Kentucky Law Journal

Volume 90 | Issue 2 Article 3

2001

NCAA v. Lasege and Judicial Intervention in Educational Decisions: The Kentucky Supreme Court Shoots an Air Ball for Kentucky Higher Education

Sheldon Elliot Steinbach
American Council on Education

NCAA v. Lasege and Judicial Intervention in Educational Decisions: The Kentucky Supreme Court Shoots an Air Ball for Kentucky Higher Education

BY SHELDON ELLIOT STEINBACH*

Academic freedom is simply a way of saying that we get the best results in education and research if we leave their management to people who know something about them.[1]

I. INTRODUCTION

For two centuries, American courts have recognized the value of having educators, not courts, be responsible for making educational judgments and for developing educational standards. That principle has been firmly established at least since the 1819 decision of *Trustees of Dartmouth College v. Woodward*,[2] in which the United States Supreme Court affirmed that a private college was to be governed, for better or for worse, by its trustees—not by the state legislature.[3] The principle has endured because it is sound and because it has well served higher education and the nation. American higher education today is the envy of the world, in no small part because we have left the work of educating to educators.

---

* Vice President and General Counsel, American Council on Education. B.A. 1963, Johns Hopkins University; L.L.B. 1966, Columbia University; M.A.P.A. 1968, University of Minnesota; Member, Maryland and District of Columbia Bars. The author, in his capacity as Vice President and General Counsel to the American Council on Education ("ACE"), served as principal in-house counsel to ACE in the preparation of an amicus curiae brief filed by ACE with the Kentucky Supreme Court in support of the National Collegiate Athletic Association in connection with the case that is the subject of this Article. This amicus brief was not accepted by the Kentucky Supreme Court. While this Article reflects work done and insights gained by the author in the preparation of the amicus brief, the views expressed herein are the Author's and do not necessarily reflect the views of ACE.

[1] ROBERT MAYNARD HUTCHINS, THE HIGHER LEARNING IN AMERICA I (1936).

[2] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[3] *Id.* at 681-82.

That independence and its salutary consequences extend from the institutions themselves to the associations that colleges and universities, faculty, staff, and students establish to advance their aims. These associations include professional societies, academic journals, accrediting bodies, and athletic associations, among other types. Through membership in their many associations, educators devise, articulate, and publicize national standards for educational professions and programs—standards which themselves reflect academic judgment. And just as the courts have declined to interfere with academic judgments of colleges and universities, so they have wisely tended to abstain from reviewing the educational judgments of higher education associations. Of course, courts step in, as well they should, when a statute is violated, a contract breached, a tort committed, or a constitutional right abridged.[4] But when asked to review standards set by higher education associations in the absence of such a violation, courts over the decades have spoken with remarkable consistency and near unanimity—leave the making and application of educational standards to educators.[5]

This principle was dramatically tested and at least partially vindicated by the Kentucky Supreme Court in its recent decision in *National Collegiate Athletic Association v. Lasege*.[6] There, the court found "extraordinary cause" to warrant reversal of two lower court rulings[7] that ordered the National Collegiate Athletic Association ("NCAA") to reinstate a University of Louisville basketball player despite his admitted multiple violations of NCAA amateurism rules, including playing in a professional league overseas, signing an agent contract, and receiving preferential treatment.[8] The supreme court took the unusual step of granting an interlocutory appeal from a preliminary injunction,[9] ruling that the Jefferson County Circuit Court abused its discretion by "wrongfully substitut[ing] its judgment for that of the NCAA."[10] At the same time,

---

[4] *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 323 (1989) ("The few common law limitations on the authority given the college over its internal affairs still consist of prohibitions against bad faith dealings and violations of overriding public policy.").

[5] *See, e.g.*, Wright v. Tex. S. Univ., 392 F.2d 728, 729 (5th Cir. 1968) ("We know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards.").

[6] Nat'l Collegiate Athletic Ass'n v. Lasege, 53 S.W.3d 77 (Ky. 2001).

[7] *Id.* at 89.

[8] *See id.* at 80-81, 85.

[9] *Id.* at 84.

[10] *Id.* at 85.

however, the Kentucky Supreme Court declined to clarify an anomalous doctrine of Kentucky common law that governs judicial review of the educational judgments of higher education associations. By failing to analyze that broader question, the court missed an opportunity to bring Kentucky into the mainstream of American jurisprudence on a question vital to the advancement of quality higher education.

