NCAA Academic Performance Program Harms Historically Black Colleges & Universities' Athletics

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INTRODUCTION

The 107 Historically Black Colleges and Universities ("HBCUs") were established in the United States prior to the Civil Rights Act of 1964 and were primarily designed to provide education to Black Americans.[1] The existence of HBCUs was predicated on Black Americans being systemically blocked from attending what we know today as Predominantly White Institutions ("PWIs").[2] It was not until 1956 that HBCUs received access to the NCAA.[3] Due to the integration of athletic programs, HBCUs found themselves struggling to attract athletic recruits and soon became less and less competitive.[4] Over time, HBCUs would find postseason play and a shot at the revenues the NCAA had to offer to be exceedingly difficult.[5]

Although systemic issues led to a departure from HBCU athletics, another more puzzling NCAA regulation regarding "academic performance" requires a deeper analysis. The Academic Performance Program (APP) introduced by the NCAA in 2003, was meant to "ensure that the membership is dedicated to providing student-athletes with an exemplary educational and intercollegiate athletics experience in an environment that recognizes and supports the primacy of the academic mission of its member institutions, while enhancing the ability of student-athletes to earn a degree."[6] Athletic programs that fail to meet the benchmarks put in place via APP receive postseason bans.[7] What APP neglects to account for, are the disparities that are present between HBCUs and PWIs.[8] Without the ability to address the

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[1] U.S. Dep't of Educ., Off. for C.R., Historically Black Colleges and Universities and Higher Education Desegregation (1991).

[2] *Id.*

[3] *See The Athletic Experience at Historically Black Colleges and Universities: Past, Present, and Persistence* loc. 963 (Billy Hawkins et. al. eds. 2015) (ebook).

[4] *Id.* at loc. 1202.

[5] *See id.* at loc. 1211.

[6] NCAA Bylaws, *supra* note 1 at Article 14.01.4.

[7] *See id.* at Article 14.12; 15.01.8.

[8] *See* Kelly Elliot & Tim Kellison, Budgeting for Success: Comparing Finances Between Historically Black Colleges and Universities and Predominantly White Institutions, 12.1 Journal of Intercollegiate Sport 25, 27-28 (2019) (segregation in the United States

root of poor academic performance through funding, HBCUs are being asked to pull themselves up by their own bootstraps in a way that PWIs have never had to. HBCUs have started behind PWIs in numerous ways, including athletics, and with the existence of this NCAA program, the burden HBCUs must overcome only becomes larger.[9] Albeit indirect, a rule like this contributes to a larger culture of inequality, inequity, and racism in the United States, and must be addressed.

I. HOW THE NCAA'S ACADEMIC PERFORMANCE PROGRAM RACIALLY DISCRIMINATES

The Academic Performance Program (APP) introduced in 2003 contradicts the NCAA's goals of academic success for the student-athletes as it pertains to HBCUs. Although the initiative serves to further the academic interests of Division I athletic programs in theory, in practice it ignores a multitude of issues that disproportionately affect HBCUs and perpetuates a cycle of undue hardship.

The APP uses two key metrics—Academic Progress Rate (APR) and Graduation Success Rate (GSR)—to measure the overall academic success at an institution.[10] The formula for APR assigns two points per student athlete on a given team for "retention" and "eligibility."[11] The earned points are then divided by the total possible points and multiplied by 1000, resulting in a number meant to measure "real time" academic performance.[12] The calculation for GSR considers whether student-athletes successfully graduate from the university over a period of six years, while also factoring in student-athletes who transfer in good academic standing.[13] GSR is meant to provide a "long term" snapshot of academic progress.[14] Based on these metrics the NCAA established APR benchmarks at scores of 925 and 900 for contemporaneous penalties and historical penalties, respectively.[15] Contemporaneous penalties are employed for rehabilitative purposes while historical penalties are more punitive in nature.[16] The historical penalties also increase in severity for repeat offenders.[17]

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exacerbated financial disparities between PWIs and HBCUs and federal funding is currently decreasing).

[9] *See id.* at 40 (HBCUs are at a financial disadvantage when compared to PWIs and have received recommendations to cut funding to athletic programs to ensure financial stability for academics).

[10] *Division I Academic Progress Rate (APR)*, NCAA, https://www.ncaa.org/about/resources/research/division-i-academic-progress-rate-apr

[11] *See* Philip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism?* 15:2 UCLA Ent. L. Rev. 225, 237 (2008).

