



Statement for the Record
Submitted to the House Subcommittees on
Health, Employment, Labor, and Pensions and
Higher Education and Workforce Development
Hearing on “Safeguarding Student-Athletes from NLRB Misclassification”
March 12, 2024

On behalf of the American Council on Education and the higher education associations listed below, which represent all higher education sectors, I thank you for the opportunity to state our strong opposition to the National Labor Relations Board’s (NLRB) effort to recast collegiate student-athletes as employees. This statement highlights the serious misunderstandings that appear to be motivating those efforts and their potential implications -- extinguishing over one half million intercollegiate athletic participation opportunities. Such an outcome could, in turn, lead to a marked deterioration of the character and quality of America’s colleges and universities, and their surrounding communities. It would also be a disservice to the hundreds of thousands of college students who choose to participate in intercollegiate athletics annually without any expectation of athletic scholarship support, much less remuneration.

The decision last month by an NLRB Regional Director that Dartmouth College’s men’s basketball team members are employees under the National Labor Relations Act (NLRA) is deeply concerning, and part of a trend to rebrand collegiate student-athletes as employees. As another example, the U.S. Court of Appeals for the Third Circuit is set to rule on whether a Lafayette College women’s tennis player, a Fordham University men’s baseball player, and other student-athletes playing non-revenue sports can be considered employees under the Fair Labor Standards Act (FLSA).¹

Distorted Portrayals of College Athletics

These cases just cited, and the broader national discussion about college athletics, rest on a false narrative: that students are enticed by athletic scholarships to join intercollegiate teams, and that they are then exploited by colleges and universities for profit. The reality is far different.

The vast majority of college and university athletic programs are not revenue generating enterprises for their institutions. If they were viewed as such, intercollegiate athletics would have virtually disappeared from American higher education long ago. In fact, nearly all of the athletic departments of the NCAA’s 1,100 member institutions have operating costs that exceed generated revenues, and the overwhelming majority of the

¹ *Johnson v. NCAA*; see <https://www.acenet.edu/News-Room/Pages/ACE-Brief-Define-Student-Athletes-as-Students.aspx>

500,000-plus intercollegiate student-athletes participate on teams that bring in little or no revenue.² This is the case even for schools with high-profile football programs. In 2019, only 25 out of 130 FBS (Football Bowl Subdivision) schools generated athletics revenues that exceeded their athletics expenses. In the same year, there were no FCS (Football Championship Subdivision) schools bringing in more athletics revenues than their athletics expenses.³ Their teams must rely on institutional or donor funding to cover significant portions of their operating costs.

Over 200,000 student-athletes play on Division III teams, with no athletic scholarships at all.⁴ Even at the Division I level, nearly half of student-athletes choose to play on their school's intercollegiate team without receiving a penny of athletic scholarship money.⁵ They participate because of their love of their sport and the competition that comes with it. For most of them, that opportunity is the culmination of their long-running dreams and aspirations, and a source of personal pride and educational growth.

Potential Implications of the Dartmouth Decision

To focus on Dartmouth – home attendance for this year's Dartmouth men's basketball games averaged 686 people.⁶ In this respect, like so many others, Dartmouth men's basketball – with no athletic scholarships and competing in a league that mandates a full day's down time per week for its student-athletes even in season – has more in common with a small liberal arts college than a Power Five school. If Dartmouth student-athletes are to be treated as employees under the NLRA and/or the FLSA, that mandate could logically and quickly be extended to virtually every Division III institution, as well as all other Division I and Division II programs. Indeed, it is not beyond the realm of possibility that this same rationale would creep down towards high school student-athletes. Many play for non-public schools in front of thousands of fans for demanding coaches with high expectations and strict rules. Are they to be categorized as employees as well?

At Division III institutions, 31 percent of undergraduates are student-athletes.⁷ They choose to play their sport without receiving any athletic scholarship money; the overwhelming majority of them report that being a student-athlete helps them fit in socially at their college;⁸ and 88 percent of them graduate with degrees.⁹ The cost of compensating over 200,000 Division III student-athletes is difficult to calculate, but there can be little doubt that it would be prohibitive. Given sensitivity to tuition increases, passing these increased costs onto the broader student body would not be a viable option; nor would it be equitable given the range of campus activities in which students routinely participate without any expectation of compensation.

