

New Concussion Management Requirements for NCAA Institutions *Podcast Transcript*

Prevention and Protection a United Educators Risk Management Podcast

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CHRISTINE: Welcome to the second season of United Educators' *Prevention and Protection* risk management podcast. I'm Christine McHugh, a researcher in the risk management department. Today we'll focus on a recent class action settlement agreement that relates to concussion management at NCAA institutions. Before we begin, I want to remind listeners that this podcast serves as risk management guidance and is not legal advice. We'll be discussing a complex settlement agreement, and it's important that schools consult with legal counsel to make sure they are properly complying with the settlement's provisions and the certification requirements.

I'm joined today by my colleague Rhonda Hurwitz, a senior resolutions counsel and leader of the Midwest team in UE's resolutions department. During her 12 years at UE, Rhonda has been one of our top experts on severe bodily injury and she specializes in TBI and concussion claims. Rhonda's valuable insight into this topic comes both from her claims experience and her previous work experience. Before joining UE, she was director of legal affairs for a major hospital and before that she was a law partner handling medical malpractice defense.

Rhonda received her undergraduate degree from Loyola University and her JD from Catholic University, where she was a member of the Health Law Journal. Rhonda, thanks for being here.

RHONDA: Thanks, Christine. I'm looking forward to discussing this important topic for our higher ed members.

CHRISTINE: Let's dive right in. There's big news when it comes to concussion management for college athletics. NCAA schools in all divisions have less than six months to certify compliance with specific concussion management protocols from a recent class action settlement. If they don't certify, they won't be included in the settlement's release — and that means they could be vulnerable to certain types of liability claims. During today's podcast, we'll provide some background about the lawsuit, we'll describe the settlement's provisions, and we'll explain the benefits for schools who comply with them by the May 18, 2020, deadline.

Rhonda, can you start us off with some background about the lawsuit?

RHONDA: Certainly. This litigation originated back in 2011 with two claims against the NCAA, one of which was brought by former Eastern Illinois football player Adrian Arrington. The cases were later consolidated with other lawsuits across the country — and were combined into one federal putative class action suit in the Northern District of Illinois. The class action challenged the NCAA's policies related to concussions and concussion-related injuries, and included causes of action such as negligence, fraudulent concealment, and unjust enrichment.

The case has evolved over the eight years since it was filed, and the Court granted final approval of the proposed settlement terms this August. The Court then determined more recently that the effective date of the settlement was Nov. 18 of this year — 14 days following the appeal deadline — and everyone should know that this is the date that triggers a six-month window for member schools to certify compliance with the member obligations in the settlement agreement if they want to receive the benefits of the settlement's release terms, which I know we'll talk more about later.



CHRISTINE: Yes, we'll definitely go through those release terms. First though, what exactly does the settlement entail? Can you give us a broad overview?

RHONDA: Sure. So broadly, the settlement agreement covers three areas:

- It creates a \$70 million medical monitoring screening program funded by the NCAA for former NCAA student athletes who played prior to July 15, 2016
- It identifies certain concussion protocol provisions that, if implemented, will allow NCAA members to benefit from the release of certain types of liability claims going forward
- And it requires the NCAA to establish some additional education practices and reporting channels

CHRISTINE: Those are all really important components. Let's talk about each of them individually, starting with the first you mentioned. What can you tell us about the medical monitoring program?

RHONDA: Sure. The settlement's main goal is to establish a medical monitoring program for all student-athletes who played a sanctioned sport at an NCAA member institution on or before July 15, 2016. The program is designed to assess symptoms related to post-concussion syndrome as well as cognitive, mood, behavioral, and motor problems that may be associated with mid- to late-life onset diseases possibly linked to concussions or sub-concussive hits.

CHRISTINE: That medical screening really is a critical part of this settlement. Let's move on to the second part — the concussion protocols. But first, can you help us understand why NCAA schools are complying with the settlement terms, even though the lawsuit was against the NCAA association and the schools were not actually part of the settlement agreement?

RHONDA: That's right — NCAA schools are not bound by the settlement, because they are not a party to it. However, they can take advantage of the settlement's benefits: The incentive for schools is that the settlement allows for NCAA schools to be released from certain types of liability if they certify compliance with applicable concussion management provisions by May 18, 2020.

CHRISTINE: That sounds like an important benefit, but what does it mean exactly to be released from liability for claims?

RHONDA: Being released means that if a school certifies compliance with applicable settlement provisions, it will not be liable for mainly two types of claims: (1) past, present, and future claims by the class members that seek damages for medical monitoring related to concussions or sub-concussive hits and (2) most types of claims pursued on a class-wide basis relating to concussions and sub-concussions during collegiate sports as an NCAA student-athlete. The release terms will not apply to any school that fails to certify.

CHRISTINE: I see – so the agreement allows the schools to be released from those two categories of claims. But are other lawsuits still possible by the student-athletes?

RHONDA: Yes. Claims which are not included in the release include class wide claims based on an injury resulting from participation in a single NCAA-sanctioned sport at a single member school, such as the football putative action pending in the Northern District of Illinois right now; and also class members will still be able to bring class wide wholly unrelated to medical monitoring or medical treatment of concussions or sub-concussive hits. Lastly, claims can still be brought by individual student-athletes for their individual personal or bodily injury claims.

CHRISTINE: Got it. So if NCAA schools want the benefit of being released from the liability claims you've described, what do they need to do right now?

