20,000 posted average scores ranging from 769 to 813. See id. Nevertheless, the decision-
The controversial issues generated by the ongoing Proposition 16 debate are not new. Ironically, the changes from the "1.6" rule of Proposition 48 to Proposition 16 returned the NCAA to where it was twenty years ago, except that freshmen are eligible to play, and partial qualifiers may practice on campus. However, the question of whether Proposition 16’s effect created a disparate impact with respect to the academic eligibility of minority athletes and left little doubt that legal challenges would soon be on the horizon.

III. CHALLENGES TO NCAA’S PROPOSITION 16 IN CURETON v. NCAA

In 1997, four African-American students challenged the legality of Proposition 16. The students brought suit against the NCAA for prohibiting intercollegiate competition of freshmen athletes who did not achieve the minimum cutoff score on the SAT. The primary question presented by the plaintiffs was whether Title VI of the Civil Rights Act of 1964 prohibited colleges and universities, through the auspices of the NCAA, from requiring students to achieve a minimum standardized test score as a condition of eligibility to participate in intercollegiate athletics and/or receive athletically-related financial aid during their freshman year. Specifically, plaintiffs claimed that Proposition 16’s utilization of a minimum test score requirement had an unjustified, disparate impact.

makers of academic eligibility legislation refused to acknowledge these statistics when implementing their proposals. See Bryan Burwell, After a String of Setbacks at Conventions, Protest Forces Cast an Eye Toward Courts, USA TODAY, Jan. 5-7, 1996, at A6; see also Russell Gough, Don’t Look for Merit in Test Scores, L.A. TIMES, Jan. 5, 1996, at B5 (relating that standardized test scores are poor means to determine “merit” and result in discrimination against poor people and minorities).

88. See id. Proposition 16 increased the number of required core high school classes from eleven to thirteen; it also introduced a “sliding scale” SAT index where a student could compensate for a GPA as low as 2.0 with a higher SAT score. See id. at 690.
89. 42 U.S.C. § 2000 et seq. (1964). Title VI of the Civil Rights Act of 1964 provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1964) (prohibiting discrimination on basis of race by any program or activity receiving Federal financial assistance).
90. See Cureton, 37 F. Supp. 2d at 689. The Eastern District of Pennsylvania previously held that the NCAA is subject to Title VI. See id. at 692 (citing Cureton v. NCAA, No. Civ.A.97-131, 1997 WL 634376, at *2 (E.D. Pa. Oct. 9, 1997)).
pact on African-American student-athletes. Consequently, they were denied recruiting opportunities, admission, scholarship opportunities and the chance to compete in Division I intercollegiate athletics during their freshman year.

A. Is the NCAA Subject to Title VI Regulations?

Before subjecting the NCAA to Title VI and its implementing regulations, the court first had to determine whether the NCAA receives federal funding. Plaintiffs alleged three main theories as to why they believed the NCAA received federal funds. First, plaintiffs claimed that the NCAA indirectly received federal financial assistance "because the NCAA act[ed] as the member institutions' agent with respect to the governance of intercollegiate athletics." Second, relying on Smith v. NCAA, plaintiffs contended that the NCAA was an indirect recipient of federal funds based on its relationship to its member colleges and universities. Finally, plaintiffs argued that the NCAA was a recipient of federal funds through its

91. See id. The disparate impact theory encompasses the notion that practices adopted with no intentional discriminatory motive may operate as the functional equivalent of intentional discrimination. See id. at 696.

92. See id. at 689. Two of the plaintiffs, Leatrice Shaw and Tai Kwan Cureton, were senior track athletes at Simon Gratz High School in 1996. Ms. Shaw earned a 3.5 GPA, graduating fifth in a class of 305 students; Mr. Cureton earned a 2.8 GPA and finished 27th in the same senior class. Despite their high class rankings, neither student achieved the test score required under NCAA rules to obtain eligibility. Both students were prohibited from competing as freshmen in Division I institutions. See Cureton v. NCAA, 198 F.3d at 107, 109-10 (3d Cir. 1999) (discussing plaintiffs' qualifications).