II. THE *LASEGE* LITIGATION

A. Factual Background

Muhammed Lasege, a citizen of Nigeria, enrolled at the University of Louisville during the 1999-2000 academic year and signed a letter of intent to play basketball there. The university declared him ineligible on the grounds that he had violated three NCAA amateurism rules.[11] Lasege did not dispute the rules violations.[12]

Lasege had moved to Russia from his home in Nigeria with hopes of eventually obtaining a visa to the United States. The Russian sports agency, New Sport, paid for his $800 airline ticket to Russia. While in Russia, Lasege signed a contract with New Sport, under which it was to represent him with respect to playing professional basketball in Russia. Lasege admitted that for eighteen months in Russia he received free living accommodations and meals and was provided a driver, a cook, a visa to Russia, clothing, and a round-trip ticket from Moscow to Nigeria.[13]

Lasege subsequently signed a second contract, this one with a Russian professional basketball club. That contract provided that he would receive a furnished apartment, airline tickets, and possible use of a car. It also promised a salary, although Lasege said he never received one. Lasege played on two junior teams affiliated with Russian professional clubs.[14]

Lasege subsequently traveled to the United States via Canada, using an airline ticket provided by an "individual[15] who knew of [Lasege] due to his athletics ability."[16] The individual also provided Lasege with lodging and meals and funded his visits to Louisville as well as to another campus.[17]

---

[11] *See id.* at 80.
[12] *See id.* at 80-81, 85.
[13] *See id.* at 81.
[14] *See id.*
[15] Likely a booster or an agent.
[16] *Lasege*, 53 S.W.3d at 81.
[17] *Id.*

The University of Louisville knew, based on these facts, that Lasege was ineligible to participate in intercollegiate basketball. As the university recognized, Lasege had violated NCAA amateurism rules. To preserve the amateur status of intercollegiate athletics, the NCAA Constitution includes as a fundamental policy the commitment to "retain a clear line of demarcation between intercollegiate athletics and professional sports."[18] NCAA Division I Bylaws give effect to that policy by declaring that a student is ineligible to participate in intercollegiate sports if the student (1) "has entered into any kind of agreement to compete in professional athletics,"[19] (2) "ever has agreed . . . to be represented by an agent for the purpose of marketing his or her athletics ability or reputation,"[20] or (3) "[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport."[21] Neither Lasege nor the university disputed that he had violated all three of these bylaws.[22] However, the university helped Lasege apply to the NCAA for reinstatement, based on the theory that he had been ignorant of NCAA rules and "other mitigating factors."[23]

Pursuant to its reinstatement review process, the NCAA gave Lasege's application careful consideration. First, the NCAA Student-Athlete Reinstatement Staff conducted an investigation. Following the investigation, the staff declined Lasege's request, finding that he had violated the three pertinent bylaws by signing a professional contract, signing an agency contract, and receiving preferential treatment in consideration of his athletic ability.[24] The *Lasege* case seemed open and shut; neither the NCAA nor the university could find any other case in which a student-athlete who had committed the same three violations as Lasege was reinstated.[25] Nonetheless, the university decided to appeal the staff decision to the NCAA Division I Subcommittee on Student-Athlete Reinstatement.[26] The subcommittee reviewed all of the documents and statements given to the staff and conducted an eighty-nine-minute hearing.[27] After consideration of the matter, the subcommittee concluded by affirming the staff decision

---

[18] NCAA DIV. I CONST. § 1.3.1 (2001-02).

[19] NCAA Div. I Bylaws § 12.2.5 (2001-02).

[20] *Id.* § 12.3.1 (Use of Agents General Rule).

[21] *Id.* § 12.1.1.1(a) (Amateur Status).

[22] *See Lasege*, 53 S.W.3d at 80-81, 85.

[23] *See id.* at 80.

[24] *See* National Collegiate Athletic Association's Motion for Interlocutory Relief at 13, Ky. Ct. App. (No. 2001-CA-48-I) [hereinafter NCAA Motion].

[25] *Id.* at 17-18.

[26] *Lasege*, 53 S.W.3d at 81.

