

## R E P O R T

To: Margie Paris, President, UO Senate

From: Rob Illig, Chair, Intercollegiate Athletics Committee

Date: March 12, 2014

Re: Annual Report of the Chair

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The Senate's charge to the IAC requires that the chair submit a written report to the Senate no later than its final meeting in May. This constitutes that report. The chair is also permitted to make oral reports to the Senate "as necessary." Under the circumstances, I will be making an oral report to the Senate that summarizes certain matters contained herein.

### **Summary**

I wish to report my conclusion – and the conclusion of many of the members of the IAC – that the committee is broken. Its acrimonious relationship with the President, the NCAA Faculty Athletics Representative, and the Athletic Director makes it impossible for the committee to achieve its stated goals. More fundamentally, the IAC's functioning is materially hampered by confusion among its members and the larger UO community regarding its proper role and the extent of its powers. This is primarily a problem of structure rather than a problem of personalities. Or, to put it differently, we can solve the problem by changing the structure, but we cannot change the personalities.

Based on the foregoing conclusions, I will recommend that the President withdraw the administration's and athletics department's involvement in the IAC, thereby making it purely a creature of the Senate. Having done this, he should appoint – in consultation with the FAR and AD – a small group of trusted faculty who can advise these individuals during the process of their decisionmaking.

I further recommend that the Senate consider revising the IAC's official charge to re-focus the committee on student-athlete welfare, including by investigating the academic culture in which UO student-athletes are immersed. Finally, I recommend that the Senate investigate the impact of conflicts of interest on proper committee functioning.

### **IAC Functions**

The main structural problem that exists on the IAC is that the committee is trying to accomplish two competing goals. It is attempting to be a "watchdog" committee, aimed at ensuring that the athletics department acts in the best interests of the UO community and does not become the tail that wags the dog. At the same time, it is attempting to be an

advisory committee, seeking to influence the FAR and AD as they make important and potentially controversial decisions.

Because it is trying to do both, the IAC is accomplishing neither.

There is a misconception among many that the IAC has oversight powers or is in some ways in a supervisory position to the FAR and the athletics department. For example, the IAC charge from the Senate states in part:

As part of its function and in order to carry out its governance function, the IAC shall be consulted by:

1. The athletics department on... [a variety of matters.]

However, the IAC has no such power to require the athletics department (or the FAR) to consult with it on any matter. The FAR exists in compliance with NCAA rules and reports directly to the UO President. Members of the athletics department report to Athletic Director Rob Mullens, who in turn reports to the President. More to the point, no human can be made to share their innermost thoughts and concerns. What the IAC most wants to know is what cannot be compelled: what difficult decisions and challenges are the FAR and AD struggling with, and what approaches are they considering adopting.

Because the IAC has no direct control over athletics personnel, it has no power to compel cooperation. Rather, in order to obtain information and recommend policy, it has two choices. First, take a confrontational approach and attempt to demand cooperation. Second, build a relationship of trust and mutual respect with the athletics department and FAR such that they seek out and value faculty input.

IAC member Bill Harbaugh has both relied repeatedly on the first strategy and made arguments in IAC meetings to the effect that the committee has never accomplished anything important except via the confrontational method. Indeed, he has told several fellow committee members that, while he used to try and get along, he has since learned through experience that relationship-building never works. One must demand a seat at the table.

At the same time, other IAC members, including student member and ASUO President Sam Dotters-Katz, have expressed concern that the personalities involved are to blame. In particular, they view Professor Harbaugh's presume-the-worst approach as eroding trust and making it impossible for the IAC to secure good information – including plans and ideas that are not yet ripe for public discussion – from athletics personnel.

Such critics point to a complete breakdown in civility over the past two years as evidence that the confrontational approach is generating only confrontation and not results. For example, both the UO General Counsel and FAR have told the President that they are no longer willing to attend meetings with the IAC due to the presence of a hostile work environment. Student member MacGregor Ehlen resigned from the IAC in late February after engaging in a highly-public online battle with Professor Harbaugh. And athletics department personnel have repeatedly told me that they love everything about their jobs – except attending IAC meetings. Clearly, posts on Professor Harbaugh's "UO Matters" blog,

such as “Rob Mullens drives another student-athlete to drink,” while not necessarily related to the IAC, have contributed to the poisoning of these relationships.

While there is merit to both critiques, I believe the more fundamental problem arises from a basic disagreement about the purpose and value of the IAC, as is demonstrated by its charge.

