

**REPORT TO THE BOARD OF TRUSTEES
OF THE STATE UNIVERSITY OF NEW YORK**

Judith S. Kaye

Skadden, Arps, Slate, Meagher & Flom LLP

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I. Introduction

In the 2008-09 college basketball season, the Binghamton University (“BU” or the “University”) men’s team won its first America East Conference (“AEC”) championship and made its first appearance in the National Collegiate Athletic Association (“NCAA”) tournament. The team posted a record of 23 wins and nine losses, a dramatic turn from its losing record (14-16) the prior year. In June 2009, BU announced that it had awarded Kevin Broadus, after two years in his first head coaching job, a five-year contract extension.

On September 23, 2009, Emanuel Mayben, returning for his second season at BU, was arrested on an indictment charging him with selling cocaine, and he was dismissed from the team. Two days later, on September 25, BU dismissed five other members of the team (three returning members and two new members) for unspecified misconduct. Amid these disclosures, press attention also focused on BU’s termination earlier in September of adjunct lecturer Sally Dear. Ms. Dear had told a *New York Times* reporter that during the fall semester she had been subjected to inappropriate pressure from the Athletic Department to depart from her attendance policy for men’s basketball players in her class.

On October 6, 2009, the Board of Trustees (“Board”) of the State University of New York (“SUNY”) engaged me and my law firm, Skadden, Arps, Slate, Meagher & Flom LLP, to conduct a review relating to the men’s basketball program at BU. Our charge has been to gather the relevant facts and to make recommendations to the Board.

II. The Scope and Process of the Review

A. Scope of the Review

The Board made clear to us that our mandate was to conduct a comprehensive, independent review of issues pertinent to the integrity of the intercollegiate athletics program at BU in light of the recent disclosures. No limits were placed on how we pursued our task. We determined to focus our review on the BU men's basketball program, although a complete understanding of the program necessitated a somewhat broader overview of intercollegiate athletics at BU and within the AEC, which BU joined in 2001. We were committed to conducting our review as thoroughly and expeditiously as possible because SUNY has a compelling interest to resolve all of the open issues relating to the BU basketball program and move beyond this sad chapter in its history. Accordingly, over the course of three months we made several trips to BU to conduct interviews and review relevant materials. During the review process, BU continued to conduct its own NCAA compliance functions and to make changes (including personnel changes) within its Athletic Department, some of which are noted below. Our areas of emphasis were as follows.

First, we examined the standards and processes that BU applied in the decisions whether or not to admit prospective student-athletes recommended by the basketball coaching staff.

Second, we looked into the progress of basketball team members, and the support services and supervision provided to them. In this regard, we looked closely at the academic support afforded to basketball players and the adequacy of the available services.

Third, we reviewed the manner in which BU addressed allegations of player misbehavior.

Fourth, we investigated Ms. Dear’s allegations regarding pressure from the Athletic Department and the manner in which BU responded. Throughout our review, we sought any available evidence that faculty members felt pressured in any manner relating to the intercollegiate athletics program.

Fifth, we reviewed the structure and the implementation of oversight of the basketball program both by the Athletic Department and by the BU administration. As part of this review, we considered concerns raised by other member institutions of the AEC and BU’s response.

We determined not to investigate the unrelated allegations of sexual harassment made by Athletic Department employee Elizabeth Williams. Those allegations are the subject of a civil action pending in the United States District Court for the Southern District of New York. (*Williams v. State University of New York, et al.*, No. 09 Civ. 6150 [PAC].)

During our review, we have heard several themes that provide an overall perspective to this report.

The first, which many are quick to point out, is that difficulties such as BU experienced are not uncommon in intercollegiate athletics programs, particularly in Division I men’s basketball. Even during the course of our review, the press reported instances of student-athlete misconduct at comparable programs. Second is repeated reference to the admirable University commitment to give second (or more) chances to disadvantaged youths, some with troubled backgrounds. Finally, we have noted the suggestions of “racism” that have at times been raised to resist questioning, and expressions of concern, about various aspects of the program.

Division I athletics inherently present a struggle to balance pursuit of athletic success—and the accompanying rewards of heightened public recognition of a university—with maintenance of academic and behavioral standards. The number of recent “misses,” whether academic or behavioral, by the BU men’s basketball team put related concerns into sharp focus; three of the eight 2008-2009 recruits (the year BU won the America East championship) have withdrawn from the University, two more have been dropped from the team.

The “giving” of second chances by the University—and the “taking” of them by the student-athletes—may in fact be illusory, even counter-productive, if careful admission choices are not made, and comprehensive services are not provided, particularly for students unaccustomed to the demands of a front-rank university and frequently far from home. The risks obviously are vastly multiplied when several such students are accepted onto one team in a single season, adding to the service demands on the University and the opportunities for the athletes to influence one another negatively. Suggestions by some that “racism” is at the root of attempts to address concerns cannot and must not be allowed to thwart rigorous independent inquiry and oversight at every stage, which are plainly required if the students, and the program, are to succeed. That there may from time to time be similar problems at other institutions does not excuse shortcomings at BU.

B. Process of the Review

Our review relied principally on interviews and review of electronic communications and other documents. I was assisted principally by Skadden partners Jeffrey Mishkin and Christopher Gunther, and by associates Sylvia Heredia and Michael Buchwald. Additional Skadden associates and legal assistant personnel contributed to our document review efforts. Over a three-month period we conducted more than 80 interviews. We made eight separate visits to the BU campus to conduct these interviews and review documentation. Most campus visits lasted more than one day. I personally visited the campus on six occasions, with four of my trips involving stays of more than one day. The interviews covered various constituencies, including current and former basketball coaching staff, other current and former personnel in the Athletic Department, current and former admissions personnel, faculty members, members of the BU administration, as well the Commissioner and senior staff of the AEC and athletic directors and presidents of other AEC member institutions (which involved additional personal interviews in Boston, Albany, Burlington, Hartford, Baltimore and Stony Brook). No one refused to speak with us. In addition, we invited certain of the basketball players to meet with us if they wished, but they did not.

We established a special email address (Binghamton@Skadden.com) through which persons could contact us directly with any information they believed to be pertinent to our review. A message from me explaining the availability of this direct line of communication was distributed by email to BU administration, faculty and staff. All but a few of the individuals contacting us through the special email address provided contact information, which led to a number of interviews that yielded important information.

In addition to the interviews, we reviewed thousands of electronic communications sent and received by more than 20 individuals. The goal was to compare and

test current recollections against actual communications during various events in question.

Finally, we reviewed thousands of pages of documents that BU gathered for us at our request, including admissions and academic progress data, disciplinary files, police reports, governance materials, documents created during BU's NCAA-mandated Self-Study, compliance information and personnel files.

The cooperation exhibited by BU administration, faculty and staff, as well as the Commissioner, staff and member institutions of the AEC, has been exemplary.

III. Factual Background Supporting Findings and Recommendations

A. The Move to Division I in Theory

1. Basic Information about BU and the SUNY System

SUNY is the nation's largest single system of universities, colleges and community colleges. It includes all institutions of higher education that are State-supported with the exception of the institutions that are units of the City University of New York. SUNY comprises 64 individual colleges and universities that offer myriad educational options including short-term vocational and technical courses, certificate, associate and baccalaureate degree programs, graduate degrees and post-doctoral studies. SUNY is governed by a Board of Trustees consisting of seventeen members; fifteen are appointed by the Governor with the consent of the Senate, the sixteenth is the president of the SUNY Student Assembly, and the seventeenth is the President of the University Faculty Senate. The Board of Trustees appoints the Chancellor, who serves as SUNY Chief Executive Officer.

BU is one of the nation's premier public universities. Its many long-tenured members of the faculty and administration bespeak the high quality of its educational

opportunity. Its student body includes more than 11,500 undergraduates and 2900 graduate students from all 50 states and 100 countries. It is a highly selective, rigorous academic institution. The most recently admitted undergraduate class had an average SAT score of 1290, and more than 90 percent of incoming undergraduates arrive with advanced college credit. BU's four-year graduation rate is one of the highest in the nation among its peer public research universities. BU is one of four University Centers in the SUNY system; the others are located at Albany, Buffalo and Stony Brook.

Close to 70 percent of BU's undergraduates pursue degrees within the Harpur College of Arts and Sciences, which has three divisions: humanities, science and mathematics, and social sciences. BU has five other schools: the College of Community and Public Affairs ("CCPA"), the Decker School of Nursing, the School of Education, the School of Management, and the Watson School of Engineering and Applied Science. CCPA was founded in July 2006 after a reorganization of what had been known as the School of Education and Human Development. CCPA offers undergraduate degrees in human development, as well as graduate programs in public administration, social work and student affairs. CCPA provides students with the opportunity to work closely with non-profit and government community partners through internships, independent study and fieldwork.

Lois DeFleur has served with distinction as President of BU since 1990, and has overseen important development projects, growth of the University's endowment and reputation, expansion of academic offerings, and the transition of the intercollegiate athletic program from NCAA Division III to Division I status. On January 13, 2010, President DeFleur announced her retirement, effective July 2010.

2. The Faculty Debate and the Decision to Move to Division I

We begin with BU's transition into Division I athletic competition, a chapter in the University's history that offers useful reminders today. The NCAA is an unincorporated association of approximately 1,200 members, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. The Association serves to maintain intercollegiate athletics as an integral part of its members' educational programs. The members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I encompasses those institutions that conduct the largest and most extensive athletic programs. These institutions are required to meet minimum financial aid awards for their athletics program, and there are maximum financial aid awards for each sport that they cannot exceed. Divisions II and III include those with less extensive programs. Division II institutions have no minimum financial aid awards, but there are maximum financial aid awards for each sport that the institutions cannot exceed. Division III institutions may not award any financial aid to their student-athletes. The NCAA has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes and rules governing the size of athletic squads and coaching staffs. In some sports, including basketball, the NCAA sponsors and conducts national tournaments.

Under SUNY policy, BU and every other SUNY campus have an Intercollegiate Athletics Board ("IAB") "to monitor, review and recommend policy for the intercollegiate athletics program, in compliance with NCAA . . . guidelines." The IAB is responsible to and reports to the campus President. When BU first entered into intercollegiate competition, it participated in NCAA Division III. In the mid-90s, the three other SUNY university centers transitioned out of Division III—Buffalo into Division I, and Albany and Stony Brook into

Division II in preparation for moving to Division I. In light of these developments, in Fall 1995 BU's IAB proposed that BU move to Division II by Fall 1998, with the understanding that it would then either remain at that level indefinitely or take steps to move to Division I at the earliest possible time thereafter. At each juncture, the decision was not without controversy.

On November 7, 1995, IAB chair Provost Mary Ann Swain formally presented the IAB's proposal to BU's Faculty Senate, emphasizing that the primary question before the Faculty Senate was whether BU would move to Division II, and providing an overview of the transition process: If BU decided to transition into Division II, the earliest it could do so would be Fall 1997; it would remain at Division II for at least three years (likely from 1998 through 2000) during which it would assess the accuracy of projections regarding, among other things, fundraising and attractiveness to students. In the Fall 1999, BU would then decide whether to move to Division I.

On November 17, 1995, the Faculty Senate Executive Committee ("FSEC") presented the IAB with a report of concerns regarding the proposed change, including the possible effect a move to Division I would have on BU's academic mission. During a December 12, 1995 meeting of the Faculty Senate, one member of the Faculty Senate reported the Budget Review Committee's main concern that BU not be placed in a financial situation that would imperil its academic programs.

To allay concerns, the IAB in a written response explained that BU had built a firm foundation from which to advance its divisional status. It noted that the University Athletic Club ("UAC") had begun to make significant progress in its fundraising efforts and that the Athletic Department would embark on a campaign to greatly increase its revenue from marketing and promotions, with all of the revenues generated dedicated to supporting athletic financial aid,

the critical variable to moving up. The IAB characterized the move toward Division I as a natural progression, which required a long-range vision and additional resources, and recognized the need for a field house to support instructional, recreational and intercollegiate athletics. The IAB affirmed its commitment to academic integrity as the principal ingredient in BU's intercollegiate athletic program and underscored that the philosophy would remain academics first, athletics second, and that this priority would be consistently reinforced to BU's athletes and coaching staff.

After continued debate, on February 20, 1996, the FSEC passed a resolution opposing the IAB's proposed change in divisional status, noting that the upgrading would inevitably require additional resources and emphasis on athletic activities and that it was important that BU not lose sight of its academic priorities. However, when the resolution was submitted to the full Faculty Senate, a substitute motion was introduced to approve the change in divisional status with the Senate reserving the right to consider at a future date the feasibility and desirability of a change to Division I status or a return to Division III. The substitute motion was debated and approved. In March 1996, President DeFleur approved the plan to move to Division II, and in Fall 1998 the intercollegiate athletic program formally entered Division II as a full member.

In Spring 1999, the IAB began campus-wide discussions regarding the open question of whether or not to move to Division I. In March 1999, the FSEC proposed to the full Faculty Senate that BU begin to enter into compliance with Division I standards in contemplation of entry as a full Division I member in September 2001. Once again, the main concerns voiced by opponents were the financial impact of the move on BU and its possible effect on BU's academic mission. The motion to move to official compliance toward affiliation

with Division I was ultimately voted down by the Faculty Senate, albeit in a purely advisory capacity, on April 27, 1999. Notwithstanding the Faculty Senate's vote, within days President DeFleur declared BU's intent to reclassify from NCAA Division II to I. BU became a full member of NCAA Division I during the 2001-2002 academic year, and it entered into conference affiliation with the AEC.

During BU's first full year as a Division I program, the FSEC reconstituted the Intercollegiate Athletics Committee of the Faculty Senate ("IAC"), which had existed when BU was a Division III program. According to the chair of the FSEC, Dr. Peter Knuepfer, the FSEC felt that there was no opportunity for the faculty to examine or address the impact of intercollegiate athletics on standards and issues associated with teaching. Dr. Knuepfer further explained that the intent of the IAC was not to oppose or duplicate the work of the IAB, but to provide the faculty with a separate voice for addressing challenges to the academic goals of the University presented by the new athletics program.

3. BU's 2005-06 NCAA Self-Study

The NCAA certification process required BU, as a new Division I program, to conduct an extensive, probing Self-Study of its Athletic Department to ensure that the University was in full compliance with NCAA Division I operating principles. The purpose of the study was to allow a wide range of campus representatives within and outside the Athletic Department, as well as community members, to examine the athletic programs in the three NCAA-specified areas: academic integrity, governance and equity/welfare. The process culminated in BU's issuance of a 135-page written report (the "Self-Study Report") to the NCAA addressing the prescribed topics, an evaluation visit by an NCAA peer review team in 2006, and a list of issues

identified by the peer review team with BU's written response. BU achieved its initial Division I certification in May 2006, and is subject to a new certification cycle every ten years.

As relevant here, the Self-Study Report addressed the governance of the Athletic Department; the admissions process for student-athletes; the support services offered to them; and the University's policy regarding absence of student-athletes from classes. As prescribed by the NCAA certification process, President DeFleur was responsible for the Self-Study. She appointed all members and the chairs of a Steering Committee and of three subcommittees charged with examining academic integrity, governance and equity. Dr. Michael McGoff, Vice Provost for Planning and Budget, chaired the Steering Committee, led the self-study process and had direct access to President DeFleur.

(a) Governance of the Athletics Program

The Athletic Director sets the policy for the athletic program, is responsible for the direction and goals of the program and reports directly to the President on matters regarding intercollegiate athletics. According to the Self-Study Report, the Athletic Director is responsible for rules compliance and, in consultation with the President, hires and fires coaches. Between 1989 and September 2009, Dr. Joel Thirer served as BU's Athletic Director.¹

The Report identifies President DeFleur as BU's Chief Executive Officer, having ultimate responsibility for the proper institutional control of the athletic program. Under Board policy, individual campus Presidents are authorized to develop athletic programs that meet the needs of their campus and, in consultation with the campus IAB, decide such issues as

¹ Dr. Thirer's full title was Director of Health, Physical Education and Athletics because, in addition to intercollegiate athletics, he oversaw BU's academic programs in the areas of health and physical education. In this latter role he reported to the Provost, Dr. Swain.

competition level, sources of funds and size of intercollegiate athletics budget. The Report noted that President DeFleur:

has maintained an active interest and role in the conduct of the athletics program at BU. She made the decision to lead Binghamton into Division I, and has since supported efforts to upgrade the program and its facilities, raise funds for athletics, and increase awareness of, and support for, intercollegiate sports on the campus. She consults regularly with the senior staff of the athletics department.

President DeFleur reports to the Chancellor and the Board of Trustees of SUNY, and she may, if she wishes, refer a particular athletics policy to the BU Council for its advice and consent.

Two bodies provide additional oversight of the Athletic Department. First, the IAB is the board of athletic control authorized and mandated by the SUNY Board of Trustees to monitor, review and recommend policy for the athletic program. The Board consists of fifteen voting members appointed by the President and is charged to advise her on policies for student athletic participation, program planning and funding, and to prepare an annual report on athletics to the President and faculty.

Second, the BU Faculty Senate provides additional oversight of the intercollegiate athletics program through its IAC and its Faculty Senate Budget Review Committee. The IAC is charged “to make recommendations and suggest policies to the Faculty Senate regarding the impact of intercollegiate athletics on academic standards and practices.” The Budget Review Committee is charged with reviewing budget plans and expenditures for BU.

In addition, three individuals play important roles in oversight of athletics. Within the Athletic Department, the Assistant Director of Athletics for Compliance (the “Director of Compliance”) is responsible for designing and implementing a program of compliance with Conference and NCAA requirements. The Director of Compliance also produces a compliance manual, known as the Guide for NCAA Compliance, for all individuals associated with BU athletics, and coordinates communications among coaches, Admissions, the

Registrar's Office and the Office of Financial Aid. Timothy Fenton was Director of Compliance until August 2007, and Dave Eagan has had the role since.

Dr. McGoff, now the Vice Provost for Strategic and Fiscal Planning and Undergraduate Education, holds a significant oversight role external to the Athletic Department. At the time of the Self-Study, the Director of Compliance reported directly to the Athletic Director alone. The NCAA peer evaluation team suggested "a dotted reporting line to a higher-ranking university administrator than the athletics director" as a "safeguard for [the Director of Compliance] in the unlikely event a violation may occur within the athletics department which could involve other athletics administrators or the athletics director." As a result, in 2006 President DeFleur created a dotted reporting line from the Director of Compliance to Dr. McGoff. After the September 2009 disclosures of problems in the BU basketball program, President DeFleur changed the reporting structure so that the Director of Compliance now reports directly to Dr. McGoff, with a dotted reporting line to the Athletic Director.