93. See Cureton, 37 F. Supp. 2d at 692.

94. See id.

95. Id.

96. 525 U.S. 459 (1999). In Smith, a female graduate student sued the NCAA for sexual discrimination, alleging that enforcement of a bylaw prohibiting graduate students from participating in varsity athletics at undergraduate institutions violated Title IX. See id. at 463-64. The Supreme Court determined that the NCAA was not subject to Title IX requirements because it was not a "recipient of federal funds" simply because it received dues from its member institutions who received federal funds. See id. at 459-60. The Supreme Court, however, did not address any of the alternative grounds proposed by Smith for bringing suit under Title IX. See id. (citing U.S. v. Bestfoodz, 524 U.S. 51 (1998)). Specifically, the Supreme Court refused to consider whether the NCAA, either directly or indirectly, received federal funds through administration of the National Youth Sports Program, which did receive federal assistance. See id. The Court also declined to consider whether the NCAA was an indirect recipient of federal funds because it exercises controlling authority over its member institutions that received federal assistance. See id. at 470.

97. See Cureton, 37 F. Supp. 2d at 692.
affiliate, the National Youth Sports Program Fund ("NYSP Fund").

The NCAA responded that plaintiffs' reliance on Smith was tenuous based on the fact that the United States Supreme Court vacated the Third Circuit's judgment because the court in Smith had "erroneously held that dues payments, from recipients of federal funds, suffice[d] to subject the NCAA to suit under Title IX." The Supreme Court made a distinction between receiving earmarked funds, either directly or indirectly through an intermediary, or simply benefiting economically from those institutions receiving the federal funds. In Smith, there was no allegation that NCAA member institutions paid their dues with federal funds earmarked for that purpose.

The Supreme Court, however, failed to rule on the alternative theories proposed by Smith to show that the NCAA was a direct/indirect recipient of federal financial assistance. The plaintiffs in Cureton believed that the Smith ruling did not preclude them from using any one of those theories to establish that the NCAA received federal funds sufficient to trigger Title VI coverage. Plaintiffs alleged four additional theories to support their claim that the NCAA was subject to suit under Title VI. First, the NCAA was a direct recipient of federal funds because the National Youth Sports Program ("NYSP") was merely an alter ego of the NCAA. Second, the NCAA indirectly received federal funds because of the complete control it exercised over the NYSP and, therefore, the NYSP

98. See id.

99. See Smith, 525 U.S. at 470 (holding that Third Circuit judgment should be vacated and remanded).

100. See id. at 465.

101. See id. at 466 (distinguishing between showing of earmarked funds in Grove City College v. Bell, 464 U.S. 555 (1984)).

102. See id. at 469. The two alternative theories proposed were: (1) that the NCAA either directly or indirectly obtained federal aid from the National Youth Sports Program; or (2) when a recipient gave controlling reign to another entity, it was covered under Title IX. See id. at 469-70.

103. See Cureton, 37 F. Supp. 2d at 693 (explaining that, under Smith rationale, where plaintiffs could not excessively rely on this theory to prove that NCAA received federal funds). Instead plaintiffs could use this theory in combination with other facts theories.

104. See id. at 694.

105. See id. The court refused this theory because the district court had previously rejected it. Rather, the court found that plaintiffs again failed to pierce the NCAA's corporate veil. See id.
Third, the member institutions of the NCAA received federal assistance, and the NCAA governed these institutions with respect to athletic rules. Finally, the member institutions which received federal funding ceded control of their athletic programs to the NCAA, making the NCAA subject to Title VI as an indirect recipient of federal funds.

In *Cureton*, the United States District Court for the Eastern District of Pennsylvania held that the NCAA was a recipient of federal funds under the "indirect recipient" or "controlling authority" theories because it indirectly received federal financial assistance through its complete control over the NYSP Fund. The court reasoned that because there was "a nexus between the NCAA's alleged discriminatory conduct with regards to intercollegiate athletics and the sponsorship of such programs by federal fund recipients, the NCAA was subject to Title VI for a challenge to Proposition 16."

