Pink-Shirting: Should the NCAA Consider a Maternity and Paterinity Waiver?

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COMMENTS

PINK-SHIRTING: SHOULD THE NCAA CONSIDER A MATERNITY AND PATERNITY WAIVER?

I. INTRODUCTION

Tired after a long, exhausting day of work, they catch a ride from a coworker and finally get home. Once home, it is time to cook dinner, clean the house, prepare for the next day’s workload, and put the kids down for the night. Finally, it is time to sleep. When the alarm clock goes off the next morning, it is time to return to the demands of their work and their bosses. While this may sound like an average day for most hardworking employees, this narrative describes an additional, less often thought-of group—college student-athletes.

The average college student-athlete experiences many stressors that non-athlete college students do not: the demand to succeed on the field, the need to balance academic studies with athletic participation, the anxiety over missed classes due to travel for competitions, and the possibility of sports-related injuries.\(^1\) All of these extra demands compound the anxiety normally faced by all college students over tests, assignments, classes, papers, and possibly leaving home for the first time.\(^2\) Many colleges and universities have recognized the potential dangers facing student-athletes and have begun counseling programs focusing on depression, self-esteem issues, coping with anxiety, and stress management.\(^3\) For some student-athletes, though, there is an additional stressor that requires more than a balancing act; it requires absolute commitment and dedication to something that must take precedence over both school and athletics—children.

Raising children, even outside the student context, is an extremely


\(^2\) Id.

\(^3\) Andy Gardiner, *Surfacing from Depression*, USA TODAY, Feb. 5, 2006, at 1D.
demanding task. Children require constant attention and sound financial planning, and their needs must be placed before the needs of the parent or parents.  This requires most parents to establish support networks capable of assisting in meeting the child’s needs.  For a college student, who is often displaced from his or her built-in support network (family), finding a support network may be particularly challenging or nearly impossible, leaving the student as the only reliable caregiver. This simply adds to the already overly stressful lifestyle of the college student-athlete.

The birth of a new child is a very trying time for new parents, and employers and legislators have recognized this fact. In 1993, Congress passed the Family and Medical Leave Act (FMLA) to allow new parents the necessary time to adjust to life after the birth or adoption of a new child. Despite academic institutions requiring much time and work from student-athletes, student-athletes are not considered employees and are not entitled to any coverage similar to that provided by the FMLA, which would include maternity or paternity leave.

Navigating the academic terrain and achieving a degree are not the only hurdles for college student-athletes. Certainly, non-athlete college students are able to drop out of school or restrict their course loads to manageable levels. However, the National Collegiate Athletic Association (NCAA) requires that student-athletes complete four seasons of participation within five years of enrolling in college (the “Five-Year Rule”); dropping out of school for a semester does not toll the NCAA’s clock. Hence, although many student-athletes need athletic scholarships to complete their educations, taking a semester off will cost the student-athlete valuable eligibility and perhaps a viable chance to complete his or her education on scholarship. Furthermore, losing eligibility prevents the student-athlete from obtaining the full benefits of an intercollegiate athletic experience.

The NCAA promulgates rules for a variety of reasons, including amateurism, health and safety, and the achievement of competitive balance, and these rules directly affect the lives of every collegiate athlete. In

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7. See infra Part IV.
particular, the strict eligibility requirements can have a profound impact on college athletes’ life decisions. Among the potential, eligibility-draining decisions is the choice to have a child. Currently, the NCAA provides a “pregnancy exception” for female athletes, which grants the athlete an additional year in which to complete her four seasons of eligibility. In essence, the pregnancy exception tolls the five-year clock. The exception, however, is limited to the physical condition of pregnancy. This Comment will examine whether the NCAA should adopt an eligibility waiver based on paternity and maternity as opposed to simply an exception for the physical condition of pregnancy.

First, a recent case dealing with this matter, Butler v. National Collegiate Athletic Ass’n, will be discussed, which will include an examination of the relevant NCAA eligibility rules. Next, the FMLA and its application to the NCAA and the NCAA’s member institutions will be examined. This will include discussions of both the application of federal law to the NCAA and the potential recognition of college student-athletes as employees, or some other similar status. Then, the policy goals of the FMLA and the NCAA will be examined to see if similarities may encourage NCAA adoption of a maternity and paternity waiver. Finally, this Comment will investigate the positive and negative implications of such a waiver, draft a prototypical waiver, and ultimately recommend its adoption.