[27] *See* NCAA Motion at 14.

denying reinstatement. It found that, by committing the reported bylaw violations, Lasege exhibited a clear intent to professionalize himself in violation of NCAA amateurism rules.[28]

B. *Procedural History*

Lasege filed suit in Jefferson Circuit Court, seeking a temporary injunction to require the NCAA to reverse its decision and immediately reinstate his eligibility. Following a hearing, the circuit court granted Lasege's motion and ordered that he be reinstated immediately. The circuit court reasoned that the NCAA had ignored "overwhelming and mitigating circumstances" that excused Lasege's violations of NCAA rules and had misapplied the NCAA's own amateurism rules. Following entry of the circuit court injunction, Lasege was permitted to join the Louisville basketball team.[29] The Jefferson Circuit Court also invalidated NCAA Bylaw 19.8,[30] which permits the NCAA to assess penalties against a school that plays an ineligible athlete pursuant to a court order that is subsequently reversed.[31]

The NCAA sought interlocutory relief in the Kentucky Court of Appeals. That court denied the NCAA request, holding that the circuit court judgment was supported by "substantial evidence."[32]

The NCAA next moved the Kentucky Supreme Court for interlocutory relief. In its motion, the NCAA pointed out that it had violated no law or legal duty to Lasege, and that under such circumstances the lower courts had no warrant to invalidate a private voluntary association's application of its own rules.[33] Indeed, Lasege, like other individual students, was not a member of the NCAA, and thus had no contract or other common law right to challenge NCAA decisions. The NCAA therefore requested that the court set aside the injunction and allow it to apply its own standards in a manner that undisputedly violated no statute, constitutional provision, or common law duty to Lasege.[34]

---

[28] *See Lasege*, 53 S.W.3d at 81.

[29] *Id.* at 81-82.

[30] *Id.* at 82.

[31] NCAA Div. I Bylaws § 19.8 (Restitution).

[32] *Lasege*, 53 S.W.3d at 82.

[33] *See* National Collegiate Athletic Association's Motion for Interlocutory Relief at 13, NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001) (No. 2001-SC-114-I) [hereinafter NCAA Supreme Court Motion].

[34] *See id.*

C. *The Kentucky Supreme Court Decision*

The supreme court granted the NCAA's request. Reversing the decisions of the two lower courts, the supreme court found that the NCAA demonstrated "extraordinary cause" that justified the unusual step of correcting the circuit court's interlocutory order.[35] Interlocutory review was warranted, the court held, because the lower court "abused its discretion."[36] The trial court exceeded its authority when it "wrongfully substituted its judgment for that of the NCAA."[37] "The NCAA's eligibility determinations," the court held, "are entitled to a presumption of correctness."[38] That the trial court "simply disagreed with the NCAA as to the weight which should be assigned to [the mitigation] evidence" was not sufficient to invalidate the NCAA's eligibility decision.[39] The court held that such decisions can only be reversed if they are "arbitrary and capricious"—that is, clearly erroneous, and "by 'clearly erroneous' [the court] mean[t] unsupported by substantial evidence."[40] The Kentucky Supreme Court found that the NCAA ruling had "strong evidentiary support—Lasege unquestionably signed contracts to play professional basketball and unquestionably accepted benefits" and "no individual has ever had his or her eligibility reinstated after committing a combination of rules violations akin to those compiled by Lasege."[41]

The supreme court also found "extraordinary cause" to reverse the circuit court's balancing of the harms.[42] It was "clear error" for the trial court to conclude that no interest of the NCAA would be harmed by the trial court injunction requiring Lasege to be reinstated.[43] On the contrary, "The NCAA unquestionably has an interest in enforcing its regulations and preserving the amateur nature of intercollegiate athletics."[44] Finally, the supreme court held that the trial court "abused its discretion" when it barred the NCAA from ever assessing a penalty against the University of

---

[35] *Lasege*, 53 S.W.3d at 85.
[36] *Id.* at 84.
[37] *Id.* at 85.
[38] *Id.*
[39] *Id.*
[40] *Id.* (citing Thurman v. Meridian Mut. Ins. Co., 345 S.W.2d 635, 639 (Ky. 1961)).
[41] *Id.*
[42] *See id.*
[43] *Id.* at 86.
[44] *Id.* at 85.

Louisville, pursuant to NCAA rules, if the NCAA decision were later upheld and Lasege declared ineligible.[45]

In a dissenting opinion, Justice Johnstone, joined by Chief Justice Lambert and Justice Wintersheimer, argued that the case did not meet the "extraordinarily high threshold" for interlocutory relief.[46] The dissent found "substantial evidence" to support the lower court injunction.[47] It believed that, by carefully scrutinizing the grounds for the injunction, "the majority chart[ed] new ground for cases involving voluntary athletic associations like the NCAA."[48]