B. Do Minimum Standardized Test Scores Create a Disparate Impact Among Minority Students?

The disparate impact theory is premised upon the notion that "some employment practices, adopted without deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." One court held that in order to establish a *prima facie* case of disparate impact discrimination, a plaintiff must prove that the implementation of a facially neutral selection "has caused an adverse disproportionate effect . . . excluding the plaintiff and similarly situated applicants from some educational opportunity." Once established, the burden shifts to the defendant to prove that the disproportionate effect is an "educa-

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106. *See id.* The court found that while the Fund was the designated receiver of the block grant, it was only a conduit by which the NCAA made its decisions. *See id.*

107. *See id.*

108. *See Cureton*, 37 F. Supp. 2d at 694. Considering the third and fourth theories, the court found that plaintiffs sustained their burden of proving the NCAA was subject to Title VI because member institutions gave it control over federal programs. *See id.*

109. *See id.*

110. *Id.* at 696.

111. *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1998)).

tional necessity" justified under Title VI. If the defendant produces evidence of an educational necessity, the plaintiff may prevail by discrediting the educational necessity justification or by offering an alternative practice which, while still promoting the educational necessity, results in a less disproportionate impact.

According to the plaintiffs in Cureton, the essence of the disparate impact was that Proposition 16's cutoff score affected people of all races differently. Caucasian student-athletes applied to Division I schools in greater numbers and were excluded less than the smaller African-American student-athlete pool of applicants. Additionally, "[f]or both African-American and low-income student-athletes, the single largest reason for not meeting Proposition 16 standards was a failure to meet the minimum standardized test score."

The NCAA emphasized that the opportunity to obtain a college degree was the important issue at stake, not the opportunity to play sports during an athlete's freshman year. The NCAA also argued that the ultimate goal of Proposition 16 was to increase graduation rates among athletes.

The NCAA indicated that plaintiffs had not disputed the increase in African-Americans' graduation rates, the narrowing of the gap between African-American and Caucasian graduation rates, nor the greater number of African-American student-athletes graduating since the adoption of stricter eligibility standards. The NCAA argued that "the increased number of African-Americans receiving athletic scholarships relative to their composition in the general student body was further proof of how college athletics

113. See Cureton, 37 F. Supp. 2d at 697 (applying "business necessity" test used in Wards Cove for "educational necessity"); see also Wards Cove, 490 U.S. at 659-60.
114. See Cureton, 37 F. Supp. 2d at 679 (citing Wards Cove "business necessity" test).
115. See id. at 698-99 (emphasizing findings of July 12, 1998 Academics/Eligibility/Compliance Cabinet Subcommittee Memorandum, which showed that NCAA contemplated dramatic impact on minority student-athletes after adoption of Proposition 16).
116. See id. at 699 (noting that in Department of Education report, 46.4% of college bound African-American athletes met Proposition 16's requirements as opposed to 67% of Caucasian college bound athletes).
117. Id. at 698 (explaining expectation that among national student population, more than 15% would be affected by SAT/ACT minimum test requirement while less than 3% would be affected by GPA minimum).
118. See id. at 699.
119. See Cureton, 37 F. Supp. 2d at 699 (arguing that standards would increase African-American graduation rates to 59%, compared to 62% Caucasian graduation rate).
120. See id.
had, in fact, benefited this group." 121 Thus, if graduation, rather than freshman-year athletics, was the opportunity at stake here, the NCAA maintained that plaintiffs had "failed to demonstrate the requisite disproportionate effect." 122 The court, however, found the NCAA's argument unpersuasive, determining that a selection practice having a disproportionate "beneficial" impact upon a specific group could compensate for any disproportionate adverse impact on that same group. 123

C. Is Proposition 16 Justified by an Educational Necessity?

The NCAA stated that Proposition 16 was implemented in order to raise student-athlete graduation rates and to close the gap between African-American and Caucasian student-athlete graduation rates. 124 Therefore, to justify Proposition 16, the NCAA needed to demonstrate that the GPA and SAT/ACT cutoff scores bore a "manifest relationship" to the goal of improving student-athlete graduation rates. 125 The court stated that without factual evidence, the NCAA would not be able to show that such a "manifest relationship" existed. 126

According to the NCAA, Proposition 16 was "designed to discourage the recruitment of athletically talented, but academically underprepared students." 127 Thus, "because graduation rates [were] the best available measure of the degree to which student athletes are academically prepared for college, it [made] perfect sense for the NCAA to look at graduation rates as a way of evaluating a rule's relative success." 128 The NCAA argued that if the goal of Proposition 16 was valid, it was not unlawful merely because "of the severity of its adversely disparate impact." 129 According to the NCAA, "[t]he degree of disparate impact [became] relevant only when the [c]ourt analyzes whether . . . equally effective alternatives exist[ed] that decrease[d] an adverse disparate impact." 130