[12] *Id.*

[13] *How are NCAA Graduation Rates Calculated?*, NCAA (Nov. 2020). https://ncaaorg.s3.amazonaws.com/research/gradrates/RES_HowGradRateCalculated.pdf

[14] *Graduation Rates*, https*://www.ncaa.org/about/resources/research/graduation-rates*

[15] *Supra* n. 11 at 237-38

[16] *Id.*

[17] *Id.*

To illustrate the APP in action, consider the following hypothetical situation involving two Black student-athletes, Athlete-A and Athlete-B, who both play men's basketball and go to a PWI and HBCU respectively. Over the course of a season, both student-athletes' teams dominate their respective conferences and demonstrate athletic exceptionalism. Much to the disappointment of their coaches, both athletes receive 1.8 GPAs and are deemed individually ineligible. Both athletes are denied their "eligibility point" in the APR calculation. However, Athlete-B's institution only had five academic advisors on staff across all sports, while Athlete-A's institution had 25. Athlete A's institution also provided his team with personal tutors that they were regularly able to meet with. Additionally, most of Athlete-B's teammates came from lower socioeconomic backgrounds and have never had the guidance to establish strong academic skills and habits. As a result of the shortage of advisors and larger volume of academically challenged students, two other athletes on Athlete-B's team earned GPAs that rendered them ineligible. All ineligible athletes failed to earn their eligibility points in the APR calculation. Because of a lack of resources and systemic issues which were entirely out of the control of the student-athletes, Athlete-B's team will earn an APR below 925 and be deemed ineligible for postseason play.

The issue is not that Athlete-B will miss out on the postseason; he is already academically ineligible as an individual. The issue is that because of the increased probability of academic problems at the HBCU, the 12 eligible players on Athlete-B's team will now miss out on the postseason despite having enough eligible players to play. Although Athlete-A's team earned the right to play in the postseason, his academics will still largely go unaddressed. Even if his GPA increases to a point of eligibility, he is still unlikely to graduate in six years.[18] However, because Athlete-A is at a PWI, he likely has more academically privileged teammates who are carrying the averages as it pertains to APR and GSR, and Athlete-A's academic failure will go unnoticed. Athlete-A ends up never getting a hold of his academics and fails to graduate. Because the GSR will be skewed due to Athlete-A's teammates, it will appear as if the athletic program at Athlete-A's school is adequately addressing the academic needs of all its athletes, when in fact, underprivileged Black athletes are still struggling. In sum, Athlete-A will be no better off academically at a PWI than he would have been at an HBCU, but APP will only punish Athlete-B's school due to more visible academic inadequacy caused by a lack of resources. The smokescreen PWIs create hides the fact that the Black players are not benefitting from the so-called academic quality that these institutions so highly tout.

[18] Derrick Z. Jackson, *Lawsuit by HBCU athletes fights what it calls NCAA's systemic racism*, The Undefeated (Jan. 15, 2021). https://theundefeated.com/features/lawsuit-by-hbcu-athletes-fights-what-it-calls-ncaas-systemic-racism/.

HYPOTHETICAL APP SCENARIO

	ELIGIBILITY POINT	RETENTION POINT
ATHLETE-A	0	1
ATHLETE-B	0	1
REST OF TEAM*	12	14
TOTAL/POSSIBLE	12/15 * 1000	14/15 * 1000
APR	800	933

On its face, APP's measurements and benchmarks may seem reasonable, yet there are glaring flaws in the policy. As much as we would like to believe all Division I schools are created equal, the reality is that funding and resources largely differ from school to school.[19] To illustrate the problem of funding, compare the smallest endowment in the SEC to the largest in the SWAC.[20] The gap is so wide that it comes as no surprise the HBCUs likely have issues providing the academic resources necessary to consistently meet the APR and GSR benchmarks required by the NCAA. The idea that HBCUs struggle is not simply an assumption; the numbers indicate that since 2015, HBCUs represent 82% of all teams banned from NCAA postseason play for failing to meet the APR benchmark despite only comprising 6% of Division I teams.[21] On the surface, the numbers might tell a story of academics being an afterthought at these institutions, but the issue is that the NCAA fails to dig deeper and give context to this trend.