Finally, the NCAA requires that each member institution designate a Faculty Athletics Representative ("FAR") whose role is "to ensure that the academic institution establishes and maintains the appropriate balance between academics and intercollegiate athletics." The FAR also acts as a representative of the University in NCAA and Conference affairs. Each institution identifies more specific duties for the FAR, and the Self-Study Report provided that BU's FAR chairs the IAB, "plays a vital role as a functionary of the oversight process as it relates to compliance" and "provides useful communications to the Director of [Athletics] regarding faculty insights and concerns." President DeFleur appointed Dr. Dennis

Lasser as FAR for the period 1999 through the Summer of 2008, and Dr. Sandra Michael for the period August 2008 to the present.²

(b) The Admissions Process for Student-Athletes

To obtain NCAA certification, BU had to demonstrate that it admits only student-athletes who have a reasonable expectation of obtaining academic degrees. The Self-Study Report described the admissions process in detail.

Prior to the Admissions office rendering a decision, coaches may submit an admissions recommendation form. The Admissions office uses this form to identify prospects as potential “special talent” candidates. Coaches can support a prospective student-athlete’s application either at the “recommended” level or the “highly recommended” level, depending on the prospective student-athlete’s likelihood of academic success and potential contribution to BU. The Director of Compliance reviews the recommendation and forwards it to Admissions.

The admissions recommendation forms are reviewed by the Associate Director of Admissions, the Director of Admissions and, if necessary, the FAR, in consultation with representatives from the various schools, the Vice Provost for Enrollment Management, or the Provost. The Admissions staff members make admission decisions based on the prospect’s probability of academic success and likely contribution to BU. In determining the prospect’s probability of success, the Admissions staff also takes into consideration the academic support services available to student-athletes.

² In April 2007, Dr. Sandra Michael expressed interest to Dr. Thirer in taking on the role of Faculty Athletic Representative. Dr. Thirer conveyed her interest to President DeFleur, who made the appointment. However, President DeFleur permitted the incumbent FAR, Dennis Lasser, to complete one final academic year (2007-08) in the position.

Admissions issues are regularly reviewed by the Director of Compliance and the undergraduate Admissions Office liaison. The Admissions Office liaison also remains available to meet directly with coaches to discuss admissions-related issues. However, all communications between the undergraduate admissions office and the coaching staff are required by BU policy to be coordinated and overseen by the Director of Compliance.

The Self-Study Report noted that the process for the admission of student-athletes is the same as that of other students, except that coaches may submit a talent recommendation form to the undergraduate admissions office. The treatment of the applications of student-athletes and other candidates also differs in that student-athletes' potential contributions to the campus community are more heavily weighted in the decision process. The Self-Study Report expressed BU's willingness to admit students who were below the level of academic achievement of regularly admitted students because student-athletes receive extra academic support and their progress is closely monitored. The Report also noted the high percentage of freshman student-athletes on athletic aid who did not meet BU's admissions standards and therefore included the recommendation that the IAB annually review retention rates for all cohorts of student-athletes and review graduation rates as they become available.

As the Subcommittee on Academic Integrity was preparing this portion of the Self-Study Report, concerns were raised regarding the admissions procedures, and one of the committee members submitted a written proposal recommending two modifications. The first was that BU admit no more than one-third of its funded athletes on a special-admit basis. The proposal noted that, by increasing the number of under-prepared undergraduates, BU would risk lowering the quality of its undergraduate program, especially if these students tended to cluster

in certain courses or majors. Ultimately the Report addressed this concern by charging the IAB with monitoring retention rates of student-athletes admitted to the University.

The second recommendation was that a faculty advisory committee be established to assist in decisions regarding the admission of athletes who do not meet BU's regular admission standards. One concern underlying the proposal was that granting a single Admissions employee authority left that person vulnerable to pressure from a direct supervisor to admit unqualified applicants, whereas dispersing authority among an advisory committee of faculty would prevent such direct pressure. The subcommittee ultimately rejected this recommendation. One of the committee members, Cheryl Brown, Director of Undergraduate Admissions, expressed concern that the creation of a committee to review athletic decisions would "tie the hands of the admissions office in responding to the [coaches'] need[] to build winning teams." She stated that "[w]e know how far we are willing to go with a student who is at risk, and we would have to educate a committee of folks to support these decisions." Another committee member, Dr. Lasser (the FAR) noted that the Athletic Department was already more scrutinized by the Faculty Senate than any other department at the University and that this recommendation was suggested by members of the University who were unhappy about BU's decision to enter Division I.

(c) Support Services

At the time of the Self-Study, the Athletic Department housed the Education Enhancement Program, which advised the entire range of student-athletes on time management, study skills, registration and career planning. The Assistant Director of Athletics for Student Services monitored student-athletes who appeared to be "at risk" (given their standardized scores, high school GPA, learning disability or coach's evaluation) by soliciting mid-semester

evaluations from professors to track attendance, grade progress and work-to-date. No formal tutoring program was offered by the Athletic Department to student-athletes; rather, advisers referred student-athletes to other campus resources and support programs as necessary. The Self-Study Report emphasized that, with the exceptions noted above, all services were available to all students as well as student-athletes, thereby simply integrating athletes into the student body.

(d) Absence Policy

In the Self-Study Report, BU described its efforts to minimize conflicts between athletic competitions and classes. Where conflicts occur, BU had a policy in the Handbook for Faculty and Professional Staff, entitled “Absences by Students from Classes for Participation in Official University Events.” The policy provided that “faculty members are strongly encouraged to accommodate student’s participation in such activities” and that “[f]aculty should be flexible in providing opportunities for students to make up tests and other work missed.” The Self-Study Report concluded:

Our experience is that when student-athletes notify their instructors well in advance of conflicts, faculty are generally flexible. The Assistant Athletics Director for Student Services assists the student-athletes in notifying instructors of pending absences and assists in proctoring makeup exams and assignments. The student-athlete is reminded that if there is a conflict that cannot be resolved through an accommodation, the University expects that the academic responsibilities of the student-athlete come first.

The Report added that “all students are subject to the attendance policy individual faculty decide is appropriate for their course.”

B. The Division I Men's Basketball Program in Actual Fact

1. The Program under Coach Al Walker

Al Walker was the head coach of the men's basketball team in its last season of Division II competition (2000-01) and its first six seasons of Division I competition (2001-02 through 2006-07). His teams compiled a win-loss record of 92-108. Coach Walker was supervised by Matt Bassett, who held the title Senior Associate Director of Athletics, until Mr. Bassett was reassigned shortly before he left BU in the Spring of 2007.

In order to attract the best available athletes, Coach Walker frequently recruited transfer students who had competed at junior colleges. His coaching staff understood that applicants transferring to BU's School of Education and Human Development could retain many of the credits earned at their prior school provided that they had obtained an Associates Degree. On an exception basis Admissions each year accepted a limited number of applicants with weaker academic backgrounds at prior institutions if Coach Walker indicated to Admissions that these applicants were "highly recommended" and would be important contributors to the basketball team. Coach Walker recalled that President DeFleur took an active interest in both the men's and women's basketball programs. As part of his recruiting efforts, Coach Walker was able to schedule in-person meetings between a candidate and President DeFleur if the President was in town.

In a comment echoed by several interviewees, Coach Walker attributed the success of his student-athletes in part to a decision to limit the number of team members in need of special academic attention and behavioral supervision. The concern was that admitting too many team members with a challenged history would risk both encountering needs exceeding the existing level of support that the coaching staff and the University could offer, and creating a

culture in which the dominant experience of the team was rooted in academic and behavioral failures. In six seasons of Division I competition under Coach Walker, 30 of the 38 players on the basketball team (79%) remained with the team through their graduation with a degree from BU.³

By all accounts, Coach Walker and his staff dedicated a significant portion of their energies to the academic success of the basketball players. Such efforts included monitoring class attendance, monitoring the completion of assignments, and personally tutoring players in need of special assistance.

In 2004, BU opened its Events Center, a nearly 5,500-seat facility built at a cost of \$33.1 million. With the new facility, Coach Walker believed his tenure as head coach would be drawing to a close because the University would want to hire a coach who offered the opportunity to compete at a higher level of play. In his final season, Coach Walker was told by the Athletic Director that his job was in jeopardy if his team failed to achieve a high degree of success. When the team was eliminated in the quarterfinals of the AEC tournament in 2007, the next business day BU announced that Coach Walker would be reassigned to non-coaching duties within the Athletic Department for the remainder of his contract, which ran through August 2008. In the announcement, Dr. Thirer stated: “Al and his staff brought in good-caliber young men to represent the University and he devoted time and energy to help our players achieve both on the basketball floor and academically.” In a cordial email to President DeFleur, Coach Walker acknowledged “why you’re making this change – to win the championship”—and offered his continuing support.

³ These figures exclude three players who joined during Coach Walker’s tenure but left after his tenure.

2. The Hiring of Coach Broadus

At the time of Coach Walker's dismissal, Kevin Broadus was an assistant coach at Georgetown University, which was on its way to its first appearance in the Final Four of the NCAA tournament since 1985. Before hiring him, BU conducted diligence through a number of channels and received no negative reports. In particular, BU checked with AEC Commissioner Patrick Nero, who had many contacts in the Big East Conference in which Georgetown competed, and the Commissioner reported back on Coach Broadus's favorable reputation. BU signed Coach Broadus to a five-year contract. At the press conference announcing his hiring, Coach Broadus stated that BU's outstanding academic reputation was one reason why he accepted the job.

On March 30, 2007, four days after the press conference, a *New York Times* article focused on Coach Broadus's role in recruiting to Georgetown a player who in four years of public high school in Delaware reportedly compiled final grades of F in twelve courses before he "redeem[ed] his academic standing" at a prep school from which the NCAA no longer accepted transcripts. Dr. Thirer was quoted as follows:

Georgetown University accepted a kid like that? Wow. I guess I'm an idealist. There's just no place for that at Binghamton. Binghamton has never engaged in that type of behavior. If there's a history of that, it certainly won't be the case here. I can guarantee that. We just don't want to win that badly.

Pete Thamel, *Georgetown Player's Ignominious Mark*, N.Y. TIMES, March 30, 2007.

After the article was published, President DeFleur called Commissioner Nero to talk about Coach Broadus and the recruiting practices at Georgetown. The Commissioner told her that he was aware of no NCAA violations at Georgetown, and that Georgetown openly admits that it "takes chances" on students with talent.

The article also caused concern among other members of the AEC, some of whom expressed those concerns to Dr. Thirer. Dr. Thirer responded that BU was capable of making its own decisions and characterized those concerns as jealousy over BU's success in recruiting a coach like Kevin Broadus. Dr. Thirer personally took on the responsibility to supervise Coach Broadus and the coach of the women's basketball team, while coaches of the remaining 19 intercollegiate teams reported to Associate Athletic Director Jim Norris.

On March 30, 2007, President DeFleur authorized Dr. Thirer to issue the following statement in response to press inquiries:

We are proud of the high academic standard that Binghamton University has set and achieved in its athletics program. Our goal is to have student-athletes who compete at a high level on the court and who meet our high academic standards. We are confident that Kevin Broadus fully understands and respects the mission of our university and that he will represent Binghamton's academic values in an outstanding manner.

In responding to alumni who expressed concern about the *Times* article, President DeFleur wrote: "I want to assure you that Joel Thirer, our Director of Athletics, and I have made it very clear to our new basketball coach about the academic expectations that we have at Binghamton and he clearly understands this."

In Coach Broadus's first year as head coach (the 2007-08 season), the team consisted primarily of players who had been recruited by Coach Walker. The team finished with a losing record of 14-16. All four seniors on the team graduated.

The team roster in Coach Broadus's second season—the AEC Championship season—had 17 players, eight playing for BU for the first time (six of them transfers from other schools) and nine who had played the prior season. Of the eight new student-athletes recruited by Coach Broadus, five left the program: three were dismissed after the season for misconduct (one of them left the University), one quit the team and left BU, and one was dismissed from BU

after the season for academic deficiency.⁴ Of the nine returning players, five left the program: one was dismissed after the season for misconduct, one was dismissed from the team mid-season for misconduct, two quit the team and left BU, and one was dismissed from BU after the season for academic deficiency. This team—with ten members who would be dismissed or quit—compiled a record of 23-9 and won the AEC championship in March 2009. Since then, Coach Broadus has brought in eight new players (including three transfers), two of whom were dismissed from the team for misconduct in September 2009 and left BU.

Some in the AEC attributed BU's aggressive recruiting and drive to win to BU's rivalry with Albany, which had won the AEC Championship in men's basketball, and the coveted trip to the NCAA tournament, two seasons in a row (2005-06 and 2006-07). Commissioner Nero noted that President DeFleur and Dr. Thirer were determined to win and that both had expressed to him that the success of Albany, a traditional rival, and their losing, was a continuing source of irritation to BU. Dr. Thirer would call Commissioner Nero regularly to complain about some aspect of Albany's program and often disparage Albany during meetings of the Conference's Athletic Directors. Others believed that BU's Athletic Department was in the midst of upheaval and that Dr. Thirer had terminated the Senior Associate Athletic Director and others in an effort to reduce any threat to his own job. Still others felt that the costly construction of the Events Center may have fed a desire to win quickly.

3. Recruiting and Admissions under Coach Broadus

In assembling his championship team, Coach Broadus assumed wider latitude to secure the admission to BU of a broader group of student-athletes, several (but surely not all)

⁴ One of the eight graduated (having transferred to BU for his senior year), and two remain on the team for the current 2009-10 season.

having a history of poor academic performance, behavior problems or both. Officials at other AEC institutions observed these developments and ultimately expressed concerns to BU's Athletic Director and President about the risks BU was taking. In addition, BU Admissions personnel resisted internally the enrollment of certain applicants deemed academically unqualified. Nevertheless, Coach Broadus was supported by the leadership of the Athletic Department and by the most senior ranks of the BU Administration.

(a) Perceptions within the AEC⁵

The other AEC members believe they have a direct and substantial interest in the events at BU, since the public perception of an athletic program of one member school, favorable or unfavorable, may well influence public perception of the Conference as a whole. It is, however, important to bear in mind that the members of a collegiate athletic conference are not only partners and colleagues in the operation of the Conference but also competitors in the athletic contests in which they engage. And while they have a common interest in the reputation and success of the Conference, each member surely acts in its own interest in the pursuit of winning as many of those athletic contests as possible.

In Fall 2007, BU signed Emanuel Mayben and Malik Alvin to letters of intent. Mr. Mayben had been a top recruit out of high school and was well known in the collegiate

⁵ The AEC is currently comprised of nine universities. Its functions include adopting and enforcing rules governing the athletic competition among its member schools, providing assistance to its members in complying with the rules and regulations of the NCAA, establishing schedules for intra-conference athletic competitions, engaging and supervising referees and other officials, and organizing and staging year-end tournaments in a variety of sports to establish the annual conference champion in that sport. The AEC's roots are in New England: Boston University and the Universities of Vermont, New Hampshire and Maine have been members of the AEC since its formation 30 years ago, and the University of Hartford joined soon thereafter. Approximately nine years ago, Drexel, Towson, Delaware and Hofstra Universities left the AEC, which began to look elsewhere to expand so as not to lose the Conference's valuable automatic bid to the NCAA Basketball Tournament. Therefore, in 2001, the AEC decided to bring in the three SUNY schools, Stony Brook, Albany and Binghamton. Subsequently, in 2003, UMBC also joined the AEC.

basketball community. He was a highly talented player, but had a poor reputation for academics and conduct. As a high school senior, he had been recruited heavily by Syracuse University, but Syracuse eventually withdrew its interest, which some AEC Athletic Directors considered a red flag. The press reported on Mr. Mayben's suspensions from high school and academic difficulties, and Mr. Mayben was quoted acknowledging past problems. Ultimately, Mr. Mayben signed with the University of Massachusetts, where he played for just one season, and then transferred to Hudson Valley Community College. When Mr. Mayben signed with BU, other members of the AEC took note, and some considered it telling that Coach Broadus had signed a player who was highly talented but posed potential risk.

Mr. Alvin was recruited from Chipola College, a two-year school in Marianna, Florida. Previously, he had played one year at the University of Texas at El Paso, but left because of academic problems. There was a growing concern among the other members of the AEC that a pattern was developing at Binghamton. On November 15, 2007, Dr. Thirer emailed President DeFleur an article from "Hoopscoop" (a recruiting information source) reporting that Messrs. Mayben and Alvin were high quality guards and would provide BU with a formidable backcourt. The article observed that "the only thing[s] missing now are a couple of big guys that can step in right away and make an immediate impact a year from now."

Then, in January 2008, BU enrolled Theus Davis, a 6'9" athlete from Canada who had previously spent one year at Gonzaga University. Mr. Davis had graduated from Lutheran Christian Academy (an unaccredited preparatory school discussed in Pete Thamel's March 30, 2007 *New York Times* article, which noted that the NCAA will no longer accept transcripts from the school⁶) as a highly rated recruit. Mr. Davis had been recruited by Georgetown when Coach

⁶ Pete Thamel, *Georgetown Player's Ignominious Mark*, N.Y. TIMES, March 30, 2007.

Broadus was there, but he eventually signed with Gonzaga. After less than a year at Gonzaga, Mr. Davis was dismissed because of allegations of drug abuse, according to contemporaneous press accounts. Coach Broadus acknowledged that he was concerned about Mr. Davis's drug issue at Gonzaga. Dr. Thirer, Provost Swain and President DeFleur were apprised of Mr. Davis's drug issue before BU's decision to admit him. When Provost Swain learned that Admissions had accepted Mr. Davis, she emailed a colleague with the direction to call President DeFleur's secretary to "let her know Mr. Davis has been admitted."

When Mr. Davis enrolled at BU, several of the coaches and Athletic Directors in the Conference called Commissioner Nero to express their concern. According to Commissioner Nero, there was a clear understanding and expectation within the AEC that its member schools will recruit and admit athletes that reflect the academic and character credentials of the particular school's student body as a whole. Other AEC schools perceived that BU was engaged in a pattern of recruiting that threatened that philosophy. Questions also arose regarding the payment of Mr. Davis's tuition (in an amount exceeding \$6,000), which had been received in cash and without a record of who had made the payment. (Mr. Davis initially was ineligible for a scholarship and therefore was required to pay tuition). A number of Athletic Directors in the Conference questioned how Mr. Davis, who had come from a modest background, had been able to make the payment. The explanation given—that two families from Canada, who were friends of Mr. Davis's family, had provided the money—was met with skepticism among the Athletic Directors.⁷

⁷ The Director of Compliance has investigated the issue and has found no evidence to support a potential NCAA violation or other impropriety. During the course of our review, we have not found any evidence to support an allegation that Mr. Davis's tuition may have been paid by someone other than friends of the family and have also learned that it is not uncommon for international students to pay tuition in cash.