In reversing the lower courts, the supreme court majority seemed to recognize the important values inherent in allowing voluntary associations, such as the NCAA, to set and apply their own standards for higher education, free from judicial intervention, where application of such standards violates no law or legal duty. "The NCAA's eligibility determinations," the court held, "are entitled to a presumption of correctness,"[49] and it was an abuse of discretion for the circuit court to "substitute[ ] its judgment for that of the NCAA."[50] "In general, the members of such associations should be allowed to 'paddle their own canoe' without unwarranted interference from the courts," the supreme court stated.[51]

"Nonetheless," the court said, "relief from our judicial system should be available if voluntary athletic associations act *arbitrarily and capriciously* toward student-athletes."[52] Thus, while the supreme court held that the NCAA did not act arbitrarily and capriciously in this case, it appeared to permit a Kentucky court to second-guess decisions of voluntary associations where the court found such decisions to be "arbitrary and capricious." In leaving open the possibility of judicial review of such judgments, the *Lasege* opinion leaves the common law of Kentucky unsettlingly out of the mainstream of American jurisprudence on a larger, and ultimately more important, question: What is the proper role of the judiciary in reviewing the educational judgments of higher education associations? As explained below, decades of jurisprudence and the sound

---

[45] *See id.* at 87.

[46] *See id.* at 90 (Johnstone, J., dissenting).

[47] *See id.* at 91 (Johnstone, J., dissenting).

[48] *See id.* at 92 (Johnstone, J., dissenting).

[49] *Id.* at 85.

[50] *Id.* at 84.

[51] *Id.* at 83 (citing Ky. High Sch. Athletics Ass'n v. Hopkins County Bd. of Educ., 552 S.W.2d 685, 687 (Ky. Ct. App. 1977), *overruled by Lasege*, 53 S.W.3d at 77).

[52] *Id.* (emphasis added).

principles that undergird that jurisprudence hold that even the "arbitrary and capricious" standard, which may be difficult to meet in many cases, leaves courts too much latitude to intrude in decisions best assigned to educators.

III. AMERICAN HIGHER EDUCATION HAS THRIVED BECAUSE COURTS HAVE ALLOWED EDUCATORS TO SET EDUCATIONAL STANDARDS

One key reason why American higher education is the best in the world is that colleges and universities, not government, set educational standards. Since the United States Supreme Court in *Trustees of Dartmouth College v. Woodward*[53] endorsed the right of independent colleges to be free from undue governmental control, our higher education system has become unique in the world for its variety and quality of institutions and educational missions. In this country, unlike others, no national curriculum or centralized education ministry constrains educational choice or progress. Students here can select among a wide—indeed dazzling—array of excellent academic programs.[54]

A "distinctive feature[ ]" of the American education system "is that the development and maintenance of educational standards are the responsibilities of nongovernmental, voluntary accrediting associations."[55] Educators' judgments about educational standards are at the heart of the academic freedom that the First Amendment safeguards.[56] The Supreme Court has held that academic freedom protects teachers, students, and "autonomous decisionmaking by the academy itself."[57]

Accordingly, courts decline to review educational standards set by educators, even where violation of a statute or common law legal duty is alleged. Courts "refus[e] . . . to extend common law rules of liability to colleges where doing so would interfere with the college administration's good faith performance of its core functions."[58]

---

[53] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[54] *See* CARNEGIE COMMISSION ON HIGHER EDUCATION, REFORM ON CAMPUS: CHANGING STUDENTS, CHANGING ACADEMIC PROGRAMS 35 (1972).

[55] *In re* Nasson Coll., 80 B.R. 600, 606 (Bankr. D. Me. 1988).

[56] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

[57] Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985).

[58] Byrne, *supra* note 4, at 323.

Those principles are bedrock law. It is well-settled in Kentucky and elsewhere, for example, that courts will not adjudicate "educational malpractice" claims.[59] This is so because courts will "not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating . . . ."[60]

Similarly, courts refuse to review educators' decisions that apply academic standards to students.[61] Decisions that involve educational standards set by educators "are beyond the scope of judicial review."[62] Courts are likewise reluctant to review academic evaluations of faculty performance, "an area in which school officials must remain free to exercise their judgment."[63]

The precedents on this point are so uniform that one court said, "We know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards."[64]

---

[59] *See* Rich v. Ky. Country Day, Inc., 793 S.W.2d 832, 835 (Ky. Ct. App. 1990); *see also* Christensen v. S. Normal Sch., 790 So. 2d 252, 255 (Ala. 2001) ("[T]he overwhelming majority of states considering educational-malpractice claims have rejected them."); Bell v. Bd. of Educ., 739 A.2d 321, 325-26 (Conn. App. Ct. 1999) (collecting cases).

