



## **FREQUENTLY ASKED QUESTIONS NOVEMBER 2019**

### **MEDICAL MONITORING CLASS SETTLEMENT AGREEMENT: ARRINGTON V. NCAA**

This document is a companion piece to the recent membership notice of final approval of the class action settlement agreement in *In re: National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation* (Arrington Matter). This document addresses some of the frequently asked questions regarding the settlement agreement in the Arrington Matter and related member obligations. The content of this document is being provided for informational purposes only and should not be construed as legal advice or a substitute for legal advice. We encourage you to review the content, including the materials accessible by hyperlink below, with applicable legal advisors and other school staff who might assist you in appropriately evaluating this information as it applies to your individual institutional risk and practices.

#### **1. What is the Arrington Matter?**

The Arrington Matter was initiated in 2011 as a putative class action concussion lawsuit against the NCAA by plaintiffs that participated in men's and women's NCAA college sports at NCAA member schools. In 2013, the parties began negotiating toward a settlement agreement that would, among other things, relieve NCAA member schools from certain potential liability in the future.

In 2016, the Court granted preliminary approval of the settlement terms and, since that time, the parties have provided the required notifications to settlement class members and taken other steps as required by the Court and/or settlement while awaiting formal and final judicial approval. Final approval of the settlement terms occurred on August 13, 2019 and, pursuant to Court order, the effective date of the Settlement Agreement is November 18, 2019. A copy of the final Settlement Agreement can be found [here](#).

#### **2. What are the primary outcomes of the Settlement Agreement?**

The primary outcomes are twofold.

- a. Medical Monitoring. The NCAA will provide \$70 million in funding to make free medical screening and testing, known as "medical monitoring," available to student-athletes who played an NCAA sport at an NCAA member school prior to July 15, 2016. The details related to the medical monitoring services are described in the Settlement Agreement. Information about the process through which student-athletes can access the monitoring services will be made available on the NCAA Student-Athlete Concussion Injury Litigation Website at: <http://collegeathleteconcussionsettlement.com/>
- b. Member Obligations. The description of member obligations can be found in Section IX of the Settlement Agreement. While the settlement agreement was

negotiated directly with the NCAA and not its member schools, the language in Section IX.B. of the Settlement Agreement provides that an institution must certify in writing that it has complied with all the member obligations described in Section IX.A. in order to receive the benefit of the settlement release. The details of the settlement release can be found in Sections II.QQ. and II.RR. of the Settlement Agreement. Subsequent questions in this document will address member obligations in more detail.

**3. What does the effective date mean, and why is it important for member schools to know?**

The effective date of November 18, 2019 is the date on which the Settlement Agreement became effective. It triggers certain timelines under the Settlement Agreement including the window in which member schools can certify compliance with the member obligations set forth in Section IX.A. If a member school wishes to receive the benefit of the settlement release, it must certify in writing within six months from the effective date (on or before May 18, 2020) that it has put in place a concussion management plan that meets the requirements of Section IX.A. of the settlement agreement.

**4. What is the risk to member schools who do not certify compliance with Section IX.A. of the agreement within six months of the effective date?**

The incentive for a member school to comply with the member obligations is that compliance is tied to the settlement release such that the release will not apply to any member school that fails to submit a written certification of compliance by May 18, 2020. Once submitted, all certifications will be publicly posted on the NCAA Student-Athlete Concussion Injury Litigation Website.

Each member school should consult with institutional legal counsel and/or applicable risk management staff to carefully evaluate the institution-specific value of the release and any corresponding risks that may result from failing to certify compliance.

**5. What if a member school has in place a concussion safety protocol that meets all existing NCAA legislative requirements?**

While many of the member obligations in Section IX.A. of the Settlement Agreement are similar to or overlap with certain existing NCAA health and safety legislation and related NCAA health and safety guidance materials, the member obligations are distinct from and, in some instances, differ from the requirements and recommendations in the legislation and guidance materials. Therefore, it is important to consult with school legal counsel and other risk management staff as necessary to fully understand these differences and to evaluate your institutional practices and compliance with respect to the member obligations and NCAA legislation and guidance

**6. How do existing NCAA legislative requirements compare to the member obligations described in Section IX.A. of the Settlement Agreement?**

NCAA legislative requirements vary by division and the legislation pertaining to concussion management for each institution is available in its respective divisional manual. However, in recent years all three divisions have referenced and relied on the NCAA Concussion Safety Protocol Checklist as part of their concussion management guidelines and review practices. A copy of the current NCAA Checklist can be found [here](#).