RHONDA: As you noted, institutions will need to meet the settlement's certification provisions by May 18, 2020. Schools must certify that their concussion management plan includes, among other things, specific return-to-play guidelines. It should be noted that many of the concussion protocols in the settlement agreement are similar to or overlap with guidance previously put forward by the NCAA in their concussion safety checklist, although there are some differences. The specific settlement provisions are:

1. Prior to practicing or competing, NCAA student-athletes will undergo preseason baseline testing for each sport in which they participate.
2. Student-athletes diagnosed with concussions will not be allowed to play or participate in any practice or game on the same day in which the concussion was sustained.
3. Any student-athlete diagnosed with a concussion must be cleared by a physician before being allowed to play in practice or competitions. Prior NCAA guidance had allowed for a physician designee.
4. Medical personnel with training in the diagnosis, treatment, and management of concussions must be *present* at contact sports games and *available* during contact sports practices for Divisions I, II, and III. The settlement terms define contact sports as men's or women's lacrosse, wrestling, ice hockey, field hockey, soccer, basketball, and football.



I will say that if institutions have been following the NCAA concussion diagnosis and management best practices and checklists, they should be in good shape to meet these new guidelines, since many of the settlement provisions mirror the protocols that the NCAA has already put forward as good practices.

CHRISTINE: So a lot of the NCAA schools might already be well on their way to complying. How is it that they go about certifying that they are in compliance with the protocols outlined in the settlement?

RHONDA: The agreement lists several settlement representatives who must receive the written certification, but I believe that the

NCAA will provide more guidance to streamline that process. And I'd say while you're staying tuned for more guidance from the NCAA, it's probably a good idea to consult with counsel to make sure you're best positioned to make that certification and respond to that guidance when it's issued.

You should also know that once submitted, all certifications will be publicly posted on the NCAA Student-Athlete Concussion Injury website.

CHRISTINE: That's an interesting point to keep in mind — that information about which schools have certified or not will be available publicly. Now I know you mentioned that if institutions have been following NCAA concussion guidance already, they may have a lot of these practices in place. Can you talk a little bit more about where there might be some differences?

RHONDA: Sure. Most schools already have return-to-play guidelines in place, as well as baseline testing protocols. But as I mentioned, all institutions — even those with protocols already in place — should obtain legal and maybe risk management guidance to make sure their concussion management plans are compliant with the settlement terms.

Perhaps the biggest adjustment for schools may end up being the protocol for contact sports about having medical personnel present at games and available at practices. Athletic departments will need to ensure that they have adequate staffing in place.

It's also important for schools to remember that this goes beyond football. The provisions addressing baseline testing, return-to-play, and medical clearance apply to all sports, and the provision about medical personnel presence at games and availability at practices applies to all contact sports — again which means football but also lacrosse, wrestling, ice hockey, field hockey, soccer, and basketball — for both men and women.

CHRISTINE: That's a really helpful point.

Now let's touch on the other part of the settlement agreement — the part that requires the NCAA to comply with certain education, training, and reporting obligations. What does that part entail?

RHONDA: As part of the agreement, the NCAA agreed to three things:

First, the NCAA will require member schools to provide NCAA-approved concussion education and training to student-athletes, coaches, and athletic trainers before every season for the 50-year duration of the medical monitoring period.

Second, annually, the NCAA will provide members with educational materials for faculty regarding suggested academic accommodations for student-athletes who sustained concussions.

And third, the NCAA will create two reporting mechanisms:

1. For members to report concussion diagnoses and resolutions to the NCAA; and
2. For third parties, such as student-athletes and/or their parents, to report concerns about concussion management issues to the NCAA.



CHRISTINE: Do we know yet how the NCAA plans to manage these education and reporting obligations?

RHONDA: Not exactly. The NCAA has not released details about the education or reporting programs. Member schools should be on the lookout for guidance coming soon from the NCAA.

CHRISTINE: I see. I know our members will be looking forward to those NCAA resources — we’ve already heard from some of them that they’re wondering about the provision regarding educational materials for faculty, so we’ll be on the lookout.

And now, as we start to wrap up, I’ll take a minute to point listeners to a few useful resources on this topic:

First, United Educators has an article about this settlement agreement on our website, www.edurisksolutions.org. The article covers much of the same information we’ve discussed here in this podcast, so if listeners prefer a written format, they can check the website for that.

Our UE website also has a number of other resources on concussions, including a checklist for creating an athletics concussion management plan. You’ll find that checklist and other resources at www.edurisksolutions.org.

The settlement administrator in this lawsuit has a website about the litigation that has some useful information too. It can be found at www.collegeathleteconcussionsettlement.com. There is a frequently asked questions section that covers a lot of the settlement aspects, and there’s also a section with many of the significant case documents. The settlement agreement that we have been discussing today can be found in that section. It’s called “Exhibit 1 to Amended Final Order and Judgment.”

And finally, the NCAA guidance that you referred to, Rhonda – the Concussion Diagnosis and Management Best Practices – is available on the NCAA’s website, <http://www.ncaa.org>.

This brings us to the end of this podcast. Rhonda, thank you so much for helping us drill down on these details. It certainly is a complicated settlement agreement, and we really appreciate your insight.

RHONDA: Thank you Christine. My pleasure.

CHRISTINE: Thanks also to our listeners for joining us today. For more podcasts and other resources about education risk management topics, please check out UE’s website, www.edurisksolutions.org. From United Educators insurance, this is the *Prevention and Protection* podcast.



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