[60] Hoffman v. Bd. of Educ., 400 N.E.2d 317, 320 (N.Y. 1979).

[61] Alden v. Georgetown Univ., 734 A.2d 1103, 1108 (D.C. 1999) (noting that the court "followed the lead of the Supreme Court as well as other courts across the country in declining to engage in judicial review of academic decision-making by educational institutions"); *see also* Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998); Pangburn v. N. Ky. Univ., No. 9700178, 1998 WL 1595522, at *2 (E.D. Ky. Dec. 30, 1998), *aff'd*, 210 F.3d 372 (6th Cir.), *cert. denied*, 531 U.S. 875 (2000); Olsson v. Bd. of Higher Educ., 402 N.E.2d 1150 (N.Y. 1980).

[62] Susan M. v. N.Y. Law Sch., 556 N.E.2d 1104, 1107 (N.Y. 1990).

[63] Clark v. Whiting, 607 F.2d 634, 640 (4th Cir. 1979) (citation omitted); *accord, e.g.*, Faro v. N.Y. Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."). Courts are equally loath to prescribe educational standards. *See* Ross v. Creighton Univ., 957 F.2d 410, 414-15 (7th Cir. 1992); *Christensen*, 790 So. 2d at 255; Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 860-61 (Cal. Ct. App. 1976); Hunter v. Bd. of Educ., 439 A.2d 582, 584, 585 (Md. 1982); Swidryk v. Saint Michael's Med. Ctr., 493 A.2d 641, 643 (N.J. Super. Ct. Law Div. 1985).

[64] Wright v. Tex. S. Univ., 392 F.2d 728, 729 (5th Cir. 1968).

IV. COURTS HAVE NO WARRANT TO COMPROMISE THE STANDARD-SETTING MISSION OF HIGHER EDUCATION ASSOCIATIONS

The sound and historic judicial policy of deference to educational standards pertains forcefully to standards that voluntary higher education associations, such as the NCAA, adopt. A unique feature of American higher education is the vital role of associations in setting and maintaining standards in virtually every area of college and university life. The various associations comprise institutions with a shared mission (e.g., National Association of State Universities and Land-Grant Colleges), curriculum (e.g., Liaison Committee on Medical Education), and geography (e.g., Southern Association of Colleges and Schools); constituencies such as administrative personnel (e.g., National Association of College and University Business Officers), professors (e.g., American Association of University Professors), and boards of trustees (e.g., Association of Governing Boards of Universities and Colleges); and a host of other categories.

Higher education associations' missions require them to establish and apply standards in areas as diverse as administrative practice, pedagogy, the conduct of research, accreditation, scholarly merit, professional qualification, and athletics. Some standards are mandatory for institutions that elect to be bound, others hortatory; some are uniquely authoritative in their field, others overlap. And the standards are continually being revised.[65] But whether styled rules, guidelines, principles, or good practices statements, these essential standards represent educators' judgments about how to advance shared academic goals. For example, education associations set accreditation standards and determine whether the institutions they review for accreditation meet those standards.[66]

---

[65] *See* Dan Dutcher, *Sports Reform Symposium: NCAA Regulation of College Athletics*, 22 J.C. & U.L. 33, 34 (1995) (typical NCAA annual convention adopted ninety new standards).

[66] *See, e.g.*, NEW ENGLAND ASS'N OF SCHS. & COLLS., COMM'N ON INST. OF HIGHER EDUC., STANDARDS FOR ACCREDITATION (1992). Courts accept these determinations. *See* Wilfred Acad. of Hair & Beauty Culture v. S. Ass'n of Colls. & Schs., 957 F.2d 210, 214 (5th Cir. 1992); Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs., 817 F.2d 1310, 1314 (8th Cir. 1987); Parsons Coll. v. N. Cent. Ass'n of Colls. & Secondary Schs., 271 F. Supp. 65, 73 (N.D. Ill. 1967) (recognizing that accreditation standards "are not guides for the layman but for professionals in the field of education"); *In re* Brooks, 11 S.W.3d 25, 27 (Ky. 2000).