However, when Commissioner Nero spoke with Dr. Thirer about these concerns, Dr. Thirer said there was no basis for concern because BU had a strong drug testing policy in place and that BU and Coach Broadus were well equipped to handle any issues that might develop within the basketball program.

On February 27, 2008, at the conclusion of a game between BU and Albany at Binghamton, Coach Broadus was involved in an altercation with Coach Will Brown and an assistant coach from Albany. As the teams and coaches lined up to shake hands after the game, Coach Broadus exchanged words with Coach Brown and then had a brief physical altercation with the assistant coach. President DeFleur attended the game. Local television captured the incident on video, and the video was promptly displayed on YouTube. Commissioner Nero and some of the AEC Athletic Directors said that this altercation generated significant discussion within the AEC and was a source of embarrassment for the Conference. On February 29, 2008, Dr. Thirer emailed President DeFleur to report that Commissioner Nero “indicated that the executive committee [of the AEC] would be mollified if we enacted a suspension on Kevin for one game. . . . I’ll look forward to your telephone call to hear your thoughts.” Coach Broadus was in fact suspended for one game.

A few months later, on May 4, 2008, BU’s Miladin Kovacevic, a basketball player who had been recruited by Coach Walker, assaulted a fellow BU student at a bar in downtown Binghamton, leaving the student in a coma. Mr. Kovacevic was arrested, but eventually fled to his native Serbia after a Serbian consular official posted bail for him. Although Coach Broadus had not recruited Mr. Kovacevic, others in the Conference felt this incident, along with the altercation between Coaches Broadus and Brown, was indicative of both

an increasingly precarious environment and a lack of control of the men's basketball program at BU.

Then, in May 2008, Binghamton recruited and admitted Derrick Rivera, a transfer student from St. Joseph's University in Philadelphia. Mr. Rivera had been a highly rated recruit out of high school and played for two seasons at St. Joseph's, where he had academic issues and had to sit out for a semester. President DeFleur received email updates as Mr. Rivera's application was being considered. Mr. Rivera's enrollment at BU became particularly controversial within the AEC when BU almost immediately filed a successful "hardship" petition with the NCAA for a waiver of its rule requiring transfers from four-year institutions to sit out a full year before becoming eligible to play at another four-year institution. Some AEC Athletic Directors doubted that Mr. Rivera had experienced a hardship justifying the waiver and suggested that the AEC adopt its own restrictions on transfer eligibility above and beyond NCAA requirements.

(b) Overriding Internal Resistance within BU

Meanwhile, Admissions personnel at BU resisted some of the new players recruited by Coach Broadus for the 2008-09 team on grounds that they lacked academic qualifications to succeed at BU.⁸ That resistance was overcome. To be clear, the applicants resisted by Admissions did not correspond to every recruit who stirred controversy within the AEC (as described above); nor did every applicant resisted by Admissions ultimately experience

⁸ In preparing this report, we have been mindful of the provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA"), a federal enactment that affords students certain rights with respect to their educational records, including those relating to admissions decisions. Where we have referred to written or oral communications concerning admissions decisions, we have been careful to avoid disclosure of personally identifiable information of any particular applicant. In those instances throughout the report where we have referred to facts concerning specifically-identified students, the information on which we have relied was derived from sources other than educational records governed by FERPA.

academic difficulties at BU. We describe below the admissions process of certain anonymous student-athletes because the incidents collectively speak to BU's overall approach.

Admissions determined that one important recruit early in Coach Broadus's tenure would be admitted "conditionally" and could be fully enrolled only after demonstrating adequate performance in early coursework. Dr. Thirer contacted Sandra Starke, Vice Provost for Enrollment Management, who supervised Admissions. Dr. Thirer indicated that he did not want the applicant's admission to be conditional and that President DeFleur would be disappointed by such a decision. In her next meeting with her supervisor (the Provost), Ms. Starke placed at the top of her written agenda her update on this applicant and the comments of Dr. Thirer. The Dean of CCPA, Patricia Ingraham, understood from Admissions that this applicant "required special mentoring" and she arranged for Dr. Leo Wilton, then a professor of Human Development within CCPA to be available to provide it. Ultimately, Admissions' decision that the recruit be a conditional-admit prevailed.

Admissions also expressed resistance to an applicant who had demonstrated poor academic performance and who had earned a large number of credits in physical education rather than academic coursework. Admissions deferred consideration of the applicant pending a review of his progress in additional coursework at his current college. The Athletic Department nevertheless released to the press that this applicant had signed a National Letter of Intent to attend BU even before an admissions decision had been made, a practice strongly discouraged by Admissions. Ultimately, Admissions accepted the applicant, and CCPA accepted a number of transfer credits for coursework having a limited, if any, academic component.

When Admissions resisted a third transfer applicant in the same recruiting cycle, Valerie Hampton, the BU Affirmative Action Officer, weighed in on the admissions process. Ms.

Hampton’s official role at the University related to faculty, staff and enrolled students—not the student admissions process. Ms. Hampton also recognized that when making inquiries at the University she had to remain cognizant that campus personnel understood her job involved investigating allegations of discrimination. Ms. Starke, in an email, reported Ms. Hampton’s inquiry on behalf of the basketball recruit to Provost Swain and Dr. McGoff contemporaneously, as follows:

[Admissions officer Brian Hazlett] got a call today from Valerie Hampton in Affirmative Action. She questioned Brian about a [basketball recruit.] She said Kevin Broadus spoke to her about [the applicant] and his application to Binghamton. When Brian asked to better understand Val’s role in calling Admissions about a prospective student athlete, she explained that it was because of her involvement with Title 9.⁹ This is the first time she has ever called Admissions about a prospective student.

Val then questioned Brian about [the applicant’s] admissibility. She wanted to know his application status and what actions Admissions planned to take. . . .

Val’s call seemed inappropriate to us. Is there something new with NCAA regulations we don’t know about? Does Val have an appropriate role with prospective students? If so, we would like to understand it better. . . .

With regard to a fourth transfer applicant considered in this same recruiting cycle, both Cheryl Brown and Brian Hazlett of Admissions concurred that the applicant should not be admitted to BU under any conditions. The applicant had an overall GPA below 2.0 at a prior institution, and his GPA was significantly below 2.0 when only academic courses were considered. Dave Eagan reported the unfavorable decision of Admissions to Dr. Thirer and described the applicant as “very weak academically” but added: “Based on how Kevin [Broadus] typically responds to these matters, I wanted to give you a heads up before I did anything.”

⁹ Title IX is the federal law relating to gender equity in scholastic athletics.

As provided in BU's Guide to NCAA Rules Compliance, the application of a recruit could be reviewed, "when necessary, [by] the Faculty Athletic Representative, in consultation with appropriate representatives from the various schools, the Vice Provost for Enrollment Management, or the Provost." The Athletic Department invoked this review process and contacted Dr. Michael. By the next evening, a decision was made to admit the applicant. The following steps led to the changed admissions decision.

The Athletic Department requested that Dr. Thirer and Coach Broadus be granted a meeting with Cheryl Brown and Brian Hazlett of Admissions. When Ms. Brown and Mr. Hazlett, mindful of BU policy, responded that such a meeting was acceptable only if the Director of Compliance attended, the Director of Compliance instead was sent to see Admissions without Dr. Thirer or Coach Broadus. Mr. Eagan conveyed to Admissions that the Athletic Department felt strongly that the candidate should be admitted.

Ms. Starke already had reviewed the applicant's academic history and concurred with the assessment of Admissions not to accept the applicant. However, Ms. Starke came under pressure from at least three sources to accede to the admission of the applicant. First, the FAR, Dr. Michael, came to Ms. Starke's office and stated, definitively and without any prior discussion, that she could not understand why Admissions would reject the applicant. Ms. Starke expressed surprise at Dr. Michael's position given her role as the voice of faculty oversight of the Athletic Department, but Dr. Michael left without further discussion of the matter. Dr. Michael spoke separately with Coach Broadus, asking whether the basketball team needed the applicant. Coach Broadus responded affirmatively.

Second, Valerie Hampton, the Affirmative Action Officer, scheduled a meeting with Ms. Starke on an unrelated topic but upon arrival indicated that she was there as a friend of

Coach Broadus to urge admission of the applicant. Ms. Starke found this approach inappropriate and quickly terminated the meeting.

In order to evaluate the application in the context of the history of academic success of basketball players, Ms. Starke emailed the Director of Compliance that same day to request “the data on individual scholarship basketball players for the past three years—incoming GPA and current status (is the student still here, current GPA).” She had received such data on all sports teams in prior years from the Athletic Department but not since the departure of Mr. Bassett, who had supervised all teams, including basketball. Indeed, in November 2007 Ms. Starke had attempted, without success, to obtain GPA and SAT scores of all incoming athletes in order to assess the prevailing standards and their correlation with academic success of the student-athletes.

On the day she made that request, Ms. Starke was called into a meeting with the President and the Provost. The President told Ms. Starke that Dr. Thirer had contacted her to express a concern or perception held by him and Coach Broadus that Ms. Starke and Admissions were making decisions on basketball player-applicants based on race. President DeFleur said that Dr. Thirer had cited Ms. Starke’s request for academic data on basketball players only. Ms. Starke was deeply upset and felt her character and integrity were being wrongfully challenged.

After their meeting with the President, the Provost met privately with Ms. Starke and told her that she supported every step she had taken, that no one in the administration thought she was racist and that the President had a blind spot regarding athletics. Separately, Dr. McGoff, the senior administration official responsible for overseeing NCAA compliance, conveyed to Ms. Starke that she had been mistreated, that the President could not possibly have

believed Ms. Starke and Ms. Brown were racist, and that the President's comments to Ms. Starke were a case of the end justifying the means.

When Ms. Starke's request for academic data on men's basketball players was forwarded to Dr. Thirer, he in turn forwarded the email to Dr. Michael with the message, "We've got to move on this." That same evening, Dr. Michael sent Ms. Starke an email, and copied President DeFleur and Dean Ingraham of CCPA, stating:

I was able to speak with Pat Ingraham this afternoon, then tried to phone you but you had left for your meeting. I explained to Pat the support the athletes receive and [a condition that would facilitate the applicant's studies]. As a former faculty member at Syracuse, Pat understands the issues and is comfortable admitting the student. In addition she has added another 'local' layer toward ensuring the academic success [of the student]--she has a faculty member in Human Development who will serve as an additional mentor and advisor.

In closing, after consulting with Pat I am very comfortable in recommending the immediate admission of [the applicant]. Pat and I are very confident that [he] will be successful in his academic efforts at BU. After reviewing the mentoring and success of our men's basketball players we have every reason to believe that [he] will be a similar success story.

I urge you to admit him without further delay.

Dr. Thirer forwarded Dr. Michael's email to Coach Broadus.

That same day, Dr. Thirer emailed Dr. McGoff, stating: "I'll call you tomorrow (Thursday) about this. We're getting a pretty good run-around with getting this kid admitted. Kevin is pretty agitated about the situation, and now Sandra Starke is asking to consult with Sandra Michael about it We need to move through the red tape on admitting a transfer who is a qualifier, and is being aggressively recruited by several of our competitors"

Later that same evening, Dave Eagan forwarded to Ms. Starke a portion of the academic data on the basketball team that she had requested. Ms. Starke spoke with Dean Ingraham, who expressed support for the applicant and the availability of a CCPA faculty mentor. Ms. Starke also spoke briefly with the Provost to report that she agreed that the applicant could

be admitted in view of the Dean's assessment. Also that same evening, Dr. Thirer sent an email to Coach Broadus, copying Dr. Michael and Mr. Eagan, reporting:

Just finished speaking with Dave Eagan and then President DeFleur. The [applicant] issue is resolved. He'll be getting his formal admit as soon as it can be processed, probably early next week.

FYI, Sandra Michael (our new FAR) and Dave Eagan were both outstanding in helping to get this done.¹⁰

It was not until the following afternoon that Ms. Starke directly communicated to Dr. Thirer, Dr. Michael and Dave Eagan on the decision to admit the applicant. Dr. Michael followed up with an email to Dr. Thirer and Dave Eagan stating: "Although this case has concluded happily, I think we should try to work out an MOU-type of process so we don't have to do this ad hoc in the future. The ideal would be for admissions to directly fast track all NCAA eligible transfers right away."

One important point invoked by the Athletic Department, the FAR and the Dean in supporting the applicant was a condition that would facilitate the student-athlete's studies during his first year at BU. Within one month of the applicant's acceptance, Dr. Michael and Dr. Thirer approved steps to remove this condition.

(c) June 2008 AEC Meetings

From June 22-25, 2008, the AEC held its annual meetings. The Athletic Directors Council ("ADC"), consisting of Athletic Directors, Senior Women's Administrators, coaches and various other administrators from AEC member schools, met in Orlando during the first three days, and then the Presidents and Athletic Directors met in Boston on June 27, 2008.

¹⁰ Dr. Thirer recalled that his complimentary reference in the email to Mr. Eagan was intended, in part, to exhort Mr. Eagan to be more proactive in advocating the admission of talented basketball players. Dr. Thirer believed that such advocacy was part of Mr. Eagan's responsibilities as Director of Compliance.

During the meeting of the ADC, a number of issues were discussed that related to a growing concern that the culture of the Conference was changing. Specifically, the Athletic Directors discussed the altercation between Coaches Broadus and Brown, and their dissatisfaction with what they perceived to be BU's and Albany's reluctance to control their coaches; Miladin Kovacevic's assault on a fellow Binghamton student; and the overall academic profile of the league. The AEC reported that the Academic Progress Rate ("APR")—an NCAA metric for measuring player retention, eligibility and progress toward graduation—had fallen over the past three years, particularly at the three SUNY schools. As a result, whereas the AEC's men's basketball program had been ranked second among all collegiate conferences when the APR numbers were first released in 2005, they had now dropped to eighteenth.

There was also a discussion about the problems associated with admitting transfer athletes who arrive at their new schools with a history of academic or conduct issues, and the impact that transfers have on APR. Although almost all of the Athletic Directors said they had concluded by June 2008 that BU had been taking unusually high risks by recruiting players who were outside the typical profile for the AEC, none of the players had as yet appeared in a game for BU and much of what was known about them was unofficial. Therefore, while there were many individual comments made during these meetings regarding BU's recruiting practices, the latitude being accorded to Coach Broadus and the perception that BU was "pushing the envelope," there was no specific or formal discussion of BU's basketball program. Those Athletic Directors who had a chance to speak informally with Dr. Thirer during these meetings described him as agitated and defensive in response to criticism about BU's recruiting.

At the Presidents' meeting in Boston, the same issues were discussed among the campus Presidents, including President DeFleur. Similarly, there was no specific or formal

discussion of BU's basketball program. Commissioner Nero, however, did have a conversation with President DeFleur after the meeting concluded, conveying that he and several of the Athletic Directors felt that Dr. Thirer's behavior at meetings had become confrontational and unprofessional. Commissioner Nero added that it was critical for Athletic Directors to contain the passion and drive of their coaches, and that, in his view, Dr. Thirer had not adequately done so. President DeFleur acknowledged these expressions and allowed that she shared some of these same concerns. President DeFleur then told Commissioner Nero that she did not intend to keep Dr. Thirer in his position as Athletic Director beyond the term of his current contract, which was scheduled to expire in 2010.

(d) Continued Internal Pressure on BU Admissions

That Summer, the Athletic Department continued to tell Admissions that there were so-called "process issues" relating to applications recommended by the men's basketball program. Attempts were made to schedule a meeting on July 7, 2008 among Admissions personnel, Coach Broadus, Associate Athletic Director Jim Norris and the Director of Compliance. When Admissions sought to reschedule because Ms. Brown (Director of Undergraduate Admissions) was unavailable, Mr. Norris responded as follows to, among others, Ms. Starke, Dr. Thirer, Coach Broadus and Dave Eagan:

Given the fact we've been attempting to schedule this meeting since last April I'm disappointed we won't be able to meet this Monday as planned. . . . Without a doubt, this meeting is of the utmost importance to our Department/University and it should have been conducted sooner rather than later to allow our coaching staff (men's basketball in particular) to operate as efficiently as possible relative to their 2008-09 recruiting plan.

The meeting went forward on July 7, 2008 and took place in Coach Broadus's office at the Events Center. Mr. Norris, Coach Broadus, Ms. Starke and Mr. Hazlett attended; Ms. Brown and Mr. Eagan did not attend. Mr. Norris did most of the talking on behalf of the

Athletic Department, with Coach Broadus addressing some specific points. They urged that the men's basketball program should be able to admit to the University prospective team members who met minimum NCAA eligibility requirements.

Ms. Starke's notes of the meeting include the following statements:

- "why should admissions determine the [roster] of athletes"
- "why shouldn't athletics make the admission decisions"
- "Why do you care if we take six players who don't attend classes?"
- "What if we want to bring in a kid who comes in for a year and goes pro"
- "What if we take someone just to win"
- "Walk on issue – non-scholar[ship] athlete that they don't highly recommend. But they want. Only highly recommended [with] scholarships in the past. Now, they want to highly recommend anyone who may help in any way. Filling seats is something that should be taken into consideration. . . . [T]hey are under pressure to make money and [a local walk-on athlete] will fill 500 seats, and we should take him."
- [When Admissions recounted Provost Swain's experience at the University of Michigan, where even an impact player for the football program would only be given more weight in the admissions process (as opposed to automatic admission),] "Kevin said that was just baloney. That it couldn't happen that way."
- "We are on the same playing field [as] Syracuse" University.
- "Other sports such as soccer took a goalie that never went to class. At first Jim [Norris] thought it was wrong, then he saw the light."
- "Even when we told them we would take [NCAA] qualifiers, [t]hey didn't accept it. Don't want us to look at the data."
- And in a comment Ms. Starke recalled coming from Coach Broadus: "Talked a lot about if we make things difficult we would have a hard time recruiting another d 1 coach."

Ms. Starke was concerned by the statements made at the meeting by Mr. Norris and Coach Broadus, and she reported them to Provost Swain. Provost Swain recalled being

surprised that such statements were made to Ms. Starke, but said she was not concerned and did not apprise President DeFleur.

Both the Provost and the President acknowledged that they understood Coach Broadus was recruiting a “broader range” of student-athletes, several with weaker academic backgrounds, and described the admission of these Broadus recruits as an “experiment.” Provost Swain recalled directing Ms. Starke to tell the basketball coaching staff that the experiment would be monitored closely and that changes would be made if these incoming students did not perform well academically. However, Provost Swain did not recall being apprised of the results of such monitoring, which she believed to be the responsibility of the Athletic Department and Dr. Thirer.

