

## The NCAA Emperor Wears No Clothes

By Sandy Thatcher, member of The Drake Group Board of Directors, who artfully pens his opinion on NCAA leadership.

What may long be remembered about March Madness in 2021 is not what teams won the men's and women's tournaments, or even that they were played in COVID-induced bubbles, but that the NCAA experienced its own version of the Emperor wearing no clothes. Playing the role of the child in Hans Christian Andersen's tale of the hypocrisy of the powerful exposed, Oregon forward Sedona Prince with her post to Tik Tok made the hollowness of the NCAA's claim to represent women equally in sports plain for all to see.

The inequities in weight room equipment provided, combined with disparities in the gifts, food, lodging, and even vaccines offered, showed the whole world how female college athletes are treated like second-class citizens. Outcries from prominent women's basketball coaches like Dawn Staley and Tara VanDerveer quickly followed. Former Notre Dame coach Muffet McGraw joined them in protest, but as an older veteran of the sport than these other two, McGraw added: "While I appreciate the outrage, the fact that there's a huge disparity between men's and women's sports is hardly breaking news."

Indeed, it is useful to be reminded that the NCAA's original mandate, which lasted for decades, was to be a governing body only for men's sports. It began as an organization led and run by white males, and it has been so ever since. The growing diversity of the students attending American colleges has not been reflected in the culture of the NCAA, nor has it affected the organization's determination to fend off every challenge it confronts, either by legal action or the pressure tactics of its own enforcement mechanism. And, above all, it has placed money before any other value while just paying lip service to academic integrity and advancement as what are supposed to be its justifying mission.

Consider what happened when the Association for Intercollegiate Athletics for Women (AIAW) began in 1971 to take charge and fuel the explosive growth of women's sports at the collegiate level, bolstered by the passage of Title IX in 1972. The evidence, as reviewed by the judge who ruled in the NCAA's favor in the lawsuit the AIAW brought on antitrust grounds, showed that the NCAA's leadership evinced no great enthusiasm for overseeing women's sports, which made it even more of a "hostile takeover," as it has been dubbed by current Drake president Donna Lopiano, who was the AIAW's president at the time of this court case in 1983, which was the AIAW's last gasp. Equally revealing was the judge's identifying "maximum participation irregardless of ability" as the AIAW's guiding principle in contrast with the NCAA's emphasis on "competitive excellence," which has a direct nexus with making money. The contrasts between the philosophies motivating the AIAW and the NCAA could not be more stark, and this legacy remains the driving force behind the NCAA's priorities today.

What the NCAA had managed to do, however, was to disguise its organizing principle of making and distributing money behind the fig leaf of a vocabulary that spoke about the sanctity of amateurism and the priority of regarding athletes as students in the phrase "student-athlete." Both were the brilliant inventions of the NCAA's first executive director, Walter Byers, who used that vocabulary backed by the threat of penalties for violation of NCAA rules to establish the NCAA's dominance of college sports through his long tenure from 1951 to 1988. But Byers himself later regretted what he had accomplished and exposed the structure he had constructed as built on sand. In an interview with *Sports Illustrated* following publication of his memoir *Unsportsmanlike Conduct* in 1995, Byers confessed: "Each

generation of young persons come[s] along and all they ask is, 'Coach, give me a chance, I can do it.' And it's a disservice to these young people that the management of intercollegiate athletics stays in place committed to an outmoded code of amateurism. And I attribute that, quite frankly, to the neo-plantation mentality that exists on the campuses of our country and in the conference offices and in the NCAA. The coach owns the athlete's feet, the college owns the athlete's body, and the athlete's mind is supposed to comprehend a rulebook that I challenge Dave Berst, who's sitting down in this audience, to explain in rational terms to you inside of eight hours."<sup>1</sup>

What the NCAA has typically done to defend itself is to spend gobs of money on lawyers. So it is not surprising that the organization's first impulse in the wake of the March Madness embarrassment was to hire an outside law firm to conduct an investigation of gender inequities. How serious that investigation will be remains to be seen when its report comes out later this spring. But, again, NCAA president Mark Emmert did not encourage optimism by agreeing to meet initially only with three male basketball players who had requested a meeting to discuss issues of social justice and gender inequity and wanted some of their female counterparts to be included in that discussion, but were not.