Voluntary professional societies in the various scholarly disciplines likewise prescribe and interpret standards in their fields, specifying, for example, requirements for undergraduate and graduate programs. The American Society for Engineering Education ("ASEE") thus promotes quality in engineering education by promulgating criteria for assessing programs and a policy on ethics.[67] Societies representing educators in a vast array of fields likewise have adopted standards for education.[68]

Education associations also perform the vital role of setting standards of professional performance for members of the academy.[69] The Association of American Medical Colleges ("AAMC") has authorized guidelines to help member institutions address issues in medical research.[70] And many education associations issue standards and conduct peer reviews for college and university administration to "further[ ] excellence in higher education."[71]

These associations and the quality-enhancing standards they establish and maintain are indispensable to American higher education. By subscribing to these standards, members aim to advance institutional missions. The results are beneficial in countless ways. For instance, standards that assure quality assist students and parents in remote or less-populated states or areas in judging the rigorousness of an academic program. Association standards also guide colleges and universities on innovative programs and emerging technological developments.[72] "Good practices" pronouncements inform members of received norms and foster professional and institutional

---

[67] *See* JOINT TASK FORCE ON ENG'G EDUC. ASSESSMENT, ASSESSMENT WHITE PAPER (1996); AM. SOC'Y FOR ENG'G EDUC. ("ASEE"), STATEMENT ON ENGINEERING ETHICS EDUCATION (1999).

[68] *See, e.g.*, AM. HISTORICAL ASS'N, STATEMENT ON EXCELLENT CLASSROOM TEACHING OF HISTORY (1998) (prescribing standards for course content, pedagogic approach, instructional resources and materials, and student performance evaluation); COLL. ART ASS'N, A CODE OF ETHICS FOR ART HISTORIANS AND GUIDELINES FOR THE PROFESSIONAL PRACTICE OF ART HISTORY (1973 & 1995 amend.).

[69] *See* AM. ASS'N OF UNIV. PROFESSORS ("AAUP"), STATEMENT ON PROFESSIONAL ETHICS (1987); ASS'N OF AM. LAW SCHS. ("AALS"), STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (1989).

[70] *See* ASS'N OF AM. MED. COLL. ("AAMC"), GUIDELINES FOR DEALING WITH FACULTY CONFLICTS OF COMMITMENT AND CONFLICTS OF INTEREST IN RESEARCH (1990).

[71] NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, STANDARDS OF EXCELLENCE REVIEW PROGRAM (n.d.).

[72] *See, e.g.*, AAUP, STATEMENT ON DISTANCE EDUCATION (n.d.).

improvement.[73] Accreditation standards advance quality by providing assurance that a program has appropriate objectives and is able to achieve them.[74] As the Kentucky Supreme Court has held, institutions that fall short of such standards raise concern about quality.[75]

Courts are particularly disposed not to second-guess educational standards where, as in the *Lasege* case, the standards derive from associations and, hence, the collective judgment of many professionals and education institutions. For example, the Kentucky Supreme Court has recognized and declined to review the validity of American Bar Association ("ABA") law school accreditation criteria.[76] Courts have likewise credited American Association of University Professors principles in matters involving proper faculty practices[77] and have long incorporated higher education associations' specialized standards in evaluating university personnel decisions.[78]

As with college and university educational decisions, courts similarly decline to review higher education associations' establishment and application of standards.[79] In such cases, "courts are not free to conduct a de novo review or to substitute their judgment for the professional judgment of the educators involved in the accreditation process."[80] Nor will courts review an accrediting body's decision to employ a set of criteria or "prob[e] into the association's motives behind its rules."[81] Rather, courts *rely* on accreditors' determinations,[82] which "ultimately depend[ ] on the

---

[73] *See* AALS, STATEMENT OF GOOD PRACTICES FOR THE RECRUITMENT OF AND RESIGNATION BY FULL-TIME FACULTY MEMBERS (1979 & 1986 amend.).

[74] *See* AM. LIBRARY ASS'N ("ALA"), STANDARDS FOR ACCREDITATION OF MASTER'S PROGRAMS IN LIBRARY AND INFORMATION STUDIES 1 (1992).

[75] *See In re* Brooks, 11 S.W.3d 25, 27 (Ky. 2000).

[76] *See id.*

[77] *See, e.g.*, Scharf v. Regents of Univ. of Cal., 286 Cal. Rptr. 227, 234 n.9 (Cal. Ct. App. 1991) (AAUP statement is "perhaps the most enduring prescriptive dictum in the field of American higher education."); Barnes v. Wash. State Cmty. Coll. Dist. No. 20, 529 P.2d 1102, 1104 (Wash. 1975) (AAUP statement is "[t]he most authoritative source regarding the meaning and purpose of tenure.").