Dr. McGoff also understood that Coach Broadus was recruiting students with weak academic backgrounds and a history of behavioral problems. He recalled that Ms. Starke notified him of her concern that the coaching staff was directly lobbying Admissions, and he responded by providing her with a page of the Self-Study Report on which he highlighted the paragraph explaining the University’s prohibition on such direct contact without coordination through the Director of Compliance.¹¹ When the Director of Compliance notified him of this same concern, Dr. McGoff directed him to raise the issue with Dr. Thirer. Dr. McGoff acknowledged that he took no action when the Director of Compliance subsequently reported to him that Dr. Thirer was unconcerned with this violation of BU policy.

¹¹ The Self-Study Report states, “It should be noted that all communications between the Undergraduate Admissions Office and the coaching staff are coordinated and overseen by the Assistant Athletics Director for Compliance.”

4. The Support Services—Fall 2008

BU thus understood that the several student-athletes now simultaneously being actively recruited and recommended by Coach Broadus presented a higher level of risk in terms of academic success and retention. In August 2008, the Athletic Department hired Ed Scott as the new Associate Athletic Director for Student Services. Mr. Scott was responsible for overseeing student support services for all 450 student-athletes in 21 sports. He focused on providing academic guidance to the men's basketball team, while his associates rendered similar services to the remaining teams.

The Athletic Department recognized that for the 2007-08 academic year the team had a low APR (Academic Progress Rate). One of Mr. Scott's first assignments was to prepare a written "recovery plan" for the men's basketball team. He issued a memorandum, dated September 10, 2008, entitled "Academic/Retention Recovery Plan for Men's Basketball," which was addressed to Dr. Thirer and copied to Coach Broadus. Mr. Scott's understanding was that Dr. Thirer planned to pass the Plan on to President DeFleur. The Plan listed nine steps designed to improve academic success and retention in the 2008-09 academic year:

1. Increased involvement by compliance and student services in the evaluation of academic readiness for incoming freshman and transfer students.
2. The basketball staff is encouraged to recruit athletes that meet the general academic demands of Binghamton University.
3. Transfer transcripts to be evaluated by particular college or intended enrollment prior to admission.
4. "At-risk" students to be identified and receive tutorial assistance at the start of the initial semester of enrollment.
5. "At-risk" students to receive individualized study plans.
6. All freshman and transfer students have required weekly meeting with academic counselor (Associate Director of Athletics for Student Services).

7. Associate Director of Athletics for Student Services will advise the men's basketball program for academic year 2008-09.

8. Associate Director of Athletics for Student Services will travel with men's basketball for academic purposes when necessary.

9. Progress toward increasing retention and academic success is to be reviewed on a semester basis by the following: Director of Athletics; Associate Director of Athletics for Student Services; Associate Director of Athletics for Compliance and Head Men's Basketball Coach.

In addition to Mr. Scott's efforts, Dr. Sharon Holmes, who led a graduate degree program in Student Affairs, designed a mentoring program and a tutoring program for certain of the basketball players for the Fall 2008 semester. Dean Ingraham of CCPA arranged for Dr. Wilton to provide mentoring. Dr. Wilton notified the Dean by email that he would be mentoring two of the new players and that one was enrolled with him for independent study over the Summer of 2008. The Dean replied, "thank you, thank you for your work with the BB players--- they need a lot of support!"

Dr. Holmes supervised the tutoring of four players by a graduate student who was financed through a stipend that was paid by the Athletic Department and partial tuition reimbursement from CCPA. The graduate student, who had no prior experience and had received no training, met with the players regularly and helped them with their classwork. According to the graduate student, some of the players would miss their regular meetings and showed little motivation to complete their assignments. When the players missed meetings or became lax in completing their assignments, Assistant Coach Marc Hsu frequently was the member of the coaching staff responsible for holding the players accountable.

Dr. Holmes also mentored one the players and played a significant role in advocating with other faculty on the player's behalf. For example, on December 8, 2008, Dr. Holmes wrote to a fellow CCPA faculty member as follows:

[Assistant Coach] Allen and I were with [specified player] until 11:45 last night trying to assist him in completing his take-home final for your class that is due today by 3:30 p.m. We were forced to stop because we were all extremely tired and [the player] needed to rest to prepare for his final today at noon. I [met] with him again this morning, but again, we ran out of time.

I hate to ask you but at this point I do not see another alternative, is there any way possible that he could have a little more time to complete the paper? He is proceeding nicely but he simply needs more time to develop his thoughts.

Naturally, Coach Allen and I could have assisted him in writing the paper but we are committed to the notion that he needs to be responsible for his own work. While we will assist him, we will not do the work for him. If you allow him more time, we will oversee the process and see that he gets the work done. I know this request comes late and I sincerely hope you can accommodate it.

The instructor granted the requested extension.

The following week, Dr. Holmes again interceded with the same instructor, this time in order to assist the player in obtaining eligibility to play in a basketball game. Dr. Holmes wrote:

We are working our butts off to help him get these tests completed. We meet again tonight. Not that we will work any less but is there any idea what his grade looks like right now?

Also, I do not think this is possible but if we are able to complete the tests by mid-week, would you be able to review the material and give him a grade so that he is on the court on Saturday. I know this is asking a lot and I would not if the powers that be had not posed the question to me.

Dr. Holmes told us that she could not recall this email or why she wrote it, but offered that her invocation of “the powers that be” would likely have been a reference to Dean Ingraham.

On January 12, 2009, after the Fall semester had ended, Dr. Holmes wrote to one assistant basketball coach: “I have had a number of discussions with folks about a Sports [Mgmt] Prog here [at] BU. The response has been varied but mostly positive. Do you think some of the guys would be able to handle online classes?”

5. Malik Alvin's Arrest and Reinstatement

On October 26, 2008, Malik Alvin was arrested for attempting to steal condoms from a Walmart and injuring a 66-year-old woman with whom he collided as he ran out of the store. Some AEC members viewed the incident as further indication that the BU basketball program was out of control. Others acknowledged that the incident was embarrassing and created more negative publicity for BU and the Conference, but that incidents of this type can, and not uncommonly do, occur with student-athletes.

Mr. Alvin was suspended from the team. However, by November 29, 2008, after missing three games, Mr. Alvin was reinstated. Dr. Thirer drafted a statement that read in part:

Alvin's reinstatement came after multiple consultations with District Attorney Gerald Mollen, Alvin's attorney, Mark Rappaport, and a meeting between Alvin and the woman whom he stumbled into while fleeing the Vestal Walmart. Alvin expressed deep remorse about the incident, and in particular about any discomfort he inadvertently caused the woman who was standing right behind him when he turned to flee. He will be assigned to community service, in keeping with established athletic department protocol.

Coach Broadus was sufficiently concerned about the Alvin arrest that he invited the campus police to address the basketball team in December 2008 regarding the importance of complying with the University's expected conduct.

6. The February 2009 *Times* Article

In January 2009, Mr. Thamel began contacting Binghamton personnel and individuals in the AEC in preparation for an article on BU's basketball program. In certain instances, as in his contact with Ms. Dear, Mr. Thamel forwarded the article he had published shortly after Coach Broadus was hired in March 2007. In that article, Mr. Thamel discussed Coach Broadus's recruitment of basketball players with questionable academic backgrounds while he was an assistant coach at Georgetown. While anticipating Mr. Thamel's article, Dr.

Thirer requested information relating to the GPA of the men's basketball team. On February 13, 2009, Dr. Thirer was advised that the men's basketball team had a GPA for the Fall semester of 2.15 and cumulative GPA of 2.21. He also drafted possible talking points to address the issues that were likely to be raised by Mr. Thamel's article and provided the talking points by email to President DeFleur. Without breaking out the GPA of the men's basketball team, the talking points included a point often repeated by BU: that overall the cumulative GPA of *all* student-athletes at BU "has exceeded 3.0 in 12 of our 15 semesters in Division I."

On February 22, 2009, Pete Thamel's article "At Binghamton, Move to Division I Brings Recognition and Regret" appeared in the *New York Times*. The main themes of the article were the cost of BU's move to Division I, the pressure that was placed on academics as a result of the move, Coach Broadus's recruitment of players with questionable backgrounds, and the legal, behavioral and academic problems of BU's current team of talented players. Mr. Thamel cited sources as varied as former and current BU personnel, other Athletic Directors and coaches, and the AEC Commissioner.

Mr. Thamel reported that BU had lowered its admissions criteria so that the only academic criteria required for a player to be admitted were the NCAA's minimum qualifications. He also highlighted Coach Broadus's recruitment of Theus Davis, Derrick Rivera, Malik Alvin and Emanuel Mayben, all of whom had either academic or legal problems, or both. The article cited President DeFleur's statement that all the players who had stayed with the program had graduated. Coach Broadus was also quoted as saying that his players had been exceptional in the classroom and that giving the players a second chance was part of his job. Additionally, Sally Dear was quoted alleging that the Athletic Department had pressured her regarding her attendance policy and the grades of basketball players.

The latter part of Mr. Thamel's article focused on the off-court problems that the players had had since Coach Broadus's arrival. Mr. Thamel referred to the incidents involving Mr. Kovacevic and Mr. Alvin as well as the suspension of Dwayne Jackson for an undisclosed violation. Additionally, Mr. Thamel cited Devon McBride's allegations that BU's players drank and smoked marijuana; Mr. McBride was a Walker recruit who reportedly left the team because he was unhappy with his playing time and Coach Broadus's coaching style.

7. Thamel's and Thirer's ESPN Appearance

On March 16, 2009, Dr. Thirer, Mr. Thamel and Tom Brennan, former head men's basketball coach of the University of Vermont, appeared on the ESPN television program *Outside the Lines* to discuss criticisms of BU's basketball program. During the broadcast, Mr. Thamel stated that there was widespread criticism of how BU's hiring of Coach Broadus and recruitment practices had changed the tenor of the AEC, which Mr. Thamel characterized as "a mom-and-pop," academically-oriented, conference. Dr. Thirer disagreed with Mr. Thamel's "mom-and-pop" characterization and described the AEC as a Division I athletic conference whose members play to win. Mr. Brennan, who had been quoted in Mr. Thamel's February 2009 article questioning whether BU's practices were worth winning a championship, stated that during his tenure, Vermont's mission had been to bring in the highest quality student-athletes that it could and educate them as well as it could. He also noted that Vermont's success and the residuals of that success were very important to Vermont and may have prompted other schools to take steps to achieve similar success.

Dr. Thirer was pressed to explain why former and current BU personnel, the AEC Commissioner and an AEC Athletic Director had made the negative remarks quoted by Mr. Thamel. Dr. Thirer stated that there were people who had both positive and negative views of

the program. According to Thirer, while BU was attempting to be a competitive Division I program, it was still committed to its core values—education, access, graduating student-athletes, retaining academic eligibility and ensuring that the student-athletes become productive members of society after graduating from BU.

When asked why the AEC had not voted Derrick Rivera onto its all-conference team, Mr. Brennan speculated that the coaches were protesting BU's obtaining an NCAA waiver, whose legitimacy they questioned, which enabled Mr. Rivera to play immediately instead of waiting the usual one full-academic year. Mr. Thamel speculated that the decision was partly a quiet protest of BU's recruitment practices and partly a result of anger over the waiver. Sally Dear's allegations were briefly touched upon, with Mr. Thamel noting that in a conversation earlier in the day Ms. Dear had asserted that no one from BU had spoken with her about her concern that she was pressured by the Athletic Department.

8. Support Services—Spring 2009 Semester and the Summer Session

Before the Spring 2009 semester, Dr. Wilton emailed Coach Broadus to notify him of the course he would be teaching. With respect to one required Human Development course, Dr. Wilton noted, "It is not often that I teach this required course. I would recommend that the athletes take it with me, if possible."

In the Spring 2009 semester, in the final week permitted for dropping and adding classes (the deadline was February 6, 2009), Dr. Holmes allowed four team members to withdraw from other classes and enroll with her in an independent study course. Dr. Holmes obtained approval from the Department Chair and from the Dean of CCPA. After the deadline for dropping and adding classes had passed, at the request of Mr. Scott, Dr. Holmes permitted a fifth basketball player to enter the independent study course because the player had encountered

an urgent need to drop another class. At the end of the course, three of the players received Bs and one received a B+; one of the players withdrew from BU before the semester was completed.

Mr. Scott also took on the role of communicating with faculty about whether players' failing grades could be changed if they took steps to complete coursework. At least two players' failing grades in a course were changed to passing grades. In May 2009, Coach Broadus also discussed a third player's failing grade with the professor, who agreed to change the grade to an incomplete.

With regard to the 2009 Summer session, when Mr. Scott attempted to withdraw three basketball players from other classes to enroll them in a class taught by Dr. Holmes, the CCPA Academic Advisor responded by email that Dr. Holmes' class was full, with two remaining spots reserved for graduate students only. However, within days Dr. Holmes emailed Mr. Scott and the Academic Adviser to say that her class size had been expanded to include the three basketball players and that she should be contacted if needed to facilitate their registration.

Five of the players enrolled over the Summer 2009 in a one-week class taught by Dr. Wilton, now Chair of the CCPA Human Development Department. Of the four students completing the course (one student had an incomplete) three received a grade of B+ and the fourth a B. The coaching staff then undertook an effort to recruit a CCPA faculty member to teach an independent study course for the basketball players over the remaining portion of the summer. On July 2, 2009, Assistant Coach Marc Hsu wrote to Coach Broadus: "I spoke to Dr. Holmes and . . . I don't think she'll be able to do [an] independent study class. [Dr.] Leo [Wilton] may be an option, but that would have to come from you, I don't know Leo @ all. An independent study class for them is ideal, this 2nd [summer] session could be difficult for them."

Ultimately, Dr. Wilton conducted an independent study course in which four new basketball players were the only students.

By July 2009, in an email to an assistant coach, Ed Scott expressed frustration that several basketball players were not making sufficient effort to succeed academically and that the basketball program had taken no responsive action. Mr. Scott asked: “[W]hat are the consequences for them not reading, leaving class early, or coming unprepared for tutor meetings?” Similarly, in September 2009, in response to an explanation from Assistant Coach Hsu regarding why a player was late to tutorial, Mr. Scott responded “I don’t have time for the same back and forth as last year My position is simply this – these guys need to be here to get [their] work done – based on the schedule that I sent up.” (Ellipses in original.) Coach Hsu maintained email contact with Dr. Wilton regarding the progress of players in his Summer classes; in late July, for example, Coach Hsu wrote:

[S]orry to bother you again. . . . I’m going to see [player] and make sure he finishes your work from the 1 week class. If I know [him], he will not be prepared and I would like to cut out as much senseless time as possible. Can you send me whatever materials he might need and just briefly get me up to speed with what he needs to do? I’m going to sit down with him and make sure he gets this work done and not put it off any longer.

Dr. Wilton would also inform Coach Hsu and Mr. Scott about the problems that he was having with the players. For instance, he informed them that he had cancelled a class meeting because two of the students were unprepared, stating “I [gave] them a full lecture about the importance of education and doing well at this institution. I also let them know that I very much cared about their learning and that I really need them to step up.”

9. Increased Pressure Following BU’s AEC Basketball Championship

Following the success of the men’s basketball team in the 2008-09 season ending in March 2009, the pressure on other coaches at BU to produce AEC championships increased.

Dr. Thirer communicated to his senior staff that this pressure was coming from President DeFleur. In May 2009, in a meeting with Ms. Brown and Mr. Hazlett of Admissions, then-Associate Athletic Director Jim Norris invoked the name of the President when making the case that more flexibility was needed to admit student-athletes who were marginal students. Ms. Brown reported on the meeting to Ms. Starke, who advised her to memorialize the substance in writing. Accordingly, Ms. Brown sent an email to Provost Swain (copying Ms. Starke) which stated in part as follows:

Jim Norris told us that all coaches are receiving additional pressure to field championship teams and, in order to do so, they need more flexibility to recruit better athletes. The athletes they want us to agree to are those who might not be as talented as students. We believe we have appropriately balanced the needs of coaches and the needs for success in the classroom and we expressed support for their mission while stressing that the coaches have to make efforts to recruit top students who are also good athletes. (We are well aware of the need to make additional allowances for athletes in the revenue sports and we have done so.)

Jim indicated that he had been instructed to draft a memo for the President that will outline some things they need to ensure better athletic success. He identified the need for more funds, the need for priority registration AND the need for more flexibility in admissions. We have supported them in almost every instance when they had a need for a key player (a goalie or pitcher, for example) – but we have not given them carte blanche to recruit athletes whose academic potential is weak.

I want you to be aware that these issues are being presented to Lois and that she may need some background on admissions' on-going support for athletics. I'd be happy to discuss if and when the need arises.

Mr. Norris recalled that his remarks to Admissions were inspired in part by his discomfort with terminating the employment of coaches whose teams were not winning enough. Neither Mr. Norris nor President DeFleur recalled discussing with the other a need for more flexible admissions of student athletes.

10. June 2009 AEC Meetings

From June 9-11, 2009, the ADC held its annual meeting in Burlington, and the Presidents and Athletic Directors met on June 12, 2009 in Boston. There was widespread concern within the AEC that the attitude and behavior of BU's players and coaches was not consistent with Conference expectations. Many in the Conference had now observed BU's players gesturing at and taunting the crowd during games, using foul language and engaging in on-court shouting matches with assistant coaches. Adding to the unfavorable view of BU's basketball program was the series of specific incidents that had led to the perception that BU's basketball program lacked control and oversight: Coach Broadus's on-court altercation with Will Brown, Miladin Kovacevic's assault on another Binghamton Student, Malik Alvin's arrest for stealing condoms and injuring a 66-year-old woman in the process, and Pete Thamel's February 2009 article alleging that Binghamton had lowered its admissions standards and that members of the athletic department were intimidating professors to boost athletes' grades. Moreover, when others in the Conference had tried to warn Dr. Thirer that BU was taking unnecessary risks and that he needed to maintain better control over Coach Broadus and the basketball program in general, Dr. Thirer continued to respond angrily and maintained that BU never had acted inappropriately. The stage was therefore set for the confrontations that followed at the 2009 meetings of the Athletic Directors and Presidents.