II. Butler v. NCAA, the NCAA, and the Pregnancy Exception

Eric Butler’s journey to the University of Kansas (Kansas) was a roundabout one. Initially planning to enroll at Northwestern Missouri State University (NMSU) in 2001 and to tryout for the football team, the 6’2”, 300-pound defensive tackle was derailed by a NMSU rule requiring all freshmen to reside in on-campus dorms. Butler’s girlfriend, Chantel Frazier, had
recently become pregnant, and, as infants were not allowed in the dormitories, NMSU was no longer a viable option for Butler, who wished to remain with his then-girlfriend and child.\textsuperscript{15}

Though NMSU was ruled out, Butler did not wish to forego the opportunity to obtain an education, so he instead enrolled at DeVry University for the fall semester of 2001.\textsuperscript{16} Because of NCAA eligibility rules, Butler's five-year eligibility clock began ticking in 2001 at DeVry, an institution that does not even have an athletics program.\textsuperscript{17} After taking the fall of 2002 off from school, he took classes at Avila University, a National Association of Intercollegiate Athletics (NAIA) school, in the spring of 2003, and joined the football team for the 2003-2004 year.\textsuperscript{18} By the spring semester of 2005, Butler had transferred to Kansas and earned “walk-on” status with the Jayhawks’ football team, where he played in all twelve of Kansas’ games.\textsuperscript{19}

Because Butler began his education at DeVry in 2001, his eligibility was due to expire in July of 2006, five years after he first began his education, rather than five years after he first began playing college football.\textsuperscript{20} This would mean that Butler was ineligible to play for Kansas during the 2006-2007 season. Realizing this fact, Kansas petitioned the NCAA on Butler’s behalf for a waiver of the rule, which would allow Butler to play his “senior” season on the Kansas team.\textsuperscript{21} In particular, Kansas asked for a waiver under Bylaw 30.6.1, which allows the NCAA to grant a waiver of the five-year rule if the student-athlete was deprived of the opportunity to participate for reasons “beyond the control of the student-athlete or the institution.”\textsuperscript{22} The NCAA denied the request for the waiver and Kansas’ subsequent appeal.\textsuperscript{23} Hence, if Butler wished to continue his playing career at Kansas, he had no alternative but to turn to the courts.

Butler filed suit in the district court of Kansas, claiming violations of the article.\textsuperscript{15} Butler, 2006 WL 2398683, at *2. The couple was married in March of 2004. \textit{Id.}
\textsuperscript{16} Butler, 2006 WL 2398683, at *1; \textit{see also} \textit{NAT'L COLLEGIATE ATHLETIC ASS'N, supra note 8, art. 30.6.1.}
\textsuperscript{17} Butler, 2006 WL 2398683, at *2.
\textsuperscript{18} Butler, 2006 WL 2398683, at *2.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} Butler, 2006 WL 2398683, at *2.
\textsuperscript{22} Butler, 2006 WL 2398683, at *1.
Equal Protection Clause (by way of § 198324) and Title IX.25 The essence of his claim centered on the NCAA’s recognition of a “pregnancy exception” that grants an exception to the five-year eligibility rule.26 The bylaw states: “A member institution may approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy.”27 Hence, only women are eligible for this exception, and Butler claimed that his exclusion, as a male, was a violation of his rights under the United States Constitution’s Equal Protection Clause and Title IX.28 Butler asked for a preliminary injunction that would allow him to complete his final season at Kansas, so the court evaluated his claim on four factors: (1) did Butler establish a likelihood of success on the merits; (2) would Butler “suffer irreparable injury unless the temporary restraining order” was granted; (3) would the “threatened injury outweigh[] whatever damage the proposed restraining order may cause” Kansas and the NCAA; and (4) would a temporary restraining order “be adverse to the public interest.”29 Finding that Butler did not meet the necessary preliminary threshold, the court denied his request,30 and the Tenth Circuit of the United States Court of Appeals upheld that decision.31

Ultimately, the basis of the district court’s decision turned on the explicit language of the NCAA pregnancy exception.32 Butler argued that the rule allowed an exception for maternity leave, as opposed to simply physical pregnancy, and because he was denied the exception for paternity leave, his rights were violated under the Equal Protection Clause and Title IX.33 In particular, he argued that the rule drew an arbitrary distinction between males and females because it allows an exception for maternity leave and not paternity leave.34 He further argued that such an arbitrary distinction was discrimination based upon sex and that the distinction was not “substantially related to the achievement of ‘important government objectives.’”35 Though legal experts agreed with Butler that he would have a legitimate claim if the