[78] *See* Kenny v. Fornof, 98 N.E.2d 127, 132-33 (Ill. App. Ct. 1951) (incorporating standards of American Association of Medical Social Workers).

[79] *See, e.g.*, Wilfred Acad. of Hair & Beauty Culture v. S. Ass'n of Colls. & Schs., 957 F.2d 210, 214 (5th Cir. 1992); Marlboro Corp. v. Ass'n of Indep. Colls. & Schs., 556 F.2d 78, 80 n.2 (1st Cir. 1977).

[80] *Wilfred Acad. of Hair & Beauty Culture*, 957 F.2d at 214.

[81] *Id.* at 215.

[82] *See In re* Brooks, 11 S.W.3d 25, 27 (Ky. 2000).

observation and judgment of experienced and capable evaluators."[83] This rule applies foursquare to the NCAA, for "[i]t is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules."[84]

Thus, courts throughout the nation know that educational quality is advanced when educators, not judges, are responsible for the sensitive analyses involved in setting and applying educational standards.[85] Indeed, longstanding precedent of the Kentucky Supreme Court makes clear that the courts of the commonwealth lack jurisdiction to review decisions of voluntary, unincorporated associations unless a law is violated or a legal duty breached. As the court held long ago: "It is generally acknowledged that in their own field the decisions of tribunals of a society in matters of discipline, internal economy, and policy not involving property rights are supreme and conclusive."[86] The lower courts in *Lasege* stood these bedrock principles on their head; the Kentucky Supreme Court, in reversing, seemed to right them.

V. STANDARD-SETTING BY THE NCAA

The NCAA and the standards it sets and maintains are critical to American higher education. Over 350,000 students participate in intercollegiate athletics competition.[87] Athletics programs are integral to colleges and universities; "[e]ngagement in the 'community' life . . . through sports appears to lead to a deeper involvement in school work in general."[88]

NCAA amateurism and eligibility rules are vital to the educational value of athletics programs. For nearly a century, colleges and universities have relied on the NCAA to ensure that competitive zeal does not supplant

---

[83] ALA, STANDARDS FOR ACCREDITATION OF MASTER'S PROGRAMS IN LIBRARY AND INFORMATION STUDIES, at 3 (1992). *See also* Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs., 817 F.2d 1310, 1314 (8th Cir. 1987); Parsons Coll. v. N. Cent. Ass'n of Colls. & Secondary Schs., 271 F. Supp. 65, 73 (N.D. Ill. 1967).

[84] Shelton v. NCAA, 539 F.2d 1197, 1198 (9th Cir. 1976).

[85] *See* Alden v. Georgetown Univ., 734 A.2d 1103, 1108 (D.C. 1999).

[86] Wilkins v. Bhd. of R.R. Trainmen, 99 S.W.2d 196, 198 (Ky. 1936); *see also* O'Neil v. O'Connell, 189 S.W.2d 965, 967 (Ky. 1945).

[87] NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, COMPOSITION OF THE NCAA 7 (n.d.), *at* http://www.ncaa.org (Sept. 1, 2001).

[88] Richard E. Lapchick, *The Student-Athlete*, 1988 NEW PERSPECTIVES 35, 36 (1988); *accord* NCAA, *2000 NCAA Division I, II & III Graduation-Rates Summary* 2 (2001).

sound educational principles and concern for student well-being. "One of the NCAA's primary objectives is to promote fair competition among its member institutions by maintaining uniform standards of scholarship, sportsmanship and amateurism."[89] The NCAA seeks "to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation."[90] College and university presidents are involved in NCAA governance to ensure that NCAA standards and determinations, while independent of the views of any one school or group of schools, reflect educators' collective judgments.[91]

The principle of amateurism is basic to intercollegiate athletics. The NCAA, in order to transmit its system of values, must retain "a clear line of demarcation between college athletics and professional sports."[92] Student involvement in sports "should be motivated primarily by education and by the physical, mental and social benefits to be derived."[93] Because "[s]tudent participation in intercollegiate athletics is an avocation," the NCAA Constitution states that "student-athletes should be protected from exploitation by professional and commercial enterprises."[94] The NCAA accordingly prohibits student-athletes from signing professional contracts or agent contracts.[95]

This basic proscription against professional athletes in intercollegiate sports protects students' academic experience, promotes fair competition, and imparts the value of amateurism. NCAA eligibility rules also advance the educational mission by teaching the value of physical fitness, self-discipline, teamwork, sportsmanship, and competition for their own sake, not for material reward.[96] Thus, an overriding NCAA goal is to ensure, through national amateurism and eligibility rules, that student-athletes are truly amateurs and not, in fact, professionals. The NCAA was true to that goal in the *Lasege* matter when it declined to reinstate Lasege to amateur status after he concededly had violated multiple amateurism rules.