(a) Athletic Directors' Meeting

Commissioner Nero had invited Gene Corrigan, a former NCAA President and highly respected figure in collegiate athletics, to attend the Athletic Directors' meetings and to give a presentation on how a school can be a good Conference member and a team player. Mr. Corrigan noted that Athletic Directors must make expectations of their coaches clearly known

and discipline coaches for inappropriate behavior. He said this was important because the Athletic Directors and coaches must set a good example for their student-athletes. Several of the Athletic Directors expressed the belief that Mr. Corrigan's presence was prompted by BU's actions.

After the full meeting of the ADC, the nine Athletic Directors held a separate session. They confronted Dr. Thirer bluntly about their concerns and unhappiness with BU's basketball program and voiced their objections to BU's recent recruits and, particularly, its immediate waiver request to the NCAA for Derrick Rivera. The Athletic Directors asked Dr. Thirer why he would risk his career and reputation, just so that BU could have a winning basketball team. The Athletic Directors and Dr. Thirer discussed Pete Thamel's February 2009 article, and many expressed to Dr. Thirer that they had tried to warn him about the risks BU was taking, but that Dr. Thirer was unwilling to listen.

According to those present, Dr. Thirer again responded angrily. He asserted that BU was committed to giving student-athletes second chances, and that BU and Coach Broadus were fully equipped to supervise these students. He also asserted that BU had followed the appropriate process in requesting a waiver from the NCAA for Mr. Rivera, and that the other Athletic Directors had no right to question BU's admissions decisions as long as the athletes met minimum NCAA standards. With regard to the allegations made by Mr. Thamel and Sally Dear, Dr. Thirer stated that they lacked credibility. He also accused some of the other Athletic Directors of talking to the media about the BU program and being "out to get us."

Though described by some of the Athletic Director-attendees as the most heated session they had attended in the AEC, the meeting ended with some measure of reconciliation. Dr. Thirer apologized for becoming upset and asked the other Athletic Directors to call him

directly if they had any issues or problems with BU. Dr. Thirer also promised to be more receptive to the others' concerns. However, many of the Athletic Directors noted that Dr. Thirer still did not acknowledge that BU had ever acted inappropriately.

(b) Presidents' Meeting

During the campus Presidents' meeting in Boston on June 12, 2009, the other Presidents emphatically conveyed their concerns to President DeFleur regarding BU's basketball program. At that meeting, a variety of issues was discussed, including the condom incident, Pete Thamel's February 2009 article and BU's recruiting practices in general. The conversation focused on the risks to the Conference that were created by BU's recruiting program and the players it was admitting. Some expressed their belief that BU was hurting the Conference from a public opinion standpoint.

According to those present, President DeFleur vigorously defended BU's recruiting practices by stating that the players had been admitted under New York State's Economic Opportunity Program (EOP), a program designed to give academic opportunities to disadvantaged youth. (In fact, no players on the 2008-09 team had been admitted through BU's EOP program.) President DeFleur emphasized that BU was committed to giving students second chances and to attracting a more diverse student body, and that BU was very effective in carrying out that mission. Some said that President DeFleur was defensive and unreceptive during the meeting, and that she even implied that some of the other Presidents' comments and concerns about BU's recruiting might be motivated by race. Specifically, according to some who were present, President DeFleur accused some of the Presidents of being insufficiently sensitive toward a coach who was actively trying to help inner city kids. Others at the meeting believed that President DeFleur's comments were not intended as an accusation of racism. At all events,

several of those present left with a sense that President DeFleur and BU were unwilling or unable to acknowledge that any problem existed.

After the meeting, President DeFleur spoke privately with Freeman Hrabowski, President of UMBC, and expressed to him that she had concerns with Dr. Thirer and the way he had been handling the basketball program. President Hrabowski's impression was that President DeFleur was genuinely struggling to find the truth between what she was hearing from the other Presidents on the one hand, and Dr. Thirer on the other, regarding BU's basketball program. She acknowledged, however, that Dr. Thirer had not been working well with the other Athletic Directors and had displayed a poor attitude. She told President Hrabowski that she was considering replacing Dr. Thirer as Athletic Director.

11. Recruiting for 2009-10

Meanwhile, Coach Broadus multiplied the challenges by recruiting an in-coming class to add to the 2009-10 basketball roster that was similar to the prior season in terms of academic and behavioral concerns.

In April 2009, Admissions gave an unfavorable admissions review to a transfer applicant with a GPA well below 2.0. The Admissions Review Form stated: "Would like to see grades from Spring 09 term due to student's current overall GPA. Based on current GPA student does not appear to be admissible." Nevertheless, the applicant was admitted.

In August 2009, Coach Broadus recommended a second transfer applicant who was a point guard at another Division I university. On August 11, Cheryl Brown of Admissions signed an Admissions Review Form indicating that there were no conditions under which the applicant would be admissible to BU. By way of explanation, Ms. Brown stated that the "[s]tudent's academic record and [the] number of credits he has achieved do not support

admission.” Coach Broadus then made an unscheduled, in-person visit to Ms. Brown to discuss the applicant, without proceeding through BU’s Director of Compliance, as required under BU policy. After the meeting, Ed Scott was directed to draft an academic plan for the applicant for review by Admissions.

The advocacy for this point guard subsided, however, when on August 18, the Rutgers University men’s basketball coach announced that point guard Corey Chandler had been dismissed from the basketball program for violating unspecified athletic department policies. The Rutgers coach stated, “We consider this a family matter and there will be no further comment.” Chandler had been suspended from the Rutgers team during the prior season for an undisclosed disciplinary violation. Within days, Coach Broadus recommended Mr. Chandler’s admission to BU without disclosing to Admissions that Chandler had been dismissed from the Rutgers athletic program. Chandler visited BU from August 25 through August 27 and met with President DeFleur on August 26 at the request of Assistant Coach Marc Hsu. By August 31, Mr. Chandler had been admitted to BU.

After what had taken place during the June 2009 annual meetings, the extension of Coach Broadus’s contract immediately following those meetings and the signing of Mr. Chandler in August seemed to confirm in the minds of some members of the AEC that the concerns they expressed to Dr. Thirer and President DeFleur had fallen on deaf ears. Some members of the Conference approached Commissioner Nero to discuss whether the Conference could do anything to prevent Mr. Chandler from enrolling at BU. However, it was determined that while BU might be ignoring the AEC’s general recruiting philosophy, it was not violating any specific rule or regulation. At this point, some of the others in the Conference began seriously to discuss whether BU belonged in the AEC at all.

Commissioner Nero called Dr. Thirer to express his concerns and the concerns of the others in the Conference regarding the signing of Mr. Chandler. Dr. Thirer, however, continued to assert that he was not concerned about Mr. Chandler's past because BU had a strong drug testing policy in place and was adequately prepared to manage its affairs.

In addition to Mr. Chandler, the basketball program successfully recommended the admission of an applicant who had attended five previous colleges, and another applicant whose communication skills called into question his ability to function academically at BU.

To assist the team members, Dr. Holmes accepted six players into the tutoring program for the Fall 2009 semester. The staff was expanded from just one to three tutors. The stipends for the tutors were now paid solely by the Athletic Department, and Mr. Scott began to play a supervisory role. When the returning tutor began working with the new players, she noticed a marked difference in the academic proficiency of the incoming players versus those tutored the previous semester. It appeared that the coaching staff had used the relative academic success of the players the previous year as the basis to recruit players who were even more academically challenged with the expectation that the tutors would be able to help them succeed. For the 2009-10 season, ten of the sixteen players were enrolled in the CCPA Human Development program, and an eleventh player was, at the urging of the coaches, in the process of switching from Harpur College into Human Development.

12. The Transfer Credits Awarded to Incoming Basketball Players

Coach Al Walker's strategy of recruiting transfer students from junior colleges was based in part on the policy of the then-School of Education and Human Development to accept large numbers of credits earned in junior college provided that the transfer student had obtained an Associate's Degree. In Coach Broadus's era, the Human Development Department

was now housed within the newly founded CCPA college. CCPA was unique among BU's six undergraduate schools in allowing students to count an unlimited number of physical education wellness credits toward the "general education" degree requirement provided that other degree requirements were satisfied. This allowed transfer students recruited by Coach Broadus to obtain credit toward a CCPA degree for a volume of non-academic coursework that some BU personnel found troubling.

In mid-2009, the administration in CCPA became focused on the transfer credit issue. The Academic Adviser in CCPA, who was responsible for administering transfer credit policy within the college, advised the Dean and others by email: "I think it is essential to limit the credit, especially given the number of athletes we take into our program." When academic credit was accepted toward a Human Development degree for a "Theories of Softball" course completed by a basketball player at a prior college, the Assistant Dean of CCPA made inquiry of the Academic Adviser and reported to the Dean, as follows:

I asked her about the theory of softball student and she gave me some interesting information. HDEV [i.e, the Human Development Department] has some very lax policies regarding transfer courses – 1) all HPEY (physical education and wellness) courses transfer into HDEV although they only count toward electives or overall credit hours and a little more problematic – 2) CCPA (HDEV) is the only school that accepts grades of D for transfer credit.¹²

The CCPA administration began steps to make the transfer credit policy more restrictive and in line with other schools at the University. On June 10, 2009, Ed Scott alerted the basketball coaching staff by email that CCPA was instituting these changes, observing: "Depending on what they set the credit limit at, this could have a pretty big impact on your

¹² The Assistant Dean's email slightly misstates the rule for accepting transfer credits. At the time, the Human Development Department would transfer in all HPE courses, which are physical education courses that have a wellness component. It would only accept two credits from HPEY courses, which are physical education activity courses.

recruiting transfers. Once CCPA . . . makes a final decision I will share that information with you.” On September 2, 2009, the CCPA faculty approved the limiting of physical education and/or wellness credits to six, including not more than two credits for activity courses. Under University policy, this stricter rule could only be applied prospectively beginning September 2009. As a result, CCPA students who enrolled prior to September 2009 benefited from the more permissive rules. One basketball player therefore received 16 transfer credits toward his CCPA degree for courses that his prior college had coded as physical education. Another received 12 transfer credits for courses at his prior college entitled: Bowling I; Care & Prevention of Injuries; Sports Officiating; Theories of Softball; Jogging; Tennis; and Strength & Training.

After our review had begun, BU began a process of re-evaluating the credits awarded to several of the basketball players, and certain CCPA personnel undertook to analyze and re-code the course classifications so as to support the previous decisions to accept the credits. Ultimately, the Provost determined, in consultation with the CCPA administration, that CCPA’s decision to accept the credits should not be disturbed.

13. The Effort to Disband the IAC

On June 15, 2009, Dr. Michael wrote to Dr. Thirer asking whether a particular faculty candidate might be appropriate for appointment to the IAB, noting that the candidate “has season tickets to basketball games.” Dr. Michael observed that she would seek President DeFleur’s prior approval and reiterated that she had thought of the candidate in part because of his season tickets to basketball.

At a Faculty Senate Executive Committee meeting on September 15, 2009, Dr. Michael argued in favor of her proposal as FAR to deactivate the IAC. She noted that neither the

IAB nor the IAC had made such a proposal. Professor Jim Stark, Chair of the IAC, argued against it. He emphasized the importance of maintaining the faculty governance structure and “stated that the IAC has an important presence on campus and is a committee of the Faculty Senate, while the IAB reports to the president’s office.” Dr. Stark “commented that admissions criteria for student athletes is of some concern.” He also noted that although “in the past the IAC has met informally with student athletes from non-revenue sports[, t]here was some hesitation when he asked that the [IAC] meet with student athletes from revenue sports.” Dr. Michael “commented that an IAB subcommittee will soon be formed to examine academic and team data.” The Executive Committee tabled Dr. Michael’s proposal pending further discussion.

At the September 25, 2009 IAB meeting, Dr. Michael reported that the “Faculty Senate will possibly be deactivating their committee and include issues raised at the Faculty Senate committee with what is being discussed within the IAB. One group would eventually be formed and report to the President.”

In her IAB annual report for 2008-09, Dr. Michael wrote: “Most members of the IAB believed that the IAC was redundant in that the IAB chair/FAR has the knowledge base and awareness to identify agenda items and individuals to provide reports so that faculty are fully engaged in the review and oversight of athletics at BU. Further, both the IAC and IAB acquire faculty members through established processes of the Faculty Senate, and both provide annual reports to the Faculty Senate.”

C. The Concern Raised by Sally Dear and the University’s Response

1. Background

In the Fall 2008 semester, Sally Dear was the instructor in a CCPA class in which three basketball players were among the 48 students enrolled. A disagreement emerged in which

(1) Ms. Dear maintained her right, as documented in her syllabus available to all enrolling students (as described below), to reduce a student-athlete's final grade for prescribed numbers of absences; and (2) the Athletic Department maintained that Ms. Dear had an obligation under University policy to modify her absence policy because of the student-athletes' commitment to play in intercollegiate basketball games.

(a) Dear's History with BU

Ms. Dear began teaching at BU as an instructor in 1998 and remains a doctoral student in Harpur College. Over the past several years, friction emerged between Ms. Dear, a vocal opponent of the direction of the Human Development Department, and the CCPA administration. She participated in a student protest against the movement of the Department (along with the rest of the newly formed CCPA) to the University's new Downtown Center. She has reacted strongly to policies of the college that she perceived as having a negative impact on her teaching assignments, compensation and benefits—including CCPA's recent efforts under Dr. Wilton to modify the curriculum of the Human Development Department and to use core tenure-track faculty to teach core courses. Ms. Dear was not on tenure track because she had not yet completed her doctoral degree.

(b) The Disagreement between Ms. Dear and the Athletic Department

(i) Dear's Attendance Policy

Ms. Dear has applied the same attendance policy since she began lecturing at BU in 1998. Under this policy, students who miss three classes will be subject to a full grade reduction. Those who miss four or more classes will receive a failing grade in the course. Ms. Dear's policy is based upon the attendance policy outlined in BU's University Bulletin, which

provides in pertinent part that instructors may establish “the number of absences after which the final grade may be adjusted downward.” According to Ms. Dear, she has implemented this policy, in part, because her class sessions are three hours long and meet once a week and, therefore, missing four of her classes is equal to missing 25 percent of the total class sessions. Ms. Dear includes her attendance policy in the written syllabi for her classes and also announces the policy during the first day of class.

(ii) The University’s Policies

BU has three separate policies regarding class attendance that are particularly relevant. First, the University Bulletin provides that:

Students are expected to attend all scheduled classes, laboratories and discussions. Instructors may establish their own attendance criteria for a course. They may establish both the number of absences permitted to receive credit for the course and the number of absences after which the final grade may be adjusted downward. In such cases it is expected that the instructor stipulate such requirements in the syllabus and that the syllabus be made available to students at or near the beginning of classes. In the absence of such statements, instructors have the right to deny a student the privilege of taking the final examination or of receiving credit for the course, or may prescribe other academic penalties if the student misses more than 25 percent of the total class sessions. Excessive tardiness may count as absence.

University Bulletin, “Attendance in Classes” (2008-09).

Second, the Faculty-Student Handbook provides that:

Students at Binghamton University have the opportunity to participate in many kinds of activities beyond the classroom that either contribute to the quality of their undergraduate experience or promote their postgraduate careers. At times, students’ participation requires them to be absent from regularly scheduled classes. Students are responsible for all work missed. At the same time, faculty members are strongly encouraged to accommodate students’ participation in such activities. If this is an organized activity, the sponsoring organization has a similar responsibility to accommodate students’ needs to meet their class obligations. Each student is responsible for notifying the appropriate instructor(s) of a potential absence at the beginning of the term for events already scheduled, and not less than a week before those scheduled once a term begins. Faculty should

be flexible in providing opportunities for students to make up tests and other work missed.

Faculty-Student Handbook, "Absences by Students from Classes for Participation in Official University Events," VII.B.2 (2008-09).

Third, the Student-Athlete Handbook provides that:

Each student-athlete who will be missing class because of a competition must notify her/his instructor at the beginning of the semester and is responsible for all tests, papers, homework, and materials that are covered while he/she is absent. Student athletes are not permitted to miss class due to practice times or team meetings. This is considered an NCAA violation. University policy states that "instructors are encouraged, but not required" to allow for makeups, etc. Therefore, it is critical to make arrangements and open lines of communication well in advance of any required absence.

Student-Athlete Handbook, "Missed Class Policy" (2008-09).

(iii) The Interactions Between Ms. Dear and Mr. Scott

On September 26, 2008, Mr. Scott contacted Ms. Dear for the first time because three players enrolled in her course expressed concern regarding Ms. Dear's attendance policy and the number of classes that they would have to miss for basketball games. He sent her an email introducing himself and requesting an in-person meeting at her convenience to discuss the enrollment of the three players in her class and "any issues that may arise from their participation in the basketball program." Ms. Dear called Mr. Scott and expressed concern that only one of the three had apprised her of his membership on the basketball team, that she had not received a copy of the basketball schedule and that she would be forced to fail the players under her absence policy as set forth in her syllabus if they missed too many classes. Mr. Scott responded that the AEC had not released the final schedule but that he would provide her with the tentative schedule, which he emailed to her on September 30. According to Mr. Scott, Ms. Dear indicated

that she was more than willing to make accommodations for the players if they missed class only for basketball-related activity.

Mr. Scott later called Ms. Dear on October 16, 2008 to request a meeting with her because the players had expressed concern that she was not treating them fairly. While Ms. Dear agreed to meet with him, she also stated that she was spending too much time concerned with the three players. During the meeting, Ms. Dear informed Mr. Scott that the players were coming to class late, leaving early, were disruptive and were signing each other in and out on the class attendance sheet, as evidenced by the misspelling of names. Mr. Scott listened to Ms. Dear's concerns and discussed with her the absence policy set forth in the Faculty-Staff Handbook. Mr. Scott then asked Ms. Dear if she would be willing to attempt to find reasonable accommodations for the players. According to Mr. Scott, Ms. Dear responded that the players would be provided opportunities to do additional course work for the classes that were missed as a result of basketball games. However, Ms. Dear expressly reserved the right to drop each player a letter grade in accordance with the absence policy delineated in her class syllabus.

A few days later, Ms. Dear met with the three players to discuss whether they would continue in her course or drop it. On October 23, 2008, Mr. Scott and Ms. Dear spoke by telephone regarding her meeting with the players, and Ms. Dear sent an email later that day to the players memorializing her position. She reserved the right to uphold the portion of her attendance policy that missing three classes could result in a full letter grade drop. She also explained that, in permitting the players to remain in the class even though they would have more than four absences, she was providing the players with a waiver on a "one-time basis" because they did not have their schedules at the beginning of the semester. She reminded the

players that she would assign them additional work “which would account for (but understandably not be able to replace) the time not spent in class.”