## **A Second Committee**

The President, FAR and AD are charged with making athletics-related decisions that impact the entire university committee. In making these decisions, they want and would be well served by the assistance of a small group of faculty advisors who can act as a sounding board, much like the Faculty Advisory Council serves the President and Provost on other matters. Such a group can only function, however, if (1) the parties trust that each is acting in the best interests of the UO, and (2) the parties can share future plans, half-baked ideas and potential concerns with the confidence of absolute secrecy.

As presently formed, the IAC cannot advise the President, FAR and AD on policy-making because it cannot satisfy either of the prior two conditions. As a result, it is left to criticize decisions only after they have been finalized and publicly announced, leaving the faculty’s important voice almost entirely un-heard during nuanced policy deliberations. In this respect, the IAC is failing and allowing important policy making to occur without satisfactory faculty input.

At the same time, this confusion over the IAC’s purposes relates to a fundamental confusion within the UO community over how to view and react to student-athletes. On the one hand, student-athletes receive many special privileges and unique treatment. Indeed, there is an obvious structural risk that they will be rewarded for winning on the field by being excused from academic excellence, especially in the all-important revenue sport of men’s football. And this doesn’t begin to address risks inherent in the student-athletes’ relationships with UO boosters. Moreover, these concerns are magnified by the high profile of student athletes. Their misdeeds are reported publicly and affect the UO’s reputation in a manner that the misdeeds of traditional students are and do not.

Student-athletes, however, are also in an exceedingly vulnerable position. The university annually sells their images for almost \$100 million. They are required to practice as full-time athletes while also attending to their studies. Their freedom is severely restricted, and they are required to comply with all sorts of NCAA rules that do not apply to traditional students. The structural risk here is that the university will be tempted to sell their images, short-change their educations, and then toss them away at graduation. As a public educational institution, we have a special responsibility to ensure the education and welfare of these student-athletes, just as we have a special responsibility toward any group of students who face particular or unusual challenges.

What the university really needs, then, is a group of faculty who have foremost in their minds the welfare of the student-athletes as students and the welfare of the university’s larger reputation. These individuals must insert themselves into the student-athlete experience and learn what is really going on, day-to-day, at the level of the student-athletes

and assistant coaches. They must attend practices and games. They must learn the players' names and where the bodies are buried.

I will therefore recommend to the President that he – in consultation with the FAR and AD – appoint a small group of faculty to serve as advisers on athletic affairs. This should not be a group of “yes men,” but rather independent thinkers willing to ask difficult questions. At the same time, however, they should be respectful of questions of confidentiality. Above all, they should have as their sole agenda the welfare of the student-athletes and of the university. They must agree with the President, FAR and AD about a vision for the UO's future, yet question and challenge their tactics for how to get there.

Meanwhile, if the Senate wishes to challenge the very existence of the UO's Division I athletics program, or to question the allocation of funds to or within the athletics department, it should specifically charge the IAC or another committee to do so. Certainly, this would be within the power of the Senate, as it is within the Senate's power to investigate or advocate for any other issue of concern. However, any such anti-athletics goals must be separated from efforts to protect and educate student-athletes under the current system. We cannot forget our ongoing duty to the student-athletes while negotiating for change in the IAC's structure or composition. To comply with our obligations, we need two committees.

### **Academic Culture of Student Athletes**

During the 2013-2014 academic year, there was much discussion about obtaining data that could be analyzed to uncover problems within athletics. While I do not doubt the value of such data, as a lawyer, my preference is to seek – in addition to raw data – a granular, contextual understanding of the day-to-day affairs of student-athletes.

With this in mind, the IAC interviewed not only the AD and other athletics-related personnel, but we met with three anonymous student-athletes. These athletes were recent UO alumni of both revenue and non-revenue sports who have been highly successful academically. Because there were only three of them, they obviously do not present a representative sample. However, their insights were thoughtful and I believe it was the overwhelming consensus of the IAC members that our discussions with these former student-athletes were among the most valuable discussions that the IAC has ever had (at least in the memory of those present).

We probed the student-athletes about a number of issues, including a variety of high-concern risks. They reported no wrongdoing or shady dealings with donors and alumni. They reported the potential of drug and alcohol use among student-athletes, but described the usage as being similar to that of traditional students. They described the tutoring they received at the Jacqua Center as far superior to that which was provided prior to the building's opening. Generally, they were quite satisfied by their treatment as UO student-athletes.