26. NAT’L COLLEGIATE ATHLETIC ASS’N, supra note 8, art. 14.2.1.3.
27. Id.
29. Id. at *2.
30. Id. at *5.
33. Id.
34. Id.
35. Id
pregnancy exception were for maternity leave,\textsuperscript{36} the court held that pregnancy and maternity leave were not the same and that “for reasons of pregnancy” meant solely the physical condition of being pregnant.\textsuperscript{37} As NCAA spokesman Erik Christianson stated, “The pregnancy exception is explicitly written for female students whose physical condition due to pregnancy prevents their participation in intercollegiate athletics.”\textsuperscript{38} Essentially, until men can get pregnant, this exception is off-limits.

In addition to the pregnancy-maternity leave distinction drawn by the court, the large amount of deference typically given to the NCAA in drafting and enforcing its rules played a role in the decision.\textsuperscript{39} In short, if the NCAA states that “for reasons of pregnancy” refers solely to the physical condition of being pregnant, then courts will most likely adopt that interpretation.

Regardless of the outcome of Butler’s appeals, his suit raised one important question: Should the NCAA adopt a waiver from the five-year rule that essentially recognizes maternity and paternity leave? Many feel that the NCAA has wronged Butler by punishing him for doing the right thing—taking care of his parental responsibilities.\textsuperscript{40}

\section*{III. THE PREGNANCY EXCEPTION, TITLE IX, AND EQUAL PROTECTION}

Because Butler sought only a preliminary injunction, the district court only examined Butler’s likelihood of success on the merits of his Title IX and Equal Protection claims.\textsuperscript{41} It found that Butler was unlikely to succeed in the Title IX claim because the NCAA’s pregnancy exception was limited to the physical condition of pregnancy; hence, Butler was not excluded from using the exception because he was a male, but rather because he could not get pregnant.\textsuperscript{42} The district court likewise found that he was unlikely to prevail on Equal Protection grounds because the distinction that the exception draws between males and females appeared to be substantially related to an important government objective “[a]t first blush.”\textsuperscript{43} However, it is worth

\begin{footnotes}
\footnotetext[36]{Whiteside, \textit{supra} note 17. Legal experts for the National Women’s Law Center stated that “if eligibility is extended for child rearing, it should extend equally to men and women. If eligibility is extended because of the physical effects of pregnancy, then that obviously applies only to female athletes.” \textit{Id.}}
\footnotetext[37]{\textit{Butler}, 2006 WL 2398683, at *3.}
\footnotetext[38]{Whiteside, \textit{supra} note 17.}
\footnotetext[39]{\textit{Butler}, 2006 WL 2398683, at *4.}
\footnotetext[40]{Jason King, \textit{Jayhawk Seeks Waiver to Play}, KAN. CITY STAR (Mo.), Aug. 3, 2006, at D6.}
\footnotetext[41]{\textit{Butler}, 2006 WL 2398683, at *3.}
\footnotetext[42]{\textit{Id.}}
\footnotetext[43]{\textit{Id.}}
\end{footnotes}
exploring whether Butler’s claims would have been decided differently had the court applied an expanded definition of “for reasons of pregnancy” that included maternity leave in addition to the physical condition of pregnancy.

A. Title IX

Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Hence, it is illegal for nearly all educational institutions to discriminate on the basis of sex, as even the indirect receipt of government-based financial aid is enough to bring a school within the purview of Title IX. Thus, Kansas must comply with Title IX. The NCAA, though, is not subject to Title IX’s requirements. For this reason, the following hypothetical analysis of Butler’s Title IX claim proceeds only against Kansas for its enforcement of the NCAA’s rule.

Butler complained that he was being subjected to discrimination on the basis of sex by Kansas because Kansas enforced the NCAA’s decision to deny Butler the pregnancy exception, which would have extended Butler’s five-year clock. Operating under the assumption that a court would interpret “for reasons of pregnancy” so broadly as to incorporate maternity leave (as opposed to simply the physical condition of pregnancy), Title IX seems to leave Kansas with a less justifiable reason for excluding paternity leave. For maternity leave alone to be acceptable, the university must provide a sex neutral reason for not allowing paternity leave, which may prove difficult. If the pregnancy exception was narrowly drawn, as it is in reality, then Kansas can rely on a woman’s need to recover physically from pregnancy. However, if the exception was construed broadly, as in this hypothetical, the above physical reasons may lose some persuasive power with a court. If the exception was designed to give female athletes maternity leave for reasons other than simple recovery, a school may be hard-pressed to give a sex neutral reason to deny the same type of leave for males. Once the physical need for recovery is removed as a determinative factor, both males and females “need” the leave to nurture, bond with, and provide for the new child.