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121. Id.
122. Id. The NCAA supported its contention that using graduation rates was an appropriate measure of Proposition 16's success since graduation rates best measured a student's academic preparedness for college. See id. at 702.
123. See id. at 700.
125. See id.
126. See id.
127. Id. at 702 (citing Defendant's Reply Brief at 10 (Docket No. 11)).
128. Id. (citing Defendant's Reply Brief at 9-10).
129. Cureton, 37 F. Supp. 2d at 700 (citing Defendant's Reply Brief at 18).
130. Id. at 702-03.
Plaintiffs responded that it was not the role of the NCAA to guarantee that student-athletes graduate, but it was the responsibility of each institution to enact support services, which may positively affect the student-athlete graduation rate. Additional, plaintiffs argued that the NCAA failed to show that narrowing the African-American-Caucasian student-athlete graduation rate gap was a legitimate justification of Proposition 16, "rising to the level of educational necessity." In addition to the lack of support for an educational institution or for the NCAA to further the objective of closing the graduation gap, the stated goal was "unequivocally not the purpose behind the adoption of the initial eligibility rules." The court held that the desire to raise student-athlete graduation rates was well-documented in the Record and was a legitimate goal directed toward eliminating both perceived and actual abuses with respect to the academic standards of student-athletes. However, there was no support in the Record for the NCAA's objective of closing the African-American-Caucasian graduation gap. The court acknowledged that closing the graduation gap between African-American and Caucasians was an educational and civil rights concern. The court reasoned that "[a]ctually proffering such a 'back-end' balancing between graduation rates as an express objective underlying Proposition 16 was in direct violation of the Supreme Court's prohibition against using a 'bottom-line' defense to disparate impact cases involving pass fail selection practices."

131. See id. (stating that "The NCAA [was] merely the entity [to] whom member institutions [ ] delegated the task of administering their intercollegiate athletic programs . . . ").
132. Id. at 703. Plaintiffs stated that the graduation gap attributed to more than test scores and high school GPAs. See id.
133. Id. at 704. Nothing in the Record stated that closing the African-American-Caucasian graduation gap was one of the goals of the NCAA with Proposition 48 or 16. See id. at 705. In fact, African-American student-athletes were already graduating at a rate equal to the overall student population and at a rate greater than the African-American students in general since the adoption of Proposition 48. See id. at 703-05.
134. See Cureton, 37 F. Supp. 2d at 704 (stating that counsel for NCAA opened his oral argument with "the legitimate goal of the organization was to improve the academic performance of student athletes . . . ").
135. See id.
136. See id. at 705 (citing Defendant's Reply Brief at 15).
137. Id. The court stated that "the desirable outcome of Proposition 16 . . . [was] simply a collateral benefit of promulgating a rule that set [ ] heightened academic standards." Id.
D. Does A Manifest Relationship Exist Between Cut-off Scores and Improved Graduation Rates and Diminishing of the African-American/Caucasian Graduation Gap?

The NCAA argued that its use of a minimum cutoff score on standardized tests for the purpose of predicting college performance was appropriate because, according to its own research, "high school GPAs and standardized test scores [were] a ‘significant but moderate predictor of college performance’ with GPAs especially being a predictor of first year grades and both criterion being predictors of later graduation."\(^{138}\)

The court held that under the “manifest relationship analysis,” the NCAA must admit evidence which showed that the use of the 820 SAT and 68 ACT cutoff scores bore a manifest relationship to the goal of raising student-athlete graduation rates.\(^{139}\) In addition, the existing SAT cutoff scores would not be justified if they were not “a valid measure of the minimal ability necessary to [achieve] the goal of raising student-athlete graduation rates.”\(^{140}\) Therefore, some independent basis was needed for the NCAA to choose the cutoff, such as a professional estimate of the requisite skill needed or an analysis of test results to locate a logical “break-point” in the distribution of scores.\(^{141}\) In the end, the court found no such basis for the cutoff score.\(^{142}\) According to the court, the NCAA chose a cutoff that appeared acceptable from its consideration of, among other things, the “essential tension between two conflicting goals: (1) raising of graduation rates; and (2) allowing more individuals access to the finite number of athletic opportunities available.”\(^{143}\) The NCAA simply engaged in a “wait and see” strategy to see if the anticipated effects and outcomes would materialize.\(^{144}\) The court,

\(^{138}\) Id. at 706 (citing Satellite Video Conference on Initial Eligibility, held by NCAA Membership Services (Aug. 19, 1998) (transcript at 21-22)).