The particular issues of concern that they did highlight were twofold. First, they suggested that there is a larger academic culture that exists which new student-athletes encounter. Newcomers to any institution always look to their peers and those who came before for guidance as to how to get along and what constitutes acceptable behavior. In addition,

certain majors and certain classes conflict with practice schedules, limiting student-athlete academic choices. This culture and architecture, as much as any university policy or person, impacts the value of the student-athletes' educations and experiences. It should therefore be of concern to the faculty.

Second, the student-athletes we interviewed expressed a wish that more be done to assist them just before and after graduation. Especially in revenue sports, there is a risk that student-athletes will want to pursue athletics during their time at the UO at the expense of prioritizing their academics. The UO faculty and athletic personnel can and should adopt policies that attempt to reverse this occurrence. However, it is ultimately on the shoulders of the student-athletes themselves to make the best use of their educational opportunities.

Still, it was reported, some student-athletes arrive at the end of their academic careers only to find that they have not gained useable skills, planned for their futures, and/or generated a network of mentors who can help them secure employment. It was suggested that the UO engage personnel to help new graduates to network with alumni in other cities in order to find jobs (although any such effort would need to carefully comply with NCAA rules). It was also suggested that student-athletes be offered a course or courses that would assist them with career- and life-planning in order to give them the best chance at leveraging their educational opportunities. Such courses could be offered either during the student-athletes' first or last semesters, or both.

With this in mind, I would recommend that next year's IAC, however constituted, seek as its primary job to become familiar with the academic challenges and culture confronting our student-athletes. Indeed, I believe that our present AD and FAR are keenly interested in student-athlete welfare and would welcome and appreciate any efforts that can be made to improve the student-athlete experience. Note that I make this recommendation for next year's IAC because I do not believe that the current IAC, as presently constituted, has enough of a trust relationship with athletics to make this happen.

### **Conflicts of Interest**

It was stated at the last IAC meeting that there was a conflict of interest between Professor Harbaugh's "UO Matters" blog and his service on the IAC. I believe that this type of overlapping relationship poses a genuine risk of a conflict and I recommend that the Senate investigate the question and promulgate a policy that would apply to all committees.

Members of a UO committee, whether elected by the Senate or appointed by some other person or body, are, I believe, akin to fiduciaries. As such their only motivation should be the good of the university. All sense of self-interest must be abandoned and the individual must act in all ways selflessly. In the defining words of the great jurist Benjamin Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.<sup>1</sup>

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<sup>1</sup> Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

What is required of a fiduciary, Judge Cardozo held, is a sense of “undivided loyalty.”

It cannot be questioned that Professor Harbaugh earns personal accolades and institutional fame from his blog. And in particular, the more controversial he appears, the more hits he receives. There is nothing improper about such an undertaking. However, it does create a structural incentive for him to seek to create controversy. Not as a personal matter, but as a structural one, there is therefore the risk that a blogger’s or news reporter’s motives on a committee like the IAC will not be truly selfless. There is the risk that he or she will use this role and access as a university fiduciary to obtain information and pursue agendas that are to their personal benefit rather than the benefit of the institution.

The issue that is presented to the Senate is whether a person who benefits personally from information obtained in the guise of a university fiduciary is engaged in an impermissible conflict. Is that information being misappropriated? Note that I am not asking whether such overlapping interests are somehow illegal or improper in an actionable sense. My question is whether a public institution and its fiduciaries are charged with behavior that is above reproach.

This is a complex matter, and I do not believe I have the information necessary at this time to render a recommendation other than that the matter be investigated and considered by the Senate or an appropriate sub-committee. However, I will strongly recommend to the President that no person with such a conflict – or even the appearance of such a conflict – be appointed to advise the President, FAR and AD on matters of athletics policy. It is also important that no person serve on both the IAC and the President’s athletics advisory council.

### **Follow-Up**

I chose to present this report in March rather than May because I believe the need for a trustworthy athletics advisory council has become urgent. However, I will endeavor to hold IAC meetings in each of April and May. Our agenda will be to re-visit the committee’s charge with the goal of recommending to the Senate a revised charge. I am not optimistic that we will be able to conclude this effort in a satisfactory manner. Rather, it may be necessary for the Committee on Committees or another appropriate sub-committee to tackle the challenge without the involvement of the existing personalities and tensions. We will also vote to elect next year’s IAC Chair.