Put plainly, HBCUs are experiencing problems that PWIs never have to consider. For instance, in the 2020-21 school year, of the HBCUs banned from postseason play across all sports, the athletic departments had an average of five academic support and compliance staff.[22] The four PWIs that partook in the College Football Playoff had an average of twenty-eight.[23] The Ohio State University alone, listed forty-six staffers in academic support and compliance.[24] HBCUs to this day adhere to a mission to serve Black people coming from lower socioeconomic backgrounds and even have more flexible admissions standards in an attempt to provide Black people who have been denied resources an opportunity to receive a formal education.[25] In other words, a decent portion of the overall HBCU population may already be

* Assuming that a college basketball team has an average of 15 players on the roster.

[19] *See supra* n. 18.

[20] Newsroom, Mississippi State, https://www.msstate.edu/newsroom/article/2020/08/msu-makes-mississippi-history-ends-campaign-107-billion-gifts (last visited May 31, 2021) (Mississippi State endowmen is over $500 million); Why Give, Alabama State, https://www.aamu.edu/about/administrative-offices/marketing-communication-advancement/development/why-give.html (last visited May 31, 2021) (Alabama A&M's endowment is approximately $50 million).

[21] *Supra* n. 18.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

starting in need of more academic assistance. Despite the lack of resources, HBCUs in general graduate more Black students than PWIs when factoring in socioeconomic background.[26] Nevertheless, HBCUs have experienced funding issues that make adding to the human resources of academic support tremendously challenging.[27] Student-athletes at HBCUs have also admitted that the experience of attending the HBCUs as an athlete have been especially challenging due to the lack of financing.[28] Inconveniences such as long bus rides rather than flights have interfered with their abilities to balance athletics and academics.[29]

Beyond the discrimination inherent in the policy, another question of arises of whether APP is accomplishing the goal that it has set out to achieve in a non-discriminatory way. Statistics from Division I athletic programs assert otherwise—the graduation rates of Black student-athletes at PWIs are only marginally higher than the rates of Black student-athletes at HBCUs.[30] With the goal of the APR benchmark being an overall GSR of 50 percent, results from PWIs in the FCS and FBS show that GSR for the Black players at these programs are not actually not meeting this target.[31] The PWIs still manage to achieve the APR and GSR benchmarks but likely only do so because of the presence of economically privileged white players.[32] The rule in essence functions as punishment to HBCUs who have entirely or majority Black teams with a higher concentration of lower socioeconomic backgrounds.

The residual effects of the APP on HBCUs have become more apparent as years pass. There was once a time when some of the best professional football players came from HBCUs such as Jerry Rice, Michael Strahan, Doug Williams, and Aeneas Williams.[33] Nowadays, HBCU players struggle to garner enough attention to make it to the next level. In 2016, just 32 players on NFL rosters at the start of the season were from HBCUs.[34] As recently as the 2021 NFL Draft, there were zero players from HBCUs drafted in 259 picks, marking the ninth time since 2000 that no HBCU athletes have been selected.[35] The reality is that exposure matters, and the fewer opportunities athletes are receiving to showcase their abilities on a national

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[26] *Id.*
[27] *Supra* n. 8.
[28] *Id.*
[29] *Id.*
[30] *Supra* n. 18.
[31] *Id.*
[32] *Id.*
[33] Adam Rank, *NFL players from historically black colleges*, NFL.com (Jan. 17, 2021), https://www.nfl.com/photos/nfl-players-from-historically-black-colleges-0ap2000000324888.
[34] Carl "Lut" Williams, *32 HBCU players make opening-day NFL rosters*, The Undefeated (Sep. 8. 2016). https://theundefeated.com/features/32-hbcu-players-make-opening-day-nfl-rosters/
[35] David Steele, *Why were HBCU players shut out of the 2021 NFL Draft?*, The Undefeated (May 3, 2021). https://theundefeated.com/features/why-were-hbcu-players-shut-out-of-2021-nfl-draft/

stage, the far fewer professionals prospects they are going to attract. A study of the financial struggles for HBCU athletic programs found that at the student-athlete level, many of the athletes at HBCUs actually admitted that PWIs were their primary college choices, likely due to the higher visibility and abundance of resources.[36] The APP's disparate effect on the HBCUs give student-athletes one more reason to make HBCUs an afterthought. The impact of APP must be examined closely and the HBCUs urgently need to find ways to address its effects.