45. 34 C.F.R. § 106.2(g)(1) (2006).
46. In National Collegiate Athletic Ass’n v. Smith, 525 U.S. 459, 468 (1999), the Supreme Court decided that although the NCAA receives dues from its member institutions that may have come from federal funds, this connection is not enough to bring the NCAA under the Title IX umbrella because the federal funds are not “earmarked” for NCAA dues.
In short, while Kansas can still argue that the physical rigors of pregnancy require a female-only exception, its argument loses luster when the exception is also justified as providing time to nurture and care for the new child. Males and females have an equally justifiable need to take time off from athletics to care for a new child. Therefore, to allow this time off for females and not males may prove to be a Title IX violation. Hence, although Kansas may still prevail in its defense of the Title IX claim, its footing is less sound if the exception is construed to provide more than time for physical recovery.

B. Equal Protection

For a plaintiff to have a claim under the Equal Protection Clause, the defendant first must be either a public institution or a state actor. Hence, claims against public universities, such as Kansas, would presumably meet this threshold determination. However, constitutional claims against the NCAA are not recognized, as the NCAA is a private institution and not a state actor. Furthermore, it should be noted that lawsuits against public institutions over the application of NCAA rules have been unsuccessful. In *National Collegiate Athletic Ass'n v. Tarkanian*, for example, the Supreme Court did not allow Coach Jerry Tarkanian to successfully sue his employer, the University of Nevada at Las Vegas, for its enforcement of an NCAA rule. Because Butler would be suing Kansas over its application of an NCAA rule, a court would most likely view the suit as *Tarkanian* revisited. Hence, the federal constitutional claim would almost certainly be dismissed, leaving Butler without an Equal Protection claim.

C. How Does This Relate to the NCAA?

If “for reasons of pregnancy” was interpreted to include an exception for maternity leave, Butler may have a claim against Kansas under Title IX, but not under the Equal Protection Clause. As noted above, the NCAA is not a state actor and does not receive federal funds, so it is subject to neither the Equal Protection Clause nor Title IX, respectively. Because of this distinction, Kansas may be placed between a rock and a hard place. Though a court may order Kansas to offer the extra year of eligibility, to do so would place it in violation of NCAA rules and regulations. If Kansas were to grant Butler an extra year of eligibility, contrary to the NCAA’s decision, and allow Butler to

50. See id. at 199.
51. Id.
play, it may be subject to sanctions from the NCAA under its Rule of Restitution.\footnote{52} The Rule of Restitution states that if a NCAA member institution allows a potentially ineligible student-athlete to participate in athletics in accordance with a court order that is later overturned, the NCAA can take action against the member institution.\footnote{53} Possible sanctions include striking all individual and team performances in which the ineligible athlete was involved, forfeiture of wins and awards, postseason bans, television restrictions, and fines.\footnote{54}

Facing these potential sanctions, it seems likely that Kansas would try to find a way to appease both the NCAA and the court. Kansas may end up recognizing Butler as a member of the team, but not allowing him to participate in any practices or games. Such a course of action would be within Kansas’s rights, but would make the filing of Butler’s claims useless. Even if he won his suit against Kansas, the available remedy would not meet his desires, and he would still not be able to participate on the football team in any significant way. Because of this, even a broader interpretation of “for reasons of pregnancy” seems unlikely to bring about meaningful results for Butler.

\section*{IV. WHY DOES THE FMLA NOT APPLY TO STUDENT-ATHLETES?}

The FMLA requires all private employers with more than fifty employees and all public employers to offer twelve weeks of unpaid maternity or paternity leave for the arrival of a new child, biological or adopted.\footnote{55} Eligible employees are those who have been employed for at least twelve months with an employer and have worked at least 1250 hours during the previous twelve-month time period.\footnote{56} These requirements present several difficulties to student-athletes who seek to fall within the protection of the FMLA.