Most of the member obligations described in Section IX.A. of the Settlement Agreement mirror the requirements described in the NCAA Checklist. However, there are several areas where the language varies between the NCAA Checklist and the Settlement Agreement. The member obligations are described in more detail below.

**a. Settlement Agreement Section IX.A.1: Preseason Baseline Testing.**

The NCAA Checklist requires that a school's concussion management plan specifies documentation that each varsity student-athlete has received *at least one* pre-participation baseline concussion assessment and prescribes a variety of areas that the assessment should address.

In contrast, the member obligations in Section IX.A.1 of the Settlement Agreement require preseason baseline testing and do not specify that it is a one-time obligation. Unlike the NCAA Checklist, the Settlement Agreement is silent on and does not prescribe any specific testing areas, which means that, because there are not currently evidence-based and prescribed best practices related to annual testing, primary athletics health care providers and athletics health care administrators will need to consider which annual tests are consistent with emerging clinical information such as, among others, the Balance Error Scoring Scale (BESS/modified BESS), the Visual Oculomotor Screen (VOMS) and other annual baseline tests that assess cognition and symptom evaluation.

**b. Settlement Agreement Section IX.A.2: Same Day Concussion Management.**

The NCAA Checklist provides that a school's concussion management plan specifies that a student-athlete with a confirmed concussion must be removed from practice/play for that calendar day. The language in Section IX.A.2 of the Settlement Agreement can be reasonably interpreted as being consistent with the NCAA Checklist requirement.

c. Settlement Agreement Section IX.A.3: Return-to-Play Clearance.

The NCAA Checklist provides that a school's concussion management plan specifies that a final determination of post-concussion return-to-play should be made by the team physician *or medically qualified physician designee*.

In contrast, the member obligations in Section IX.A.3 of the Settlement Agreement require that any NCAA student-athlete diagnosed with a concussion by medical personnel must be cleared by a physician before being permitted to return to play in practice or competition. The Settlement Agreement does not include a reference to a physician designee (e.g., nurse practitioner; athletic trainer) as an individual who may be eligible to clear a student-athlete post-concussion. Accordingly, each member school that wishes to benefit from the settlement release should review its existing concussion management protocol to evaluate the return-to-play clearance process and which staff will be available and required to participate in post-concussion clearance activities going forward.

d. Settlement Agreement Section IX.A.4: Presence of Medical Personnel During Competitions.

The NCAA Checklist provides that a school's concussion management plan specifies that medical personnel with training in the diagnosis, treatment and initial management of acute concussion must be "present" at all NCAA varsity competitions in certain sports\*. It goes on to state that to "be present" means to be *on site at the campus or arena of the competition*.

In contrast, Section IX.A.4 of the Settlement Agreement provides that NCAA member institutions shall ensure that medical personnel with training in the diagnosis, treatment and management of concussion are present at all Contact Sports\* games for Divisions I, II and III. It does not include any additional language that expands or clarifies what it means to "be present" at a competition. Accordingly, under a conservative interpretation of this language it could be argued that to "be present" means to be physically present at the competition field or arena and each member school that wishes to benefit from the settlement release should review its existing concussion management protocol and consider how it will address this specific requirement going forward.

\*Note: The NCAA Checklist also varies from the member obligations in the Settlement Agreement with respect to which sports must be covered by applicable present medical personnel. For purposes of Section IX.A.4, the Settlement Agreement defines Contact Sports as: football, lacrosse, wrestling, ice hockey, field hockey, soccer, and basketball, whether a men's or women's team. The

corresponding NCAA Checklist requirement applies to all those sports as well as NCAA varsity competitions in equestrian, pole vault, rugby and skiing. Because the list of Contact Sports covered by Section IX.A.4 of the Settlement Agreement is a subset of the sports identified in the NCAA Checklist, it is reasonable to conclude that the Settlement Agreement does not expand member obligations with respect to how many sports must be covered by applicable medical personnel for competition purposes.

e. Settlement Agreement Section IX.A.5: Availability of Medical Personnel During Practices.