II. THE LACK OF "DISPARATE IMPACT" CREATES A HURDLE FOR HBCUS

The doctrine of disparate impact finds its origins in United States labor and employment law, but has also been discussed in the context of the Equal Protection Clause of the Fourteenth Amendment, housing, and education.[37] The doctrine addresses rules, policies, or practices that are facially neutral, but has an unjustified adverse effect on a protected class of citizens.[38] This is different from disparate treatment, which requires that discrimination be intentional in order to succeed on a claim.[39] The doctrine may find ground in the Fourteenth Amendment's Equal Protection Clause, which reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[40]

The United States Supreme Court adopted the disparate impact doctrine in *Griggs v. Duke Power Co.*, where the Court held that Title VII of the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[41] As one of the most heavily cited cases regarding disparate impact, *Griggs* demonstrates that in the context of labor and employment, policies can be deemed invalid if they disproportionately affect a protected class despite being facially neutral.

Although disparate impact has been addressed in some courts through application of the Civil Rights Act of 1964[42], the question remains as to whether the doctrine can be applied in a broader sense under the equal

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[36] *Supra* n. 8.
[37] *See generally* ARTICLE:EQUAL PROTECTION AND DISPARATE IMPACT: ROUND THREE, 117 Harv. L. Rev. 493; *See e.g. Tex. Dept. of Housing and Cmty. Affairs, et. al. v. The Inclusive Communities Project, Inc.*, 576 U.S. 1 (2015); *See e.g. N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).
[38] *Id.* at 494.
[39] *Id.* at 525.
[40] USCS Const. Amend. 14
[41] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[42] EQUAL PROTECTION, *supra* note 18 at 498.

protection clause of the Fourteenth Amendment.[43] In *Washington v. Davis*, 426 U.S. 229 (1976), the U.S. Supreme Court held that laws that have a discriminatory effect but lack discriminatory intent can still be valid under the U.S. Constitution.[44] The case made clear that for equal protection challenges for facially neutral policies with discriminatory effects, the disparate impact on its own will generally not be enough to render a policy invalid.[45] The Court clarified however that it did not prohibit legislatures from deciding whether they wanted to impose disparate impact standards. Scholars have often reached the same conclusion as the *Davis* Court and have pointed out the inadequacy of relying on equal protection as a means for seeking relief from practices that have disparate impact.[46]

Scholars have also explored the idea of addressing discriminatory practices of the NCAA through Civil Rights statutes such as section 1981. Under, 42 U.S.C. § 1981, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory...to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."[47] The scope of section 1981 is specifically in the enforcement of contracts.[48] Although a student-athlete athlete could bring a section 1981 claim due to National Letters of Intent serving as contracts, they would have to prove that whatever discrimination they are facing is intentional.[49]

The lack of disparate impact under section 1981 and section 1983 make the probability of succeeding on a claim of discrimination significantly lower and allows injustice in situations like this to persist. Viewing discrimination in a way that permits its unintentional practice in certain contexts contributes to a pattern of systemic racism that passively neglects the needs of protected classes of citizens such as Black Americans.

CONCLUSION

The unavailability of disparate impact in context of APP and HBCUs leaves room only for remedy under the law in the event a plaintiff can prove discrimination was intentional. Without a movement to correct this apparent hole in civil rights law, more situations like this in which otherwise protected

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[43] *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc*., 576 U.S. 519, 535 (2015) ("Both Title VII and the ADEA contain identical "because of" language, see 42 U. S. C. §2000e-2(a)(2); 29 U. S. C. §623(a)(2), and the Court nonetheless held those statutes impose disparate-impact liability. In addition, it is of crucial importance that the existence of disparate-impact liability is supported by amendments to the FHA that Congress enacted in 1988.")

[44] *Washington v. Davis*, 426 U.S. 229, 245 (1976).

[45] EQUAL PROTECTION, *supra* note 18 at 495; *See also Washington v. Davis*, 426 U.S. 229 (1976).

[46] *Id.* ("the Fourteenth Amendment does not prohibit practices that have disparate impacts, but legislatures can pass laws banning disparate impacts if they so choose.").

[47] 42 U.S.C. § 1981

[48] *Id.*

[49] *Id.*

classes of citizens find themselves the victims of disproportionate policy effects are sure to eventually arise.