First, courts generally regard student-athletes as both students and athletes, \textit{but not as employees}.\footnote{57} As the court in \textit{Waldrep v. Texas Employers Insurance Ass’n} noted, if a contract for hire existed between the university and the athlete, it would be to attend school and participate in athletics.\footnote{58} However, accepting any compensation beyond scholarship funds for participating in athletics would disqualify the student-athlete as an amateur and prevent him or

\begin{footnotes}
\footnote{52} Nat’l Collegiate Athletic Ass’n, \textit{supra} note 8, art. 19.7. \\
\footnote{53} Id. \\
\footnote{54} Id. \\
\footnote{55} Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(A)-(B) (2000); § 2611(4)(A). \\
\footnote{56} § 2611(2)(A)(i)-(ii). \\
\footnote{58} Id. \\
\end{footnotes}
her from participating in collegiate athletics.59 Furthermore, courts have also been reluctant to find student-athletes to be employees because the “employer,” in this case the educational institution, does not have a significant right of control over the activities of its “employee” and is unable to fire the “employee.”60 Hence, student-athletes are generally prevented from being considered employees.

Though this position is the modern trend, some individuals believe that student-athletes, particularly those playing sports that draw large amounts of revenue to the university, deserve to be considered employees.61 This argument centers on worker’s compensation statutes and the ability of student-athletes, usually football and basketball players, to be eligible for the benefit.62 The primary arguments articulated by those advocating the recognition of student-athletes as employees state that student-athletes contract with the university to play sports for compensation (scholarships),63 and that the university and athletics department exercise a very large degree of control over a student-athlete’s time on campus.64 Student-athletes are told what classes to take, when to study, and when and what to eat, in addition to the traditionally known demands placed upon student-athletes by practice schedules and games.65 However, these arguments have traditionally been unsuccessful.66

Because student-athletes are not considered employees, educational institutions are not required to follow the FMLA in regard to student-athletes, which prevents someone like Eric Butler from asserting rights under the FMLA. Despite this fact, the case law and scholarly discussions concerning this topic do indicate that there are a significant number of similarities between student-athletes and employees.67 If Congress found that policies such as the FMLA are necessary to protect the rights of parents and to

59. Id.; see also NAT’L COLLEGIATE ATHLETIC ASS’N, supra note 8, arts. 12.01.1, 12.02.2, 12.02.3.
63. Waldrep, 21 S.W.3d at 700.
64. Coleman, 336 N.W.2d at 226.
66. See, e.g., Waldrep, 21 S.W.3d at 698-702; Coleman, 336 N.W.2d at 228.
67. See Waldrep, 21 S.W.3d at 701; Coleman, 336 N.W.2d at 225-26; Gurdus, supra note 65, at 919; Whitmore, supra note 61.
preserve "family integrity" in the employment context, then perhaps the NCAA should investigate if similar policies would be useful for student-athletes, who share many of the same qualities and burdens of normal employees.

V. SHOULD THE NCAA ADOPT A MATERNITY AND PATERNITY WAIVER?

Because of the similarities between student-athletes and employees (such as institutional control over their time and the receipt of some form of compensation) the NCAA should look to the FMLA, which recognizes a maternity or paternity leave for employees, to see if the purposes, findings, and policy goals of the legislation match the goals and concerns of the NCAA. Before examining the positive and negative aspects of adopting a maternity and paternity waiver (as opposed to the current pregnancy exception) it is beneficial to investigate the findings and purposes of the FMLA and to determine if it has benefited the group it was designed to help. If the FMLA's policy of recognizing maternity and paternity leave for employees has not produced positive movement towards achieving the purposes of Congress, then a similar measure at the collegiate level may also be ineffective.

A. The Family and Medical Leave Act: Purpose, Benefits, and Problems

The FMLA grants new parents, both the mother and the father, up to twelve weeks of unpaid leave following the birth or adoption of a new child. The Act was designed for several purposes: (1) "to balance the demands of the workplace with the needs of families," (2) "to promote the stability and economic security of families," (3) "to promote national interests in preserving family integrity," and (4) "to entitle employees to take reasonable leave... for the birth or adoption of a child." One finding that this Act was based upon was that there is a "lack of employment policies to accommodate working parents," which "can force individuals to choose between job security and parenting."

Though some employers view FMLA leave as a loss of productivity, this was not the design of the legislature in establishing the measure. Rather, legislators believed that allowing employees to handle important health and

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69. § 2612(a)(1).
70. § 2601(b)(1)-(2).
71. § 2601(a)(3).
family concerns would actually increase productivity. As noted in the Code of Federal Regulations, "[a] direct correlation exists between stability in the family and productivity in the workplace." If an employee knows that he or she has the ability to take time off to deal with serious health or family issues without losing his or her job, then, in theory, the employee can work more efficiently and make a "full commitment[] to [his or her] job."»