² See https://ncaaorg.s3.amazonaws.com/research/Finances/2022RES_DI-RevExpReport_FINAL.pdf; https://ncaaorg.s3.amazonaws.com/research/Finances/2022RES_DII-RevExpReport_FINAL.pdf; https://ncaaorg.s3.amazonaws.com/research/Finances/2021RES_D3-RevExpReport.pdf.

³ https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf

⁴ <https://www.ncaa.org/sports/2021/2/16/our-division-iii-story.aspx>.

⁵ <https://sportsepreneur.com/misconceptions-about-college-athletic-scholarships/>.

⁶ <https://dartmouthsports.com/sports/mens-basketball/stats/2023-24>

⁷ https://ncaaorg.s3.amazonaws.com/about/d3/D3_FactsandFigures.pdf

⁸ *Id.*

⁹ https://ncaaorg.s3.amazonaws.com/research/gradrates/2023/2023D3RES_ASRTrends.pdf

Financial Threats

Treating student-athletes as “employees” would trigger a variety of other costs for institutions beyond paying student-athletes minimum wage (or more). These costs could include (i) potential overtime payments whenever a student-athlete “works” more than 40 hours per week (which could include time spent traveling to and from athletic competitions); (ii) tax obligations, social security, and Medicare payments in connection with wages paid to student-athletes; (iii) state and federal labor-law compliance, including the detailed tracking of hours, time off, and the provision of various benefits; and (iv) premiums for workers’ compensation and unemployment insurance.

In addition, the administrative costs and burdens of paying student-athletes would be substantial. For instance, institutions would have to establish additional systems to track student-athletes’ “work” hours and time off to ensure they are paying minimum wage and overtime. Schools would also need to engage attorneys specializing in state labor and tax laws to comply with the laws of not only their own state, but also those of states to which their “employees” would travel with their teams for competitions.

All of these additional costs would make fielding intercollegiate teams cost-prohibitive for all but a handful of athletics departments. The inevitable result is that schools at every level – Division I, II and III – would have little choice but to eliminate many or all of their teams. Intramural competition, and perhaps student-run club teams, would survive, but American intercollegiate sports as we know it would virtually collapse under the weight of untenable expense.

The financial impact would be disproportionately visited on smaller, less resourced schools. For many of them, offering intercollegiate athletic opportunities to full- and part-pay students is a key component of building their classes. The elimination of fiscally unsustainable teams could lead to the actual closure of schools.

For all colleges and universities, the disintegration of intercollegiate athletics would rob a substantial portion of their students of what participating on an intercollegiate athletic team contributes to their education. Unlike professional sports teams, whose primary purpose is to generate profits for their owners, the vast majority of intercollegiate athletics teams are sustained by their schools because of the belief that the teams provide students with valuable opportunities to develop outside the classroom -- building self-confidence and self-discipline, learning unique lessons about teamwork, and generally enriching their college experience.¹⁰

In summary, treating student-athletes as employees under the NLRA, or the FLSA, has deeply troubling implications for the continued viability of intercollegiate athletics, and would be potentially devastating for many of America’s institutions of higher education, as well as for future generations of aspiring collegiate athletes who risk losing the opportunity to have an intercollegiate athletics experience.

¹⁰ See Erianne Allen Weight et al., *Holistic Education through Athletics: Health and Health-Literacy of Intercollegiate Athletes and Active Undergraduate Students*, 1 J. Higher Ed. Athletics & Innovation 38, 50–52 (2016).

I thank the subcommittees for the opportunity to submit these comments and for considering our views. We stand ready to assist Congress in evaluating the implications of these dramatic threats to our colleges and universities and their student-athletes.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Mitchell". The signature is written in a cursive, slightly slanted style.

Ted Mitchell
President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
National Association of Independent Colleges and Universities