The NCAA Checklist provides that a school's concussion management plan specifies that medical personnel with training in the diagnosis, treatment and initial management of acute concussion must be "available" at all NCAA varsity practices in certain sports\*. It goes on to state that to "be available" means that, at a minimum, medical personnel can be contacted at any time during the practice via telephone, messaging, email, beeper or other immediate communication means and that the case can be discussed through such communication, and immediate arrangements can be made for the athlete to be evaluated.

Section IX.A.5 of the Settlement Agreement states that NCAA member institutions shall ensure that medical personnel with training in the diagnosis, treatment and management of concussion are available at all Contact Sports\* for all practices for Divisions I, II and III. While it does not include a definition of what it means to "be available," it would be reasonable to interpret that reference in a manner that is consistent with the language in the NCAA Checklist.

\*Note: As with Section IX.A.4 of the Settlement Agreement, the NCAA Checklist varies from the member obligations in Section IX.A.5 with respect to which sports must be covered by applicable present medical personnel but it is reasonable to conclude that the Settlement Agreement does not expand member obligations with respect to how many sports must be covered by applicable medical personnel for practice purposes. See FAQ 6.d above for additional information.

**7. What is the mechanism for a member institution to deliver the compliance certification required under the Settlement Agreement?**

Certifications must be delivered to certain identified settlement representatives within six months of the settlement by May 18, 2020. The Settlement Agreement provides that each institution shall provide its certification to the Special Master, Class Counsel and Notice Administrator and that such certification will be posted on the Settlement Website.

The national office is in the process of identifying a platform through which we might simplify and streamline the certification process for member schools. We anticipate that we will be able to share more information about the suggested certification platform and process after the NCAA Convention in early 2020.

**8. Section IX.C. of the Settlement Agreement provides that member institutions will report to the NCAA instances of diagnosed concussions in NCAA student-athletes and their resolution. Is this part of the compliance certification requirement and how are member schools supposed to report?**

Member schools are required to participate in concussion reporting under Section IX.C of the Settlement Agreement but doing so is not tied to the compliance certification or the release. It is likely that the concussion reporting requirement will be distinct from the catastrophic injury reporting process. While the logistical details around the process are still uncertain, the national office anticipates that it will finalize and share more information about the anticipated reporting system and related reporting process after the NCAA Convention in early 2020.

The timing for reporting isn't prescribed in the Settlement Agreement. However, the national office would expect that institutional reporting activities will begin once the concussion reporting system has been established. It is anticipated that each division will consider legislation at the 2020 NCAA Convention to require institutions to report instances of concussions and their resolution.

**9. What about the concussion education requirements under the Settlement Agreement?**

Section IX.F of the Settlement Agreement states that the NCAA will require member schools to provide NCAA-approved concussion education and training to student-athletes, coaches and athletic trainers before every season and will periodically remind institutions of such obligations. These obligations are consistent with expectations under the NCAA Checklist (although the NCAA Checklist also requires that each school's concussion management plan accounts for annual education of team physicians and directors of athletics). The Committee on Competitive Safeguards and Medical Aspects of Sports, in conjunction with the NCAA Sport Science Institute, is in the process of reviewing currently available educational materials and will continue to supplement and distribute relevant concussion-related education materials to member schools as necessary to facilitate and support continuing compliance in this area.

**10. What should I do if I have additional questions about the Settlement Agreement or the steps that should be taken related to the compliance certification?**

The Settlement Agreement is a legal document. Its terms require legal analysis and interpretation. Accordingly, we strongly encourage you to consult with institutional legal counsel and/or risk management staff about any additional questions you may have. In addition, you can forward non-legal questions to members of the Sport Science Institute at [ssi@ncaa.org](mailto:ssi@ncaa.org).