Productivity aside, there are other benefits to FMLA policy. Allowing both men and women parental leave allows new parents time in which to bond properly with their new child or children. Most notably, paternity leave grants new fathers an earlier opportunity to be actively involved in their child's rearing. As some scholars note, such early involvement allows new fathers to feel involved at a time when many men feel ineffectual. This involvement may pay dividends in the future, as based upon their earlier experiences, the fathers may feel more connected to the child and more competent to handle the child's needs. This is also important at the societal level, as encouraging men to be actively involved in early childcare may help reduce employers viewing FMLA leave as "women's leave." Such an attitude by employers could potentially stunt the hiring of women, as costs associated with FMLA leave may make hiring women appear more expensive.

There are questions, though, regarding whether the FMLA actually eases the burden on those who most need its help—low-income workers. One barrier to the use of FMLA leave is that one must be an "eligible" employee. This means that an employee must work for an employer with fifty or more employees or for a public entity, and one must have logged at least 1250 hours within the last year for that employer. Because of these restrictions, "only 77 percent of all U.S. employees work for an employer covered by the FMLA, and of these employees, only 62 percent are actually eligible for the leave." Many low-income workers simply do not meet the hours requirement, or they

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73. Id.
74. Id.
75. Id.
77. Id.
78. Id.
79. See id. at 23.
80. Id.
82. § 2611(2)(A)(i)-(ii).
83. Dau-Schmidt & Brun, supra note 4, at 200.
work for small employers. Even those low-income workers who are eligible for FMLA leave often do not use it. This is not because they do not need it, but rather because they cannot afford to take unpaid leave.

B. Would the NCAA Face the Same Problems with a Maternity and Paternity Waiver?

Though some individuals may fear that the same problems that plague proper use of the FMLA leave provision would cause a similar NCAA maternity and paternity waiver to fail, the NCAA can actually avoid these problems. Though the federal government limits the definition of “employers,” the NCAA does not have to. As its rules apply to its member institutions, nothing prevents the NCAA from simply creating a maternity or paternity waiver that would apply to all of its members. In doing so, every student-athlete at a member institution would be eligible.

Furthermore, though many low-income workers cannot afford to take unpaid FMLA leave, student-athletes probably can afford to take a year off from athletics. At most, the student is losing the value of an athletic scholarship for a one-year period. It is possible, however, that coaches may elect to keep the athletes on scholarship, despite their inability to participate in athletics. This may be optimistic, but it is not outside the realm of possibility. In the worst-case scenario, the student loses an athletic scholarship, but other sources of financial aid exist for students. Unlike the salary of a worker who is taking unpaid leave, the value of an athletic scholarship can be more readily replaced through other financial aid resources, such as Pell Grants or outside scholarships. In short, the NCAA is uniquely situated to prevent the obstacles facing the FMLA leave provision from also limiting the value of a maternity and paternity waiver to student-athletes.

C. What Would Be the Net Effect of a Maternity and Paternity Waiver?

Assuming that the NCAA created maternity and paternity waivers, there would be both positive and negative effects that must be weighed against each other to determine if the measure would be worthwhile.

i. Positive Effects

When a student-athlete becomes a new parent, the student’s first

84. Selmi & Cahn, supra note 76, at 16.
85. Id.
86. Id.
responsibility is to the child. The NCAA certainly wants to encourage student-athletes to be responsible parents, but by allowing the five-year clock to run while a student-athlete fulfills parental duties, the NCAA is requiring the student-athlete to make a choice: student-athlete or parent. In some cases, the student-athlete has no choice but to give up athletics, which prevents him or her from attaining the full benefits of participation in collegiate athletics. The skills gained and lessons learned through participation will be lost. By implementing maternity and paternity waivers, the NCAA could allow the student-athlete to be a responsible parent without forcing him or her to forfeit these benefits.

In addition, if a student-athlete is allowed to retain eligibility via a waiver, he or she is more likely to remain on scholarship with his or her NCAA institution, solely because the coach would be aware that the student-athlete would be returning to the team.\(^8\)\(^7\) As mentioned above, however, there is still a chance that the athlete’s scholarship would be taken away for the time period of the requested waiver.\(^8\)\(^8\) In such a case, other sources of financial aid do exist, though it is possible that the student-athlete could fail to obtain additional aid and be unable to attend college. As one of the NCAA’s core objectives is the furtherance of education,\(^8\)\(^9\) any action that the NCAA can take to ensure successful completion of a degree would be considered in line with its mission. The above problem would be aided by the NCAA’s recognition of a maternity and paternity waiver.