What does seem clear is that the NCAA would rather spend millions of dollars on legal fees rather than actually spend money on helping athletes, such as providing long-term insurance coverage for injuries they sustain in playing college sports. The amounts of money going to lawyers from NCAA coffers is staggering. Drake board members lawyer Julie Sommers and economist Andrew Zimbalist reported in their article in *Forbes* (March 22) titled "The NCAA Is Playing the Ball in the Wrong Court" that third-party legal fees for the NCAA in fiscal 2019 are predicted to be \$54 million, and that the *Alston* case pending before the US Supreme Court could cost the NCAA in court costs, attorneys' fees awarded to the plaintiffs, and their own lawyers bills \$100 million or more. In defense of its outmoded model the NCAA also spends great amounts of money on lobbying annually. Sommers and Zimbalist ask the right question: "Instead of legal fees and lobbying against athletes, what greater good could the NCAA have accomplished with the millions spent on high-priced attorneys and lobbyists?"<sup>2</sup> Indeed.

Meanwhile, there are some things that the NCAA could do now that would cost little if anything to implement. How about something simple such as requiring, as a condition of membership, that institutions demonstrate compliance with Title IX? How about reinstating the Division I certification program that required each member institution to undergo a comprehensive national athletics governance association certification at least once every ten years? The peer-review process, administered and funded by the governance association, was preceded by campus-wide self-evaluation conducted by various committees consisting of a majority of tenured faculty and nonathletics-affiliated staff members. Established in 1993 as a central plank in an NCAA reform agenda, the NCAA certification program, which included a much more comprehensive examination of athletic program elements than that conducted by the traditional higher education regional accreditation agencies, was discontinued in 2011 under Emperor Emmert's watch, over the objection of the NCAA Committee on Women's Athletics, coaches of women's sports, and female athletics administrators, and should be reinstated.

As the pandemic progressed and more colleges began to announce their intentions to drop some women's sports, it became apparent that many colleges had long not been in compliance with Title IX requirements. Champion Women released a report showing that 90% of college and university athletic programs were not in compliance with Title IX and women athletes were being shortchanged over \$1 billion in athletic scholarships—a full 48 years following the passage of this landmark legislation.<sup>3</sup> A

renewed drive by the NCAA to hold all the member institutions accountable would be a good step in the right direction for the NCAA to show that it is serious about its rhetoric of promoting gender equity in college sports.

Or maybe Emperor Emmert and the inept NCAA Board of Governors following and supporting his every decision will just continue their modus operandi. It goes something like this: express horror and unacceptability (sound familiar?), appoint a committee to investigate and make recommendations (sound familiar?), loudly and proudly announce a new policy (as it did on May 1, 2020, requiring recruited athletes to report past sexual violence transgressions, but with no teeth and no ineligibility penalty for such athletes), and then withdraw the action (as it did in November 2020 when it announced that implementation of the sexual violence disclosure policy would be delayed). If you doubt the MO, look up the demise of the Division 1 certification program or the withdrawal of NIL and freedom-to-transfer legislation from the 2021 NCAA Convention. Emmert appears to have also lost his invisibility cloak.

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- <sup>1</sup> For further reading about amateurism, see historian Taylor Branch's now classic article in *The Atlantic* in October 2011 titled "The Shame of College Sports," where he exposed the vocabulary for the sham it is. "A deeper reason explains why, in its predicament, the NCAA has no recourse to any principle or law that can justify amateurism. There is no such thing. Scholars and sportswriters yearn for grand juries to ferret out every forbidden bauble that reaches a college athlete, but the NCAA's ersatz courts can only masquerade as public authority. How could any statute impose amateur status on college athletes, or on anyone else? No legal definition of amateur exists, and any attempt to create one in enforceable law would expose its repulsive and unconstitutional nature—a bill of attainder, stripping from college athletes the rights of American citizenship."
  - <sup>2</sup> <https://www.forbes.com/sites/andrewzimbalist/2021/03/22/the-ncaa-is-playingthe-ball-in-the-wrong-court-by-julie-sommer-and-andrew-zimbalist/?sh=55e0bb131676>
  - <sup>3</sup> <https://titlexschools.com/wp-content/uploads/2020/06/Title-IX-in-2020.pdf>