Although it found no violation of any statute, no breach of contract, and no tort, the trial court in *Lasege* nonetheless overturned the NCAA's

---

[89] Karmanos v. Baker, 816 F.2d 258, 259 (6th Cir. 1987).

[90] Cole v. NCAA, 120 F. Supp. 2d 1060, 1063 (N.D. Ga. 2000).

[91] *See* NCAA, *2000-01 NCAA Division I Manual* 22-25 (2000).

[92] NCAA v. Gillard, 352 So. 2d 1072, 1073 (Miss. 1977) (citing the NCAA constitution).

[93] NCAA DIV. I CONST. § 2.9 (2001-02).

[94] *Id.*

[95] NCAA Div. I Bylaws §§ 12.1.1., 12.2.5.1, 12.3.1 (2001-02).

[96] *See* NCAA DIV. I CONST. § 2.9 (2001-02).

reasoned application of its own rules.[97] The ruling, which as shown above contravened settled Kentucky law, if upheld, also would have abridged the NCAA's First Amendment right of associational freedom. The United States Supreme Court recently made clear that private associations have a First Amendment expressive associational right that protects them from "[g]overnment actions that may unconstitutionally burden this freedom."[98] That right is violated where (1) governmental action would significantly affect the group's ability to "advocate public or private viewpoints,"[99] and (2) the action is not justified "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[100]

The lower court rulings in *Lasege* violated the NCAA's associational rights under that test. Undeniably, the ruling "significantly affected" the NCAA's overriding expressive mission to "promote fair competition among its member institutions by maintaining uniform standards of scholarship, sportsmanship and amateurism,"[101] and to establish "a clear line of demarcation between college athletics and professional sports."[102] Forcing the NCAA to permit admitted professionals such as Lasege to compete would send a directly conflicting message to student-athletes and the public. "[C]ourt-ordered waiver" of NCAA rules would "compromise[] the educational purpose of the NCAA."[103] And surely no compelling state interest would be served by a rule that subjected a voluntary association's decisions to judicial reversal in the absence of any statutory violation or breach of legal duty.

Adoption of the flawed lower court holding in *Lasege* thus would have compromised voluntary higher education associations' ability to maintain standards necessary to their missions. Such a holding would have grave implications. For example, were voluntary associations' internal decisions subjected to judicial review in the absence of any legal violation, a professor who believed that a professional society wrongly rejected his scholarly work for publication in a journal could obtain judicial review of

---

[97] *See* NCAA Supreme Court Motion at 13.

[98] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

[99] *Id.* at 648 (citing N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)).

[100] *Id.* (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

[101] Karmanos v. Baker, 816 F.2d 258, 259 (6th Cir. 1987).

[102] NCAA v. Gillard, 352 So. 2d 1072, 1073 (Miss. 1977).

[103] Cole v. NCAA, 120 F. Supp. 2d 1061, 1071 (N.D. Ga. 2000).

the decision's academic merit. A student could obtain review of accreditation standards applied to the college at which he received low grades. A university researcher who invested in a company that promoted his research could sue associations that prescribe conflict of interest guidelines. And a disgruntled athlete could sue to invalidate an athletics association's application of a lawful eligibility standard—as in *Lasege*. Such results, contrary to sound jurisprudence,[104] obviously would impede quality higher education.

For all of these reasons, voluntary associations in higher education must remain free to maintain standards when doing so violates no law. The mainstream of American jurisprudence recognizes that important principle. By reversing the contrary decisions of the lower courts, the Kentucky Supreme Court in *Lasege* seemed to steer a course beneficial to higher education in the Commonwealth by letting educators, not judges, set and apply educational standards. But by leaving open the door to judicial review of voluntary association decisions that a court may deem "arbitrary and capricious," even where the associations violate no law, the supreme court left obscure precisely what *Lasege* entails for such cases in the future. At the next opportunity, the court ought to close that door, passage through which will do higher education in Kentucky no good.

---

[104] *See, e.g.*, Med. Inst. of Minn. v. Nat'l Ass'n of Trade & Technical Schs., 817 F.2d 1310, 1314 (8th Cir. 1987); Clark v. Whiting, 607 F.2d 634, 639-40 (4th Cir. 1979).