\(^{139}\) See Cureton, 37 F. Supp. 2d at 706 (citing Newark Branch NCAA v. Town of Harrison, N.J., 940 F.2d 792, 804 (3d Cir. 1991)).

\(^{140}\) Id. at 708 (quoting Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1531 (M.D. Ala. 1991)).

\(^{141}\) See id. (citing Guardians Ass’n of N.Y. City Police Dep’t v. Civil Serv. Comm’n, 630 F.2d 79, 105 (2d Cir. 1980)).

\(^{142}\) See id.

\(^{143}\) Id. (citing Memorandum of NCAA Division I Academics/Eligibility/Compliance Cabinet Subcommittee on Initial Eligibility Issues at 4 (July 27, 1998)).

\(^{144}\) Cureton, 37 F. Supp. 2d at 708 (quoting McCardle Deposition at 42, Exhibit D to Plaintiff’s Opening). The court concluded that the NCAA had failed to justify either: (1) that its choice of a 820 cutoff score was reasonable and consistent with normal expectations of acceptable proficiency of student-athletes towards attaining a college degree; (2) that its choice of a 820 cutoff score was the logical
in fact, noted that the NCAA failed to specify what it would consider “normal expectations of the acceptable proficiency” to facilitate student-athletes’ ability to obtain a college degree or what it would consider the requisite ability to graduate.\textsuperscript{145}

Accordingly, the court concluded that the NCAA had not produced any evidence demonstrating that the 820 SAT and 68 ACT cutoff score, under Proposition 16, furthered the goal of raising student-athlete graduation rates.\textsuperscript{146} Even if the NCAA had offered evidence sufficient to shift the burden to the plaintiffs, the court concluded that plaintiffs had satisfied their burden by showing that the adverse racial impact resulting from the SAT cutoff score was “not justified by any legitimate educational necessity.”\textsuperscript{147} The court acknowledged “that [a] strong statistical basis exist[ed] for the use of any particular single minimum score,” but that required the NCAA to perform the appropriate, determinative analysis to substantiate its basis for selecting the 820 cutoff score.\textsuperscript{148} Therefore, the court ordered the NCAA to stop immediately using the minimum standardized test scores as a requirement for freshmen eligibility, indicating that the provision was illegal.\textsuperscript{149}

IV. \textsc{Cureton Addendum: The Third Circuit’s Reversal}

In December 1999, the United States Court of Appeals for the Third Circuit reversed the decision of the district court in \textsc{Cureton}.\textsuperscript{150} The Third Circuit held that the language of section 601 of Title VI was “program specific.”\textsuperscript{151} In other words, section 601 of Title VI did not preclude recipients of federal funds from discriminating with respect to programs \textit{not} receiving the federal fund-
Therefore, the circuit court held, to the extent that this suit was based on the NCAA receiving federal financial assistance due to grants extended to the "Fund," that the suit must fail because the "Fund's" programs and activities were not at issue in this case. As to the question of whether the NCAA maintained "controlling authority" over their member institutions which receive federal financial assistance, the Third Circuit held that this argument failed as well. The court stated that the NCAA did not control its members. While it was true that member institutions make student-athlete admission and scholarship decisions conscious of possible NCAA sanctions, that did not mean the NCAA controls them because the institutions could either accept the sanctions imposed or withdraw from the NCAA, albeit not the most optimal choices with respect to an institution's future competition in national collegiate athletics. Despite the fact that the NCAA constitution required its members to forfeit authority over their sports programs to the NCAA, the member institutions retained control over the individual athletic programs and could make their own determinations as to whether they would adhere to the NCAA rules and regulations.