On November 4, 2008, Ms. Dear emailed Mr. Scott expressing—for the second time—frustration with the players. She informed him that the players had ignored her request to meet with them and that, even though the players were attending class, their behavioral problems had continued. Ms. Dear also expressed concern about the players’ ability to participate in the final group presentations because those presentations were scheduled for a day when the players would be traveling for a game. She concluded the email by stating “I am holding up my end of the deal but, as you can see, their efforts have not been reciprocal. This is not a game, but if I were to use that metaphor, right now the points are stacking up against them and pretty soon the ball is going to be out of their court.”

Mr. Scott responded on November 5, expressing appreciation that Ms. Dear was keeping him abreast of the progress of the players and informing her that he had spoken with them regarding their behavior in the classroom. Regarding the final presentation, Mr. Scott reminded Ms. Dear that he had personally sent her a schedule informing her of the days when the players would be absent due to games and expressed concern that the schedule would now present a problem for the final presentation. He then stated:

I’m not sure I understand how this was not indicated any earlier, primarily when we discussed them dropping the course for this very reason. I was under the impression this had been thought through from your perspective and that you had devised a way of handling the situation that would be fair to all of your students.

Mr. Scott concluded the email by requesting permission to attend the first half of Ms. Dear’s class, or in the alternative, to meet with Ms. Dear prior to the start of her class to further address any concerns she had.

In response, Ms. Dear sent Mr. Scott an email on November 7, 2008, in which she in large part reiterated the concerns that she had previously stated. She also stated that “we are reaching the ‘point of no return’ as they will not have sufficient time to craft and complete their work before the semester is over and grades need to be submitted.” Regarding the final project, Ms. Dear explained that it had not been “indicated any earlier” because it was a change in “methods of assessment” that had been proposed and voted on by the class after her last conversation with Mr. Scott. As a result of the vote, the players were required to participate in the group project to the same extent that they would have been required to take a mid-term or final exam. According to Ms. Dear, the players had two options: (1) they could miss the basketball game that was scheduled for the day that they were supposed to make their presentation; or (2) they could attempt to arrange with the other group members to make their presentation on a different day. She then stated that she was unable to make any further accommodations. Ms. Dear denied Mr. Scott’s request to attend her class because she considered it “highly inappropriate and potentially disruptive.”¹³ In closing, Ms. Dear remarked that:

I would like to emphasize that, in light of the privileges and accommodations being afforded them, I would have thought these young men would be substantially more diligent about doing their work, being model students in class, and staying in contact with me. In other words, doing everything they could possibly . . . do to succeed. Clearly that has not been the case and is not the case.

Soon after this email exchange, one of the players dropped Ms. Dear’s class. The player was able to do so because he had registered for sufficient credits that he could drop the

¹³ At one class session, Coach Broadus came to Ms. Dear’s classroom to check whether the players were in class (they were). Ms. Dear recalls that Coach Broadus actually entered the classroom. Coach Broadus recalls that he looked through the door, prompting Ms. Dear to exit the classroom to ask why he was there.

class and still remain a full-time student. The two other players did not have this option available to them and remained in the class.

On November 20, 2008, Ms. Dear copied Mr. Scott on an email that she sent to one of the two remaining students in her course expressing concern that the student had not thus far been diligent in the class and noting that, based on the basketball schedule, he would miss the remaining classes of the semester. Ms. Dear closed the email stating “At this point I’m not sure how you are going to be able to complete the requirements for the class.”

On December 8, 2008, Mr. Scott emailed Ms. Dear informing her that he had met with both players to address the concerns that she had outlined in her emails and that he had not heard from Ms. Dear regarding the players’ progress on two issues: (1) the extra assignments for missing class and (2) the final project. The players believed that there was confusion regarding these issues and had informed Mr. Scott that they had made the necessary arrangements regarding the additional assignment and that their group had made the decision to make their presentation on a different date. Mr. Scott also referred to progress reports that he had received from Ms. Dear in which she had indicated that the students were earning Bs in her class.

On December 18, 2008, Ms. Dear wrote to one of the students, copying Mr. Scott, “[p]lease also note that 4+ absences should equal an immediate failure (see syllabus) but you were granted a ‘reprieve’ due to (what were originally explained as) extenuating circumstances.” On that same day, Ms. Dear responded to Mr. Scott’s December 8 email, informing him that one player had received a D in the class and the other player had failed. She stated that both of the grades reflected a full grade drop due to both of them having been absent from the class more than three times. She noted that the player with a D should have received an F, but because he

turned in an extra credit paper and was responsible about sending in his work on time, she gave him “some ‘credit’ for that degree of responsibility.” Ms. Dear added:

I would also like to clearly state that, in the future, no adjustments will be given to athletes as far as attendance in my classes. Towards that end I suggest that you/your office advise students accordingly when they are registering for classes.

Some hours later, Mr. Scott inquired by email whether Ms. Dear would be willing to speak with him, but she replied by email that the matter was closed. She and Mr. Scott had no further communication. After the semester ended, Mr. Scott inquired into the process for appealing the failing grade, but the student ultimately decided not to pursue an appeal.

Months later, on February 9, 2009, Ms. Dear emailed the player that had received the D offering him the opportunity to prepare a presentation as a replacement assignment for the presentation that he had missed the previous semester. She stated that her offer was based on the player’s previous responsible behavior in her class and his staying in contact with her throughout the last semester. The player does not appear to have availed himself of this offer.

(c) Coaching Pressure on One of the Basketball Players

Meanwhile, a student-athlete not on the basketball team was also in Ms. Dear’s class. This student contacted Associate Athletic Director Jim Norris to express concern regarding one of the basketball players. She wrote:

I realize how stressful being an athlete and student can be, but it can become even harder to balance the two without having an understanding coach. From my experience on the [non-basketball] team academics always came first in all situations. From speaking to [the basketball player] and seeing texts and other comments from his coach I feel that he is being treated the exact opposite. I honestly believe he likes his coach and doesn’t want to bring any negativity to him or his job, but the reality of the situation is he is putting [the player] into a spot that is not allowing him to succeed. From speaking with him recently it’s very possible that he may not be passing enough classes to be academic[ally] eligible for next semester.

On the same day, Mr. Norris emailed Dr. Thirer, copying Mr. Scott, informing him that he had met with Mr. Scott regarding the student's email and that Mr. Scott had begun to address the situation. Dr. Thirer replied the next day, stating: "I spoke with Ed [Scott] tonight. The concerns that were expressed to you have some validity, and Ed is going to pursue the issue with both [the basketball player] and separately with Kevin [Broadus]." However, Mr. Scott felt he already had addressed the issue through his dialogue with Ms. Dear on behalf of the basketball players. As a result, no one in the Athletic Department communicated the student-athlete's concern about the basketball player—a concern that the Athletic Director found to have "some validity"—with Coach Broadus. Ultimately, this basketball player was the only one of three in Ms. Dear's class to receive a failing grade and did not take advantage of an opportunity to submit an extra credit paper that may have yielded (as it did for one of the other player-students) a passing grade.

(d) The University's Support for Dear's Position

(i) By the Human Development Department

In September 2008, Dr. Thirer expressed concern to Dean Ingraham of CCPA regarding the impact of Ms. Dear's attendance policy on the basketball players. On September 24, 2008, Tammara Behonick, Assistant Dean of CCPA, emailed Dean Ingraham and Dr. Albert Dekin, then Chair of the Human Development Department, BU's policy for absences for participation in official university events as contained in the Faculty-Student Handbook, stating that it was her understanding that the policy applied to athletes. Dr. Dekin responded that because the department has three-hour classes that meet once a week, some of the Human Development faculty had implemented clearly defined attendance policies, especially those where class participation in discussions and class work were essential parts of the course. Dr.

Dekin's stance was that, since these attendance and participation requirements were clearly delineated in the syllabi, students who would need to miss class more often than allowed should not take those courses where attendance and class participation were required components of the evaluation process for the course. Dr. Dekin provided this email to Ms. Dear.

The following day, Ms. Behonick responded that it had been brought to Dean Ingraham's attention that some athletes in Sally Dear's course had been singled out as needing to abide by the attendance policy or fail. She stated that it was her understanding that, given BU's policy regarding absences for organized university events, the faculty should try to work with those students. Later that day, Dr. Dekin sent Ms. Behonick excerpts from BU's attendance policies from the University Bulletin and the Faculty-Staff Handbook. Dr. Dekin stated that "[t]he procedure described in the University Bulletin (which I believe to be the authority in these matters) clearly provides that faculty can set the attendance policies for their courses and are expected to stipulate them in their course syllabus."

(ii) By the CCPA Administration

On two separate occasions in 2008, Ms. Behonick communicated with Ms. Dear directly regarding her class attendance policy. Toward the end of the Spring 2008 semester, Ms. Behonick was contacted by an upset parent regarding the possibility that her son would receive an F in one of Ms. Dear's courses. The student had missed four classes and had attempted to receive an exception to the attendance policy from Ms. Dear because he was going to miss the fourth class for attending his aunt's funeral. According to Ms. Behonick, Ms. Dear said that she could not make a judgment such as this since there were other students in her class who missed four classes and would also fail. In this instance, Ms. Dear was asked to consider the circumstances, but was assured that the decision was hers. Ms. Dear subsequently submitted a

failing grade for the student. In a May 27, 2008 email, Ms. Behonick informed Provost Swain that the student's mother would call regarding her son receiving a failing grade and that Ms. Dear turned the grade in more than two weeks late. Provost Swain responded that she believed that Ms. Dear's syllabus was clear and that the "student took a chance by missing three previous classes and was caught." The Provost also noted that there were no penalties for turning grades in late.

In the Fall 2008, Ms. Behonick was informed that some orthodox Jewish students were unable to attend class due to the Jewish holidays. Ms. Behonick informed Ms. Dear that in accordance with New York State Education Law 224-a, student absences may be excused for religious reasons and that Ms. Dear would need to make accommodations for the students. Ms. Dear ultimately taped the class so that the students would be able to view it at a later date.

When the situation arose with the basketball players, the CCPA administration did not communicate with Ms. Dear regarding this issue. Rather, Ms. Dear made her final decision regarding the implementation of her attendance policy without interference.

(iii) By the Campus Attorney

On September 25, 2008, Ms. Behonick forwarded her September 24-25, 2008 email exchange with Dr. Dekin to the Campus attorney, Barbara Westbrook-Scarlett, requesting that Ms. Westbrook-Scarlett review the email exchange and noting that there was some controversy over the two policies that govern student absences. She asked Ms. Westbrook-Scarlett to provide an answer regarding faculty's obligations when they have student-athletes in their classes. In her reply email, Ms. Westbrook-Scarlett concluded that BU's attendance policies did not supersede "the instructor's authority to require a student to attend a certain number of classes but does encourage the student to contact the instructor at the beginning of the

semester with any foreseen conflicts in order to try to work out a reasonable solution.”

According to Ms. Westbrook-Scarlett, if the instructor refused to “come to an agreement, then the student may then have to decide if they want to drop the class or drop their participation in that sport/competition.”

(e) The February 2009 *Times* Article and Its Aftermath

(i) The *Times* Story

In his February 22, 2009 article, Mr. Thamel reported Ms. Dear’s allegations that Mr. Scott had harassed and pressured her regarding her attendance policy and her right to drop the basketball players’ grades. Ms. Dear also told Mr. Thamel that she had had a frustrating experience with the basketball players who had been in her class and that she would have preferred to see more academically prepared and serious students. Ms. Dear also expressed concern about losing her job for speaking out about the basketball team. Mr. Scott was cited as stating that Ms. Dear’s allegations were inaccurate and that their face-to-face meeting regarded the treatment of the athletes as outlined in faculty-staff handbook.

(ii) Dean Ingraham Apologizes to Mr. Scott

Shortly after Mr. Thamel’s article appeared, Dean Ingraham personally requested a meeting with Mr. Scott through Dr. Holmes. Mr. Scott met with Dean Ingraham and Dr. Holmes for approximately 20 minutes on February 25, 2009. During the meeting, Dean Ingraham apologized for Ms. Dear’s comments to the *Times*. According to Mr. Scott, Dean Ingraham stated that “by no means are the comments by Sally Dear a reflection of CCPA’s opinion of you, your student-athletes or the athletic department.” Dean Ingraham informed Mr. Scott that she had reviewed some of the email correspondence between Mr. Scott and Ms. Dear

because Mr. Scott had blind-copied Dr. Thirer, who then forwarded the emails to Dean Ingraham. At the conclusion of the meeting, Dean Ingraham asked Mr. Scott to communicate directly with her in the future concerning academic matters relating to CCPA. She also requested copies of Mr. Scott's email correspondence with Ms. Dear and Dr. Dekin.

(iii) Thamel's and Thirer's ESPN Appearance

On March 16, 2009, Pete Thamel and Dr. Thirer appeared on the ESPN program *Outside the Lines*. Mr. Thamel referred to Ms. Dear's allegations that she was pressured to change the grades of student-athletes and that multiple professors had told her that they were pressured to do the same. Mr. Thamel noted that BU had taken a lot of risks and changed the culture of its university, which resulted in off-court problems, and predicted that these decisions would have consequences in the future. Dr. Thirer refuted the allegations that Ms. Dear had made and noted that, based on conversations that he had had with the President and the Deans of all the colleges, there was no evidence to support Ms. Dear's allegations. He also noted that if Ms. Dear had had concerns, she could have availed herself of the University's processes. Dr. Thirer stated that Ms. Dear had been approached by her department chair, who had spoken with people in the Athletic Department and the Provost's office. Mr. Thamel noted that he had spoken with Ms. Dear earlier that same day and she had told him that no one from BU had approached her since the *Times* article was published.

(iv) The Ensuing Inquiry

On March 24, 2009, Dave Eagan, the Director of Compliance, sent an email to Dr. McGoff recounting "some allegations against our department and university as documented on the recent ESPN Outside the Lines feature . . . and in a recent New York Times article." Mr. Eagan concluded as follows:

In order to protect our university, I think it is very important for someone outside of athletics to take a closer look at these allegations, given the fact that the allegations were made on national television and in the national print media. Please let me know if I can be of further assistance.

In response to Mr. Eagan's email, Dr. McGoff collected correspondence and written communications from Dr. Dekin, Assistant Dean Behonick, Mr. Eagan and Mr. Scott. Dr. McGoff limited his focus to whether Athletic Department personnel had inappropriately pressured Ms. Dear. Additionally, Dr. McGoff spoke with Provost Swain and President DeFleur, who had inquired about interactions which the Athletic Department might have had with other faculty. He was also informed that Dean Ingraham had become the direct contact between the academic programs in CCPA and the Athletic Department. Dr. McGoff did not, however, meet with, or speak to, Mr. Scott or Ms. Dear.

Dr. McGoff explained that, based on his review, it was his understanding that Ms. Dear's complaints were based on a difference in perceptions. He believed that the crux of the disagreement was Mr. Scott's tenacity in claiming that student-athletes should be given greater consideration in class attendance to accommodate game schedules and his belief that her attendance policy contravened University-wide policies. He found Mr. Scott's communications with Ms. Dear to be respectful. He also noted that Mr. Scott had not asked Ms. Dear to change the players' grades and that Ms. Dear did not change her grades. At the end of his review, Dr. McGoff concluded that no NCAA violation had occurred and relayed this finding to Mr. Eagan and Provost Swain. Dr. McGoff felt no urgency to put his findings in writing because he considered such a writing to only be a "note to file" and thought the matter closed.

Shortly after the Thamel article was published, President DeFleur personally reached out to each of the Deans of the colleges to determine whether there were any concerns that needed to be addressed. According to the Deans, there was no evidence to support Ms.

Dear's allegations of the Athletic Department pressuring teachers to change grades for student-athletes.

(v) The Decision Not to Renew Ms. Dear

In Fall 2008, CCPA began to determine which adjuncts would not be renewed for the Fall 2009 semester. In January 2009, Dean Ingraham and Assistant Dean Behonick sent a memorandum to CCPA's department chairs informing them that adjuncts should not be assigned to core courses, that tenure track faculty should teach a full load and that the use of adjuncts to teach courses would be very limited and reviewed on a case by case basis by the Dean's office. Also in January 2009, Assistant Dean Behonick sought a meeting with the Human Resources Department to discuss the list of adjuncts who would be receiving a non-renewal letter; Ms. Dear's name was on this list. After the Thamel article appeared, Dr. McGoff met in person with Provost Swain and expressed his view that not renewing Ms. Dear at that juncture would leave an unfavorable impression and that a preferable course of action would be finding Ms. Dear a continuing teaching role. The University then determined to renew Ms. Dear for the semester but assigned her only one course rather than the two she had taught the prior year.

On September 15, 2009, the Assistant Dean of CCPA notified the University's Director of Human Resources by email that two adjunct instructors in the Human Development Department, one of them Sally Dear, were not being renewed for the Spring 2010 semester. The Director of Human Resources forwarded this email to Dr. McGoff, who replied: "Thanks. Hold on tight." Dr. McGoff continued to believe that terminating Ms. Dear's employment might present an appearance problem for the University. Dr. McGoff was unable to discuss his concern with the Provost, who was out of town. On September 25, 2009, Dr. McGoff reached out to the Deputy to the President to ensure that President DeFleur was aware that a notice of

non-renewal would be mailed to Ms. Dear later in the day. The Deputy responded by email: “I spoke with the President. She said to let [Dean] Pat [Ingraham] send the letters out – we are letting go many adjuncts due to budget cuts; she does not need to review the letters.”

D. The Student-Athlete Events of September 2009, and the Administration’s Response

1. Lead-up to September 2009

By Summer 2009, the Director of Compliance, Mr. Eagan, expressed growing concern with the men’s basketball program. He advised Dr. McGoff that the basketball coaching staff was communicating directly with Admissions without involving him as required by BU policy. At Dr. McGoff’s suggestion, Mr. Eagan raised this issue directly with Dr. Thirer, who replied that he was unconcerned. Mr. Eagan reported Dr. Thirer’s response to Dr. McGoff, who took no action.

On August 14, 2009, Mr. Eagan sent an email to Dr. Thirer listing a series of concerns that he had previously communicated to Dr. Thirer and concluded:

I apologize for the lengthy email. However, I am extremely frustrated and think there needs to be a tremendous improvement in the basketball program[’]s commitment to how we operate. Please let me know how you would like me to proceed.

Dr. Thirer replied: “I will address these issues with Kevin at the first opportunity.”

There is evidence that the coaching staff was also finding it increasingly difficult to manage the conduct of team members even before the mid-September 2009 incidents that became so well publicized. On September 10, Assistant Coach Julius Allen wrote to Dr. Holmes as follows: “What is the deal with [specified player] and also the rest of the guys? I am starting to think for the long run we have to stay on top of these guys real tight. They a[re] capable of going off the deep end. . . . We’re going to need a few counselors before it’s over.”