By implementing a waiver, the NCAA would also be voluntarily conforming to federal policy. In fact, it can be argued that the NCAA would be improving upon the model of the FMLA in meeting the needs of new parents.

Finally, allowing waivers, particularly in the case of student-athletes such as Eric Butler, would be good for the NCAA’s public image. Many people view the NCAA as a strict parent that often does not make the best decisions for its student-athletes.\(^9\)\(^0\) The general public does not believe the NCAA to be known for its good-natured acceptance of unusual cases that test the

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87. Typically, the student-athlete would need to have eligibility left under the five-year rule. In the case of a maternity or paternity waiver where the athlete would be outside the five-year rule, the NCAA would need to modify its rule. See NAT’L COLLEGIATE ATHLETIC ASS’N, supra note 8, art. 15.01.5.

88. The allocation of athletic scholarships gets difficult to accurately discern in regard to a potential maternity or paternity waiver due to issues relating to the timing of pregnancy and voluntary withdrawals. See id. art. 15.3.4.1(d).

89. Id. arts. 1.3.1, 2.2, 2.2.1.

90. Some even view it as a “castle with a big moat around it.” Scorecard: For the Record, SPORTS ILLUSTRATED, Sept. 25, 2006, at 18.
boundaries of NCAA rules. Consequently, when the NCAA grants an unusual waiver, it generally makes the headlines. This waiver would be another example of the NCAA showing "it has a heart."  

ii. Negative Effects

Despite many positive effects, a maternity and paternity waiver would undoubtedly have some drawbacks. Most notably, it would be an administrative burden on the NCAA to individually decide which waivers to grant. However, the NCAA already has procedures established to determine the granting of waivers, so it would not be starting from scratch. Rather, the NCAA would merely be adding one more type of waiver to consider. Member institutions would need to complete the necessary documentation of the student-athlete's situation, and the NCAA committee could then continue like any other waiver proceeding.

Another potential problem with the waiver is that it grants an extra year of eligibility for athletes in which they can train for athletics. By taking a year off from the team, the athlete could take advantage of the waiver to spend a year training on his or her own. This may upset competitive balance on the field, which the NCAA strives to protect. Though this may be a somewhat legitimate concern, the potential for abuse is relatively low when one considers the individual evaluation necessary to the waiver process and the relatively low likelihood that a single additional year of training would give an athlete a substantial competitive advantage. In some cases, missing out on team practices and structured workouts may severely damage the ability of an athlete to compete when he or she returns from time off. Still, the potential for abuse is present.

Finally, this waiver could present an opportunity for overzealous NCAA member institutions and coaches to pressure athletes into playing another year for their respective teams. Though it may seem cynical to think that someone may father a child simply to gain an extra year to train, a paternity waiver puts
that incentive in place. This is an area where the NCAA must certainly police its member institutions, but it also needs to rely heavily on some sense of ethics at the individual and institutional level.

VI. DRAFTING THE MATERNITY AND PATERNITY WAIVER

Though the potential for abuse is present, the introduction of a maternity and paternity waiver seems to have a net positive effect on the education and welfare of student-athletes and the stability of their families. For this reason, the NCAA should consider adopting such a waiver. However, the NCAA must institute certain rules to maximize the positive effects while minimizing the negative effects.

First, each athlete can use the waiver only once, for obvious reasons. This would guard against student-athletes postponing their final seasons of eligibility indefinitely for training purposes.

Second, unlike the FMLA, student-athletes would not be eligible for a waiver for adopted or surrogate children. Adopting a child or becoming a surrogate mother is a choice and is less likely to happen by accident. While this rule is not meant to reward those student-athletes who unintentionally become parents while at their undergraduate institution, it does recognize the reality that adoptions by accident do not occur as frequently as natural pregnancies, particularly among the college-aged population.

Third, the student-athlete must request the waiver prior to the birth of the child. Pregnancy is not a sudden occurrence, so the student-athlete should plan in advance if he or she chooses to request the waiver. This prevents difficulties at the institutional level, as member schools will be aware in advance if they may be without the services of a student-athlete on a particular athletic team. Such advance action will also make it easier for the NCAA to conduct a thorough review of the request and to structure the waiver in the way best suited for the student-athlete’s needs as a parent, a student, and an athlete.