V. FUTURE IMPLICATIONS OF CURETON

Until Cureton is finally resolved, a high level of uncertainty surrounding the academic eligibility requirements of collegiate student-athletes exists. Although the NCAA's objective to improve graduation rates of student-athletes has been well received by college athletic administrators, the methodology used to implement this objective has drawn sharp criticism. For example, according to

152. See id.
153. See id. at 116 (explaining that issue of whether Fund was alter ego of NCAA was immaterial because "discriminatory impact aspects of the regulations only can be applied to the specific program receiving federal assistance and the Fund's programs are not in issue here").
154. See id.
155. See Cureton, 198 F.3d at 116; see also NCAA v. Tarkanian, 488 U.S. 179, 181 (1988). The Cureton court supported its conclusion by analogizing to Tarkanian. See Cureton, 198 F.3d at 116. In Tarkanian, the University of Nevada at Las Vegas (UNLV) suspended a tenured coach under pressure of NCAA sanctions. See Tarkanian, 488 U.S. at 181.
156. See Tarkanian, 488 U.S. at 198-99 n.19 (explaining that while university's "desire to remain a powerhouse" among collegiate basketball schools was rational reason not to withdraw membership from NCAA.) Just because "options were unpalatable does not mean that they were non-existent." Id.
157. See Cureton, 198 F.3d at 118 (emphasizing that member institutions are autonomous in choosing to admit applicants, hiring employees and deciding what facilities it would require).
1997 NCAA statistics, only forty-one percent of male basketball players graduated within six years or less.\textsuperscript{158} Nevertheless, the NCAA considered adopting two proposals designed to strengthen the concept that student-athletes are serious about their academics.\textsuperscript{159} Specifically, the two proposals would have enacted the first changes in NCAA legislation since the association restructured its governing process, placing university presidents in charge of establishing policy.\textsuperscript{160}

The proposal to ban freshmen from participation in collegiate athletics raises numerous questions. These include, but are not limited to, the extent to how involved the student-athlete would be with regard to travel, practice and competition. Supporters of an absolute ban on freshmen academic eligibility argue that allowing these student-athletes the opportunity to practice and travel would create a "mockery" of the central argument to limit freshmen participation. Adversaries of freshmen eligibility theorize that student-athletes would ultimately miss the same number of classes, and they also would be exposed to many of the stresses already imposed on upperclassmen.\textsuperscript{161} These revisions should ultimately keep the best interests of the student, university and college athletics in perspective.

Although a great deal of the plaintiffs' arguments focused on Title VI regulations and whether Proposition 16 had a disparate impact on African-American student-athletes, one variable of significant magnitude has been overlooked. The NCAA's Rule Change Memorandum contains the following statement:

Low-income student-athletes also have been impacted to a greater degree than other student-athletes by Proposition 16 standards. For example, in 1997, 18 percent of all student-athletes with a self-reported family income below $30,000 failed to qualify, whereas only 2.5 percent of student-athletes with a family income greater than $80,000 failed to qualify.\textsuperscript{162}


\textsuperscript{159} See id.

\textsuperscript{160} See id.

\textsuperscript{161} See id.

\textsuperscript{162} Cureton, 198 F.3d at 119 (McKee, J., dissenting in part, concurring in part) (discussing importance of remembering grave social context which has been lost due to its irrelevancy in legal analysis).
Therefore, Proposition 16 has a disparate impact on economically deprived student-athletes regardless of race.\textsuperscript{163} The dynamics of the disparate impact in \textit{Cureton} appears to be entrenched in the dynamics of socio-economic status. That is, the issues encompassing Proposition 16 are not issues of race, but of class. If they are poor, student-athletes are more likely to be adversely affected by Proposition 16, regardless of whether they are African-American or Caucasian. The effect of Proposition 16 is that student-athletes who have attended wealthy high schools and come from wealthier families who help prepare them for the SAT or ACT exam are more likely to have an advantage under Proposition 16.\textsuperscript{164} Moreover, the economic hierarchy of our society makes class and race inseparable issues.\textsuperscript{165}

\textsuperscript{163}. \textit{See id.} (stating that “dynamics of the disparate impact here [were] the dynamics of socio-economic status”).


\textsuperscript{165}. \textit{See id.} This observation is not intended to detract from or add to the discussion of the cultural bias that many believe also influences SAT scores.