2. The Events of September 2009 as Described in Campus Police Reports

According to reports prepared by the BU campus police, the following three incidents involving basketball players occurred during the month of September prior to the dismissal of the six players. Our description of the incidents is taken entirely from the reports.

On September 7, 2009, the BU police received a report of an odor of marijuana near David Fine's dormitory room. When officers arrived at the residence hall, they reportedly smelled a strong odor of marijuana and located Mr. Fine's room as the source of the odor. The officers knocked on Mr. Fine's door and when he opened the door the officers noted that Mr. Fine had red glassy eyes. Mr. Fine denied knowledge of the marijuana. The officers also saw the remains of a marijuana cigarette in plain view. When the officers asked about it, Mr. Fine opened his drawer and handed them a glassine envelope containing approximately two grams of marijuana. Mr. Fine was not arrested but was advised that the matter would be turned over for University Judicial action and that sanctions may be imposed. President DeFleur was notified of the incident.

On September 13, 2009, a BU police officer who was "running radar" noticed a speeding car. The officer stopped the vehicle and identified Mr. Mayben as the driver. When a second officer approached, he noticed a marijuana cigarette on the front seat of the car. Mr. Mayben was asked if he had drugs and he responded that he did not. Mr. Mayben was then asked to empty his pockets and agreed. As he exited the car, the first officer also noticed a small clear plastic baggie containing marijuana in the inside of the driver's door. When confronted with the bag, Mr. Mayben stated that the car was not his and that the owner was David Fine. An officer searched Mr. Mayben and found a small plastic bag containing marijuana on his person. Mr. Mayben was issued a ticket for speeding and an appearance ticket for the unlawful

possession of marijuana, which was returnable to the Vestal Town Court on September 24, 2009. President DeFleur was notified.

On September 14, 2009, a BU student reported to the BU police that her debit card had been stolen and used illegally.¹⁴ That morning, she had received an instant message from Chretien Lukusa, one of the basketball players, informing her that she should check with her bank because he knew of someone who had used the card. The student did as suggested and learned that an unknown person had made four purchases. The student also received a text message from a person she did not know stating “we have your card and will give you the money we charged later today or tomorrow, give us the exact amount.” On September 15, 2009, after the officers retrieved the security videos from the stores where the card was used, Mr. Lukusa, who had voluntarily come to the station to be interviewed, was able to identify three of the four individuals on the videotape: Derrick Rivera, Malik Alvin and Paul Crosby. The video showed all four putting merchandise into a shopping cart. Mr. Rivera had accompanied Mr. Lukusa to the station on that day and when asked why he was at the station, he stated that he was there because he thought that it might relate to the debit card. Mr. Rivera was told that it was in his best interest to return the items that he had bought with the card. Mr. Rivera stated that he no longer had the merchandise but would be able to pay the amount used by obtaining money from his mother. Mr. Rivera also identified Corey Chandler as the fourth person in the video.

On September 16, 2009, Paul Crosby and Malik Alvin voluntarily arrived at the station, accompanied by Assistant Coach Hsu, and spoke with the officers. Both Mr. Crosby and Mr. Alvin admitted to putting items into the shopping cart but denied having any knowledge that

¹⁴ The police report refers to the card as both a “debit card” and a “credit card.” We have used the term “debit card” because it was the term used by the card’s owner.

a stolen debit card was used to pay for those items. The following day, Corey Chandler came to the station accompanied by Coach Hsu and provided a sworn statement. Chandler stated that he had no knowledge of a stolen debit card or of a television that was purchased that night. After Mr. Chandler provided his sworn statement, the officers spoke with Coach Hsu and advised him that they believed that the players had signed false statements and that the information would be sent to the District Attorney's Office. Coach Hsu asked what the players should do if they wanted to change their statements. The officers told Coach Hsu that the players would have been better off if they had come forward and told the truth. Coach Hsu stated that he would discuss the issue with the players.

On September 18, 2009, Mr. Rivera came to the station, accompanied by his attorney, Mark Rappaport, who previously had represented Mr. Alvin in the October 2008 incident relating to the theft of condoms. Mr. Rivera admitted to having found the debit card and used it to purchase merchandise with the other players. He claimed, however, that the other players were unaware that he was paying for the merchandise with a stolen debit card. Mr. Rivera also claimed that later that day, he informed the other players that the merchandise had been purchased with a stolen debit card and told them to give him the items that they had purchased because he did not want them involved in any illegal activity. Mr. Rivera also claimed that he threw the clothing away. He ultimately returned the television. During the interview, the officers told Mr. Rivera that the other players had clearly lied in their sworn statements and that they appeared to have been coached in what to say. According to the police report, the officers also told Mr. Rivera that it was obvious that the plan was for him to "take the fall for everything and the others are to pretend they knew nothing." The officers forwarded the information from their investigation to the Broome County District Attorney's Office.

President DeFleur was briefed by the Chief of the BU police department regarding the debit card incident and the results of the police investigation.

3. The Coaches' Active Role in the Sworn Statements to Police

On September 16, 2009, the day that Mr. Crosby and Mr. Alvin provided statements to the police officers, the following series of text messages were exchanged among Coach Broadus and his assistant coaches:

Coach Hsu: We [are] all here with detectives. [Assistant Coach] Don [Anderson], myself, DJ [Mr. Rivera's mother and] uncle.

Coach Broadus: Are they going to charge them?

Do you think the[y're] gonna drop it

Coach Hsu: No charges yet. But when Chretien contacted [the] girl to try and help, she got nervous, and went to the police.

Right now, she has pressed charges, but Walmart and her Bank can also [press] charges But she doesn't know who the people are who took her card ... They [are] going to leave the case with a 3rd party (DA's office). The DA is basically the one to facilitate everything from here, whether or not anyone press[es] charges, the DA will facilitate everything. (Ellipses in original.)

Coach Broadus: Whose taking the heat? All or just DJ

Coach Hsu: Unfortunately, all 4 now. Cause no one knows exactly who did what, so they [are] investigating all 4 of them until more info comes about

Coach Broadus: Get all the guys together meet at 10:30am

Coach Hsu: Just the 4 guys, or the whole team?

Coach Broadus: The 4 guys! Go find Jason [w]ith DJ mom

Coach Broadus: Come to[] my office

Coach Hsu: I'm downtown with Corey. He's meeting with Leo for independent study now.

Coach Broadus: Leave him then go back to[] get him. I need you to[] bring Paul and Malik

Coach Hsu: Leo asked me for a ride back to campus, they will be done in a few mins.

Coach Broadus: Ok

Coach Broadus: Y[']all sit in there with them
[to Coach Hsu and Coach Anderson] If they feel [uncomfortable] tell them to[] ask for a [l]awyer

Coach Hsu: Ok, I will try and get my brother on speaker phone with them and be [their] representation

Coach Anderson: Got it

Coach Broadus: Get your brother to[] [r]ep Corey

Coach Broadus: Are they finish[ed] yet?
[to Coach Hsu and Coach Anderson]

Coach Hsu: No Paul is still in there, then Malik goes

Coach Broadus: Is Malik still in there

They want DJ

Coach Hsu: No, Don said he left about 45 mins ago. [Assistant Coach Julius Allen] just called me and said he wants to prep Corey on what to say?

Did Mark explain to y[']all what Corey needs to say?
What is Jules talking about (Ellipses in original.)

Coach Broadus: His story is the same as Paul and Malik!!!!

Coach Hsu: Ok

Coach Broadus: Talk to Juls

4. The Coaches' Rush to Resolve Mayben's 9/13 Incident under Seal

As discussed above, when Mr. Mayben was arrested on September 13, 2009 for unlawful possession of marijuana, he was given a desk appearance ticket, returnable to the Vestal Town Court on September 24, 2009. Shortly before Mr. Mayben was due in court, a discussion began among the coaches regarding the upcoming court date, which culminated in what appears to be a rush to resolve Mr. Mayben's case two days before his scheduled appearance.

On September 16, 2009, almost a week before Mr. Mayben was due in court, Coach Broadus sent the following text message to his entire coaching staff: "Ask Tiki to look on his Citation to[] see when his [appearance] date is." Coach Allen responded that the appearance date was the 24th.

On September 18, 2009, Coach Broadus and Coach Hsu had the following exchange regarding Mr. Mayben:

Coach Broadus: Did you talk to[] Tiki

Coach Hsu: Not yet. Calling now.

He doesn't get it either

Coach Broadus: Why what he say

Coach Hsu: Same old [T]iki, him against the world, he doesn't need anyone['s] help

He was fine, but he just wasn't as [grateful] as I thought he would be (Ellipses in original.)

On September 22, 2009, two days before the return date of Mr. Mayben's appearance ticket, Coach Broadus initiated a flurry of text messages to Mr. Mayben and his coaches in an attempt to have Mr. Mayben appear in court that afternoon. The following are the most pertinent text messages:

Coach Broadus: Call me asap
[to Mr. Mayben]

Coach Broadus: He needs to call me! Asap
[to Coach Anderson]

Coach Anderson: Tiki is in Troy doing the paper work for his car? And not answering the phone

Coach Broadus: When does he have class

When will he be back for it? He needs to[] be

Coach Anderson: 1:40 downtown

I working on it now

Coach Broadus: He needs to[] get back asap! The Judge wants to[] see him
[to Coach Anderson] asap

Coach Broadus: Need to[] get Tiki back asap. The judge wants to[] see him
[to Coach Hsu]

Coach Hsu: I spoke to Tiki on the phone 5:30 last night, and asked him if he was straight to get to class, he said he was fine, so he must have lied, or went to class and left for Troy, I didn't check his class last night... I will keep calling him ...
(Ellipses in original.)

Coach Broadus: You need to[] see the Judge today!
[to Mr. Mayben]

Coach Broadus: Tiki needs to[] get back here asap
[to Mr. Mayben's uncle]

He needs to see the judge to[] get this cleared

Mr. Mayben: I told Mr[. W]estbrook I couldn't make it today so [w]ho made [the] date for today [bec]ause [I] did not agree to [th]at

Coach Broadus: You need to[] get it done today! Very very important that you get this off the books in the court. Trust me. You need to[] be down here by 3pm

Because Mr. Mayben was in Troy without a vehicle, Coach Broadus directed Assistant Coach Hsu to drive to Troy to pick up Mr. Mayben and return with him to the newly scheduled court appearance in Vestal.

5. The Arrest of Mayben for Selling Drugs in Troy

On September 23, 2009, Mr. Mayben was arrested in Troy for selling cocaine.

The next day, President DeFleur released the following statement:

I am reiterating to our Athletic Director Joel Thirer and Coach Kevin Broadus that we will not tolerate this behavior in our student athletes. This behavior does not reflect the quality of our program and the hundreds of student athletes at Binghamton University. We appreciate that Coach Broadus has given second-chances to athletes but our program can not take these risks and I have made this clear to both Thirer and Broadus.

In addition, Dr. Thirer issued this statement regarding Mr. Mayben's dismissal:

Emanuel Mayben has been permanently dismissed from the men's basketball program. His arrest is both shocking and disappointing. Our University and department will not tolerate this type of behavior. It's a privilege to be a student-athlete and represent this University and we will not allow that privilege to be abused. Our coaches need to recruit student-athletes who value the opportunity that's being given to them and I have communicated that directive to Coach Broadus loud and clear.

According to Dr. Thirer, Mr. Mayben's September 23 arrest was the tipping point and the rules changed. Prior to Mr. Mayben's arrest, the other players who had been involved in incidents earlier in September by some accounts had been suspended from the team, but no one had been dismissed. After Mr. Mayben's arrest, it was decided that a message needed to be sent that the behavior was unacceptable and that all of the players had to be dismissed. Dr. Thirer informed Coach Broadus of the decision to dismiss the players during a meeting with Dr. Thirer, Mr. Norris and Mr. Siegel. After the meeting, Coach Broadus broke the news to the players. The following day, Coach Broadus announced that Malik Alvin, Corey Chandler, Paul Crosby,

David Fine and Derrick Rivera were dismissed from the team. No reason was given for the dismissals, and no BU personnel were made available for further comment.

6. The “Resignation” of Dr. Thirer and the President’s Announcement

On September 30, 2009, President DeFleur announced: “Dr. Joel Thirer will be stepping down as Director of Health, Physical Education and Athletics effective immediately. He will be assigned to the Office of the Provost where he will work on projects related to undergraduate transfer issues.”

We have been provided with differing accounts of how Dr. Thirer’s reassignment came about. According to Dr. Thirer, he was blindsided by the announcement that he had resigned. Earlier that day, he had been called into the President’s office for a meeting. The President articulated to him that a change needed to be made and that she would be making a formal statement later in the day. Dr. Thirer was also to prepare a statement, which he provided to Gail Glover. When Dr. Thirer asked to be able to review the President’s statement, Ms. Glover responded that she was not authorized to let him see it. Only after the President’s statement was publicly released did Dr. Thirer learn that his removal had been characterized as a resignation. President DeFleur, on the other hand, maintains that Dr. Thirer offered her his resignation, although she observed that she could understand how Dr. Thirer could have perceived that he was fired in light of the strong actions she was implementing in response to the September 2009 developments.

The following week we were retained by the SUNY Board of Trustees to conduct an independent review, gather the relevant facts, and make recommendations based on our findings.

E. NCAA Compliance Issues Involving the Coaching Staff

During the course of our review, we took note of four matters that might give rise to a potential violation of NCAA legislation, and include them in this report in the hope of furthering the objective of moving beyond this sad chapter in BU's history. The first came to our attention during review of text messages sent and received by the basketball coaching staff through University-issued telephones. The remaining three were brought to our attention by the Director of Compliance, who already has made self-reports of secondary violations to the NCAA on behalf of BU. These four matters are described below. Where the Director of Compliance had already taken the lead on investigating the matter, we reviewed the resulting work product and made our own determination whether any additional investigative leads were available.

1. Communications between Coach Hsu and Malik Alvin

A number of text messages between Assistant Coach Marc Hsu and team member Malik Alvin suggest that Coach Hsu provided Mr. Alvin with both improper benefits and inappropriate academic assistance. The following are excerpts from their text message communications relating to benefits:

May 20, 2009 – May 21, 2009

Mr. Alvin: Yo you got money on you?

Coach Hsu: No I don't. [A player] may come up with Fred Snea and hoop tonight. How can they contact [you]? . . .

[Later that evening]

Mr. Alvin: Where [are you] at[?] [W]e [are] waiting for [you] at [D]enny[']s

Coach Hsu: Why are you waiting for me? I gave Fred 50 dollars, I am not coming-

May 28, 2009

Mr. Alvin: [You] got 20 dollars on [you]?

Coach Hsu: Where [are] my headphones? Leo work? Community service?¹⁵

June 17, 2009

Mr. Alvin: . . . [A]re [you] going to give me the money in the morning so I can pay my fine[? L]onnie said he talked to [you] about it

Coach Hsu: Call me on my school cell using your phone and explain to me what is going on

Mr. Alvin: It[']s the fee for my community service[. I]t[']s 120\$ but I only have 60\$

June 25, 2009

Coach Hsu: . . . I got to do something for Kev in the office before I leave. Let's meet @ the gas station around 345 right before [your] class. Also I wan[t to] do everything @ once, and make sure [you are] going to class-

Mr. Alvin: A[ll r]ight

Coach Hsu: . . . I will meet [you] @ your class in 20 or 30 mins, and just give [you] some guap for gas

Mr. Alvin: I[']m about to get it now[.] [I']m [i]n coach a office

Coach Hsu: I don't have it on me! I got to stop @ the bank, that's why I said I'm do[ing] everything @ once-

Mr. Alvin: I won't make it[.] I have no gas at all

Coach Hsu: Ask coach for a couple of dollars

¹⁵ Coach Hsu had been reminding Mr. Alvin in prior text messages of his need to complete coursework for his class with Dr. Leo Wilton and his community service hours as part of the disposition of the criminal charge arising from his theft from Walmart.

No witness provided evidence that a representative of the basketball program (or anyone else at BU) offered or conveyed an improper benefit to a recruit or student-athlete.

Coach Hsu denied giving any money or other improper benefit to Mr. Alvin. He claimed that his messages were intended merely to silence Mr. Alvin's requests. Mr. Alvin declined our invitation to speak with us.

The following are excerpts from their text message communications relating to Mr. Alvin's coursework:

May 11, 2009

Mr. Alvin: Yo the paper [is] due 12 noon[.] I wrote 2 1/2 pages but I need you to reword the part about the book because I got that from the internet

Coach Hsu: Ok so send it to me then

Mr. Alvin: . . . [J]ust add a conclusion on violence

Mr. Alvin: I left the stuff from the internet the same so you can know what you[']r[e] changing

Mr. Alvin: The teacher['s] email is [email address provided. I]t[']s due before 12noon tomorrow

Coach Hsu: I will send [it] to [Mr. Alvin's tutor] in the am

June 22, 2009 – June 23, 2009

Coach Hsu: I thought [you were going to] work with Mo on that Leo final?

Mr. Alvin: I don't have a phone and [M]oe gone give his paper but I need [you] to change it up so it [w]on't be the same exact paper

Coach Hsu: We need to know the questions and [stuff] though.

July 1, 2009

Coach Hsu: When are you coming back for court? We have to finish Leo [assignment] after court[. T]hey are on my [case] about that!!!!

Mr. Alvin: Tonight

....

Mr. Alvin: Go to my email[. M]uhammad sent it to me[.] It[']s in my [B]inghamton email [Mr. Alvin then provides his email address and password.]

Coach Hsu: I have no idea what the assignment is, or what it[']s about, or what we need to do. We need to do it [to]gether

Mr. Alvin: It[']s done already[.] I just need [you] to change it up

Coach Hsu: We will talk about it tomorrow or over the phone! Not email!

Coach Hsu denied that his assistance with Mr. Alvin's coursework was inappropriate.

2. BU's Report of the Recruiting Violation by Coach Broadus

On October 6, 2009, Coaches Broadus and Hsu attended a basketball practice session at Notre Dame Preparatory School in Fitchburg, Massachusetts that was open to coaches to evaluate players. Under the NCAA recruiting calendar, October 6 was the first day of an evaluation period during which the coaches were permitted to attend and watch the practice but were not permitted to have contact with the recruits.

According to FoxSports, when its reporter asked Coach Broadus on October 9 whether he and Coach Hsu had engaged in impermissible contact with two Notre Dame players, Coach Broadus denied speaking with the players. However, FoxSports further reported that the two players had confirmed that Coach Broadus had spoken directly with them, expressing interest in their attending BU and inviting them for a campus visit.