Fourth, each waiver should be individualized to the particular student-athlete applying. Each waiver should begin and end at the best time for the student-athlete, but it must run for twelve consecutive months. This will ensure the optimal outcome for the student, child, and member institution. As all births do not occur in the off-season, it is important that the athlete take his or her leave at a time that would fulfill the purpose of the maternity or

95. See Evil Flying NCAA Monkeys: You’re Not on Kansas’ Squad Anymore, Daddy, Aug. 16, 2006, http://daddytpe.com/2006/08/16/evil_flying_ncaa_monkeys_youre_not_on_kansas_squad_anymore_daddy.php (commenting that programs could try and “hold onto their star players by turning them into baby daddies”).
paternity leave. However, as the waiver should be for one full calendar year, the student-athlete may need to begin his or her leave from the athletic team prior to the birth of the child, particularly in the case of female athletes. Also, if a student-athlete participates in any intercollegiate competitions in a given sport for the calendar year, he or she has used a year of eligibility. Hence, the waiver cannot truly restore eligibility, but it does serve to “freeze” the five-year clock.

Finally, in order for the waiver to freeze the five-year clock, the student-athlete must maintain progress toward a degree, as is normally required of NCAA student-athletes. This will ensure that the student-athlete remains enrolled in school despite a lack of participation in athletics.

Following the above rules, the proposed waiver could be crafted using the following bylaws and inserted beneath bylaw 14.2.1, the five-year rule:

14.2.1.x Maternity and Paternity Waiver. The Committee on Student-Athlete Reinstatement, or a committee designated by it, shall have the authority to waive this provision [the five-year rule] by a two-thirds majority of its members present and vote to grant a one-year extension of the five-year period of eligibility for any student-athlete who is currently pregnant or is the biological father of an unborn child, subject to the following conditions:

(a) Such a student-athlete may use this waiver only once during his or her collegiate athletic career;

(b) The waiver must be requested prior to the birth of the child; and

(c) Such a student-athlete must maintain progress toward a baccalaureate or equivalent degree at his or her current institution as determined by the regulations of that institution and in accordance with Bylaw 14.4.

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96. NAT'L COLLEGIATE ATHLETIC ASS'N, supra note 8, art. 14.4.


98. Although there could be some abuses of this waiver based upon its broad wording, the individualized waiver process of the NCAA should have no trouble identifying such abuses and denying waivers in those instances.
14.2.1.x.1 Administration of Maternity and Paternity Waivers. Waivers granted under Bylaw 14.2.1.x should be structured according to the following guidelines:

(a) The member institution may request that the waiver begin at any point prior to the birth of the child, and in the event of a birth prior to the requested waiver date, the requested waiver date will be retroactively changed to the date of birth;

(b) The waiver shall run for twelve consecutive months; and

(c) Participation in athletic contests in any year of partial eligibility created by use of this waiver shall collectively count as one year of athletic participation.

With these rules in place, one can consider the waiver’s operation in the case of a hypothetical football player whose significant other is due in late October. The student-athlete learns of the pregnancy in March. Once the athlete finds out that his significant other is pregnant, he should immediately request a waiver from the NCAA, if he so chooses. At this point, the athlete must consider his options. He may request a waiver date any time prior to the expected date of birth. If he requests a date at the beginning of October, he will withdraw from athletic participation and begin his leave at that time. Most likely, he will have participated in anywhere between one and six football games. Under normal NCAA rules, if his season ended at this time, he would have used a full year of eligibility.99 Under the paternity waiver provision, however, this is only a “partial” year of eligibility used. After twelve consecutive months have passed, the athlete can resume participating in football, presumably missing the first five or six games. This leaves him another seven to eight games to participate in for the post-leave season. Again, under current NCAA rules, this participation would use a full year of eligibility.100 Under the waiver provision, though, this qualifies as his second “partial” year of eligibility. Collectively, the two partial years equate to one full year of eligibility. By crafting the waiver in this manner, the athlete is truly able to freeze the five-year clock without sacrificing any eligibility on partial seasons. He is able to simply pick up where he left off. Without this ability, the athlete would only benefit from the waiver if he was fortunate enough for the birth of his child to be before the football season began.

99. Nat’l Collegiate Athletic Ass’n, supra note 8, art. 14.2.3.1.
100. Id.
Being a student-athlete is a full-time job, as is being a good parent. Trying to be both is a daunting task. Recognizing this, the NCAA should strongly consider implementing a maternity and paternity waiver for student-athletes faced with this situation. By following the basic rules outlined above, it is possible to craft a waiver that does not distort the mission and purpose of the NCAA, but enhances the physical, emotional, and educational well-being of the NCAA’s student-athletes.

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