Later that day, Coach Broadus self-reported his impermissible contact with the two players to BU. Coach Broadus acknowledged that he had spoken briefly with the Notre Dame coach and the two recruits, gave the coach and the recruits his business card and invited the recruits to visit BU. Coach Broadus explained in a written statement to BU that he did not realize that these communications were one day past the permissible contact period and that he would consult the NCAA recruiting calendar in the future. BU self-reported Coach Broadus's violation to the NCAA later the same day. On October 14, 2009, interim Athletic Director Jim Norris, citing "continuing incidents of concern related to the men's basketball program," announced that he had placed Coach Broadus on an indefinite paid leave of absence and had appointed Assistant Coach Mark Macon as interim Head Coach.

Coach Hsu denied that he was party to the impermissible communications with the recruits, and Coach Broadus told Mr. Eagan that Coach Hsu had no contact with the preparatory school coach or the two student-athletes. However, Coach Broadus acknowledged to us that Coach Hsu was present for those impermissible communications.

BU's self-report to the NCAA requested that this incident be treated as a level one secondary violation. The self-report included a listing of corrective actions taken by BU, including a letter of reprimand to Coach Broadus and prohibition of any further off-campus recruiting by him through October 31, 2009; a reduction in the men's basketball program's permitted evaluation days; and the institution of a requirement that the Director of Compliance provide advance approval for all recruiting trips.

Because of the technical and limited nature of the infractions at issue and the Director of Compliance's strong response, we determined that the University's response was sufficient and did not merit further investigation by an independent party.

3. BU's Report of the Coaches' Telecommunications with Recruits

Independent of our review, the Director of Compliance conducted a review of 2008-09 recruiting documentation, including telephone records, for all sport programs. He determined that Coach Broadus and Assistant Coaches Julius Allen, Don Anderson and Marc Hsu had made a limited number of impermissible telephone or text message contacts with recruits in violation of NCAA legislation. Accordingly, on December 17, 2009, the Director of Compliance made a self-report to the NCAA of a level one secondary violation by the four coaches. The report stated that (1) Coach Broadus sent two prohibited text messages (on September 10, 2008 and March 14, 2009) and made one prohibited telephone call (September 8, 2008); (2) Coach Allen sent one prohibited text message (August 7, 2008); and (3) Coach Anderson made three prohibited telephone calls (September 11 and 24, 2008, and November 1, 2008). The self-report identified a number of corrective actions taken by the University, including disabling the text messaging feature on cell phones issued to these coaches by the University, a five-week restriction of all off-campus recruiting by these coaches (including telephone contacts), a reduction in the basketball program's evaluation days and mandatory monthly compliance review sessions with the entire basketball staff.

Again, because of the nature of the infractions at issue and the Director of Compliance's strong response, we determined that the University's response was sufficient and did not merit further investigation by an independent party. The NCAA inquired of us whether there was an explanation for an apparent discrepancy in that the coaches' own reports of recruiting contacts reflected telephone communications not reflected in the University's telephone records. While we do not have a definitive answer to this question, we suspect that coaches may in some instances have reported communications made on telephones not belonging to the University.

4. The Emanuel Mayben Allegations and Recantation

In the wake of Emanuel Mayben's arrest in Troy, BU determined that he should no longer remain in campus housing. In response, Mr. Mayben sought a cash refund of the housing component of his scholarship. In consultation with the AEC, the Director of Compliance, Mr. Eagan, concluded that such a refund would constitute a prohibited benefit to Mr. Mayben and could not be paid.

Mr. Mayben was upset and contacted Mr. Eagan by telephone on October 5, 2009. Mr. Mayben was verbally abusive and not fully coherent. He stated that if he did not receive a refund by the end of the week he would go to ESPN and the *New York Times* and "bring . . . down" the Athletic Department, the President of the University and "Coach." Mr. Mayben then alleged that Coach is paying for cell phones and that Coach is paying for "JUCOs," a reference to junior college transfers. He also vaguely referred to "Theo," which Mr. Eagan took to be a reference to former BU player Theus Davis. Mr. Eagan responded that it was his job to investigate allegations of misconduct in athletics and asked to meet with Mr. Mayben. Mr. Mayben refused to comment further other than to say his attorney would be in contact.

Mr. Mayben communicated his concern about obtaining the refund to Assistant Coach Don Anderson, who then visited Mr. Eagan to ask why the refund could not be made. Mr. Eagan explained that issuing the refund would be an NCAA violation, and Coach Anderson responded that he understood.

Mr. Eagan took appropriate steps to notify responsible personnel that a refund should not be issued to Mr. Mayben. However, a refund check was nevertheless mistakenly processed and mailed to Mr. Mayben's home. We have spoken with the personnel involved and conclude that this inadvertent error was made in good faith.

On October 23, 2009, Mr. Mayben sent the following text message to Coach Anderson: "Between Me [a]n[d] U... I got my refund for housing." (Ellipses in original.) Coach Anderson received this text message but did not notify Mr. Eagan or anyone else of the news that Mr. Mayben had received the refund which Mr. Eagan had described to him as impermissible. Coach Anderson explained that he did not view it as his business to involve himself, notwithstanding the fact that he had approached Mr. Eagan previously to discuss the matter and advocate on Mr. Mayben's behalf.

On November 12, we apprised Mr. Eagan of Mr. Mayben's October 23 text message. Mr. Eagan contacted University personnel and learned of the mistaken refund payment. The University then mailed a notification to Mr. Mayben that the refund should not have been issued to him and that he would have to repay the funds. Mr. Eagan subsequently worked with Student Accounts to develop improved procedures designed to prevent any mistaken refunds to student-athletes in the future.

On November 20, 2009, Mr. Mayben called Mr. Eagan to inquire about the notification that he would have to repay the refund. Mr. Eagan advised him that repayment was mandatory and that acceptance of the refund would be an acceptance of an improper benefit. In this conversation, Mr. Mayben recanted his prior allegations of misconduct concerning the basketball program. Mr. Mayben indicated that he was upset at the time because he felt that he was being treated unfairly regarding his refund request. Mr. Mayben said that he had never received any improper benefit from anyone associated with the basketball program and that he had no information that anyone else received an improper benefit. Mr. Mayben said that his tuition at Hudson Valley Community College had been paid in cash by his uncle. Mr. Eagan wrote an email to Mr. Mayben confirming their conversation, to which Mr. Mayben replied as

follows: “Exactly,, I honestly have nothing else to say about anything that does not pertain to Me getting My degree. Sorry for your inconvenience!!!” On November 30, 2009, Mr. Mayben went to the Student Accounts office and signed an agreement to pay the amount that was improperly refunded for the Fall semester from the balance of financial aid due to him for the Spring semester.

Mr. Mayben remains enrolled at BU. He declined our invitation to speak with us. In November Mr. Eagan conducted in-person interviews of all men’s basketball players then on the roster. All players denied having any information that anyone associated with the basketball program offered or provided any improper benefits. Mr. Eagan received such denials as well from each of the dismissed basketball players who agreed to be interviewed by him. All members of the coaching staff have denied such misconduct. It therefore appears that no additional avenues of investigation currently exist regarding Mr. Mayben’s now-recanted allegations. BU has made a self-report to the NCAA regarding the mistaken refund payment to Mr. Mayben.

IV. Principal Findings and Recommendations

Based upon the foregoing factual recitation, we make the following findings and recommendations.

1. Admissions Standards

Although BU admissions personnel previously had admitted basketball applicants with weak academic backgrounds on an exception basis, Coach Broadus assumed wider latitude to apply minimum NCAA standards for all player-applicants, including candidates who had struggled at prior institutions and non-scholarship applicants expected to “walk on” the team. In several instances, Coach Broadus sought the admission of athletes who had exhibited serious behavioral problems at prior institutions. When Admissions personnel resisted this change in standards, the head coach and the Athletic Director pushed back strongly, in at least one instance enlisting allies in the BU administration to overturn a rejection decision by Admissions, ultimately overcoming the resistance.

In some cases, Coach Broadus and others communicated directly with Admissions regarding applicants and admissions standards without proceeding through the Director of Compliance, the designated “Admissions Liaison” between coaches and Admissions. These contacts violated BU’s policy in its published Guide to NCAA Rules Compliance, which stated: “All admission reviews, admission recommendations, and contact with the Office of Admissions will be coordinated through the Admissions Liaison, no exceptions.” When the Director of Compliance brought such violations of BU policy to the attention of Athletic Director Thirer and Vice Provost McGoff, no action was taken. BU’s new admissions strategy for basketball players—described as an “experiment”—involved risk that was approved by the Athletic Director and at the highest levels of BU administration, including the President.

2. Support Services

Beginning in the Fall 2008 semester, BU's admissions strategy suddenly multiplied the pool of student-athletes requiring extensive academic and other support services that the coaching staff and Athletic Department were not yet fully equipped to provide. To be sure, they made efforts. A tutoring/mentoring program was established in the college in which most of the players were enrolled, and BU brought into the University a new Associate Athletic Director for Student Services who had greater experience in Division I athletics. Members of the coaching staff attempted to monitor players' attendance at classes and tutoring sessions, to assist in the completion of assignments and arrange extensions where necessary, and even to lobby faculty for the creation of summer classes and independent study opportunities for players to catch up academically outside the basketball season. But these efforts were essentially reactive to mounting difficulties, and insufficient to meet needs that should have been anticipated earlier. It is important, and admirable, for a university to create opportunities and second (or more) chances for particularly challenged student-athletes. But those opportunities become illusory if the institution does not have a sufficient support network already in place to help these individuals succeed.

3. Responses to Allegations of Misbehavior

The manner in which the coaching staff and the Athletic Department reacted to certain allegations of misconduct by basketball players contributed to a culture in which damage control was emphasized at the expense of constructive discipline and personal responsibility. Separately, the three-game suspension of Malik Alvin following his arrest is certainly open to criticism for its leniency. In one criminal matter, the coach personally involved himself and an assistant coach in securing a player's expedited attendance in court in order to resolve a pending

matter under seal. In a separate criminal inquiry, the coach gathered and spoke with several players prior to their police interviews and then directed assistant coaches to accompany the players to the campus police station for their interviews.

To be clear, coaches and administrators are not responsible for every mistaken judgment or criminal incident involving a student-athlete. Nor should they be expected to abandon a student-athlete in a time of need in the face of an arrest or law enforcement inquiry. The balance between appropriate supportive efforts and insistence upon personal responsibility is not always easy to strike. Nevertheless, the reactions and involvements of BU personnel, taken as a whole, leaned too heavily in the direction of managing the fallout and too lightly in the direction of maintaining a code of conduct through expectations of appropriate discipline.

4. The Sally Dear Allegation and Its Aftermath

With regard to the disagreement between Ms. Dear and the Athletic Department, we conclude that both sides reached their strongly held positions in good faith. Ms. Dear earnestly wished to enforce her published student attendance requirements that she felt crucial to the effective teaching of her class; Ed Scott, with the support of the Athletic Director, persistently advocated that the players were due a higher level of accommodation to their schedules when competing on behalf of the University. Ultimately, Ms. Dear's academic department, CCPA administrators and the University's counsel supported Ms. Dear's right to apply her absence policy. Ms. Dear chose to modify her absence policy to a limited degree to accommodate the players, reducing grades but not to the full extent provided in her syllabus. We found this outcome to be appropriate under all the circumstances.

More problematic was BU's reaction when the *Times* in February 2009 published a story reporting (among several other criticisms of the basketball program) that Ms. Dear felt

pressure from the Athletic Department bordering on harassment. In a televised interview one month later, Pete Thamel of the *Times* stated that no BU administrator had spoken with Ms. Dear about her concerns. In fact, no member of the BU administration, CCPA or the Athletic Department asked Ms. Dear about her concerns or directed anyone else to do so. Instead, the Dean of CCPA, without speaking with Ms. Dear, concluded that her perception of pressure was baseless and apologized to Mr. Scott. After collecting and reviewing emails and other documents, Dr. McGoff likewise concluded that Ms. Dear's concerns were unfounded—again without speaking with Ms. Dear or having met with Mr. Scott. And on October 1, 2009, the Provost issued a two-page memorandum rejecting Ms. Dear's assertion without having spoken with any witness to the events in question or hearing a report from someone who had spoken with such a witness. Amid these developments, in September 2009 BU notified Ms. Dear and another adjunct lecturer that their teaching positions would not be renewed, and Ms. Dear's academic department hired three new adjunct lecturers to teach for the spring 2010 semester.

BU's reaction to Ms. Dear's publicized concerns risked promoting an impression that might perhaps have been dispelled by a more appropriate response. After Ms. Dear's concerns were publicized, the President and the Provost asked the Deans of each BU college to inquire of their faculty whether there were any instances of pressure exerted by the Athletic Department, and the Deans reported back that there were none. Moreover, it should be noted that no faculty member came forward to us with any concern of pressure from the Athletic Department as voiced by Ms. Dear, despite the well-publicized available avenue to contact us directly. But where a stated concern like Ms. Dear's has been rejected without any effort to speak directly with her, the process undermines confidence that any aggrieved faculty would feel free to raise similar concerns with the BU administration or with us. Here, there is ample

evidence of personal friction between Ms. Dear and the CCPA administration before the disagreement emerged between Ms. Dear and the Athletic Department; additionally, there is ample evidence of earnest motivations for BU and CCPA to find as many opportunities to reduce costs as possible in light of serious budgetary constraints, as well as restructuring of its curriculum. Again, however, BU's response left discomfort about the incident with a long-time faculty adjunct that might otherwise have been dispelled.

5. Oversight of the Basketball Program

Finally, we found that additional and improved oversight of the men's basketball program was required both within the Athletic Department and from the BU administration personnel outside the Athletic Department, including the President. The former Athletic Director's personal efforts to supervise Coach Broadus, a first-time head coach, and the basketball program were insufficient. Neither the Faculty Athletic Representative nor Vice Provost McGoff stepped in to provide additional oversight in the face of growing problems. The President took no corrective action in her role as the supervisor of the Athletic Director and the person charged with ultimate responsibility for BU's intercollegiate athletic program. Neither the President nor the former Athletic Director reacted with sufficient objectivity and self-inquiry when faced with growing concerns from the AEC and its member institutions regarding the direction of BU's men's basketball program. The Intercollegiate Athletic Board and the Intercollegiate Athletic Committee of the Faculty Senate should therefore undertake an expanded, documented role going forward in supervising the direction and operation of the men's basketball program.

6. BU Should Establish a More Active Role for the IAC and the IAB in Oversight and Control of the Athletics Program

The President has ultimate responsibility for leading all campus functions at BU, the Athletic Department being one of many. The men's basketball program was a limited but high-profile component of BU. President DeFleur took an active interest in the basketball program, heard concerns voiced by the AEC and its members, directly supervised Dr. Thirer (who in turn directly supervised Coach Broadus) and appointed Dr. Michael and Dr. McGoff to their roles in overseeing intercollegiate athletics.

The Provost has responsibility for the academic integrity of the University. The Admissions function reported to her. When she was advised of pressures coming from the Athletic Department and from the administration to admit prospective basketball players without meaningful review of their credentials, the Provost privately supported Admissions but took no action to address the pressures or to discuss the issue with those who advanced the interests of the men's basketball team.

The oversight of the men's basketball program in particular, and intercollegiate athletics generally, would be strengthened by formalizing a more active role for the IAC and IAB.

The IAC is a valuable institution of the Faculty Senate and a vehicle for oversight independent of the President and the BU administration. As the IAC Chair has recommended, the proposal to disband the IAC should be rejected. The IAC should consider revising its charter, in light of the findings of this Report, to formalize a more active role in monitoring and documenting its review and analysis of important issues faced by men's basketball and intercollegiate athletics. Particular areas that might benefit from ongoing review and analysis by the IAC include the admissions standards for prospective student-athletes (including standards applicable to transfer credits), admissions procedures, the academic success and retention of

student-athletes by team, the effectiveness of support services offered to student-athletes in need of assistance, effectiveness of the Athletic Department's supervision of coaches, the prevalence of behavioral problems by team and the appropriateness of disciplinary responses. With respect to admissions procedures, the IAC should consider anew the recommendation of the Subcommittee on Academic Integrity, made during preparation of the Self-Study Report, that a faculty advisory committee be established to assist in decisions regarding the admissions decisions for prospective student-athletes who do not meet BU's regular admission standards. Moreover, while giving second chances to student-athletes with special academic needs is commendable, the University should consider, and make known, how large a concentration of such students at any one time it is prepared to accommodate successfully. The IAC should also consider whether a detailed annual report to the Faculty Senate on specific areas of review would provide the faculty with an improved forum for input into the direction of the University's athletics program.

The IAB is a valuable source of both oversight of the Athletic Department and of counsel to the President and the administration on matters relating to the intercollegiate athletics program. Again, the IAB should consider reviewing and revising its charter in light of the findings of this Report and in light of the IAC's important role. Because of its links with the Athletic Department and the campus administration, the IAB may be most valuable in formulating proposals for improvements, while ceding to the IAC when appropriate responsibility for appraising the effectiveness of such improvements. While some overlap in the memberships of the IAC and IAB may offer efficiencies and other benefits, care should be taken to develop unique memberships for each institution that reflect the differences in their functions.

7. SUNY Should Consider Appointment of an Athletic Oversight Officer

The SUNY Board of Trustees and the Chancellor have ultimate responsibility for the operation of all educational institutions that comprise the SUNY system. That responsibility extends to oversight of the athletic programs at each of the SUNY schools. As the events that have occurred at BU confirm, colleges and universities that have chosen to compete at the NCAA Division I level are subject to an intense and unremitting struggle to balance the desire to win games with the primary academic mission of an institution of higher education. At times, as this report shows, the intensity of the desire to win may undermine and compromise that primary mission. Even with respect to competition at the Division II and III levels, pressures will exist to preserve a suitable balance between athletics and academics, including how best to resolve the controversial and difficult issues that necessarily arise when an institution considers elevating its athletic program to Division I. To help ensure that those institutions in the SUNY system that conduct significant intercollegiate athletic programs are better able to maintain the critical balance between athletic success and academic excellence, and to enable the SUNY system to exercise broad oversight and control of all its athletic programs, SUNY should consider the appointment of a SUNY Athletic Oversight Officer who will report only to the Board of Trustees and the Chancellor. The duties of that officer should be to monitor on a continuous basis the admission, academic progress and behavior of student-athletes attending SUNY schools; to oversee and ensure compliance with all applicable policies of each institution, SUNY, the conferences to which SUNY schools belong and the NCAA; and to make recommendations to the Board of Trustees and the Chancellor regarding policies and procedures concerning intercollegiate athletics throughout the SUNY system.