



POSITION STATEMENT

The Drake Group Raises Concerns Regarding July 1, 2020 U.S. Senate Commerce Committee Hearing on College Athlete NILs/Compensation¹

July 10, 2020

The Drake Group² believes several specific issues raised during the July 1, 2020 U.S. Senate Commerce Committee Hearing on "Exploring a Compensation Framework for Intercollegiate Athletics" are misleading both to members of Congress and the general public.

First, claiming that NIL laws would perpetuate gender inequities because of Title IX (which was done several times over the course of the hearing) is a false argument. College athletes receiving compensation from third-parties external to the institution for endorsements of products or provision of other services, being employed by these entities, or earning compensation for running their own sport-related business has no bearing on Title IX laws. Title IX only applies to educational institutions that receive federal funds and not to college athletes as individuals, third party agents operating on their behalf, or outside businesses that employ them. Only if the educational institution directly or indirectly arranges for college athletes to receive such compensation does Title IX apply.

Drake finds it particularly disingenuous for college athletics administrators to raise Title IX during an NIL discussion, when [83% of all NCAA member institutions did not meet this law's proportional participation standard in 2017-18](#), the NCAA does not require compliance with Title IX as a condition of membership, the [NCAA's Financial Reporting System](#) reveals that male athletes receive an average of 51% of Division I universities' scholarship budgets, while female athletes receive 45% (4% of scholarship expenditures were recorded as "coed or unaccounted") and Division I FBS institutions spend more than twice as much on each male student-athlete as on each female student-athlete with regard to operating expenditures. NCAA institutions

¹ Preferred citation: Katie Lever, Emmett Gill, Gerald Gurney, Karl Idsvoog, Donna Lopiano, Brian Porto, David Ridpath, Allen Sack, Sandy Thatcher and Andrew Zimbalist (2020) Position Statement: The Drake Group Raises Concerns U.S. Senate Commerce Committee Hearing on College Athlete NILs/Compensation. (July 10, 2020). Retrieve from <http://thedrakegroup.org>.

² The Drake Group is a national organization of faculty and others whose mission is to defend and achieve educational integrity and freedom in higher education by eliminating the corrosive aspects of commercialized college sports.

appear to be worried about gender equity only as a chess piece to be used in arguments opposing outside compensation.

During the hearing, SEC Commissioner Sankey continued to play the gender card suggesting that he was concerned that men's football and basketball players' monetization of their NIL rights would somehow pull compensation away from female athletes and women's sports, while offering no data to support such a contention. Most marketing experts agree that giving college female athletes NIL rights could actually provide them a special benefit because they typically reach the peak of their athletics earning potential in college, not only as a result of college athletics achievements but also because of their Olympic and international performances, and female athletes having fewer opportunities than male athletes to compete professionally. A popular example is Kaitlyn Ohashi, a former-UCLA gymnast whose perfect floor routine from 2019 has currently garnered over 115 million views on YouTube. Since the routine went viral Ohashi has [stated](#) that "Along with this [video] came a lot of attention and opportunities, but I couldn't capitalize on them. I was handcuffed by the NCAA rules that prevented me from deriving any benefit from my own name and likeness, regardless of the fact that after my final meet, I had no pro league to join."

To be clear, both female and male college athletes have market potential. In May 2020, [Axios](#) released a report of potential influencer earnings of college athletes by rank. Out of the top twelve highest potential earners, half were female athletes. Women also have footholds in traditionally-feminine markets, such as beauty supplies, feminine hygiene products, and home goods that they could conveniently capitalize upon as social media influencers. Although female athlete earning potential from NILs will most likely not be as high as that of male athletes, that discrepancy is not a Title IX violation. On the contrary, access to a fair market, regardless of the outcome, is a huge step toward gender equity in collegiate athletics.

Further, it is important to underscore that whether or not NIL income to athletes diverts revenue away from the athletic department, the implementation of Title IX depends upon the vigilant oversight of the Office of Civil Rights in the Department of Education. It also depends upon the commitment of athletic directors who can easily replace any diminution of sponsorship and licensing revenue in their departments by curtailing the pervasive waste and excess that characterize Division I sports administration.

Testimony of higher education representatives on the panel misrepresented the graduation rates of college athletes. Keith Carter, The University of Mississippi Vice Chancellor of Athletics claimed, "We are very high we are in the 80 percentile, which is higher than the normal student population." Dr. Carter used the NCAA Graduation Success Rate (GSR), which cannot be compared to any non-athlete student population, is deliberately misleading, and is a metric that is inflated by as much as 20 percentage points and has been established as an inaccurate metric because it [omits those who drop out of the institutions](#). The 2018 federal graduation rate (FGR) for all [Ole Miss college athletes](#) was 57 percent, but only 45 percent for Black Ole Miss college athletes (compared to 60 percent for all Ole Miss students). These graduation rates are hardly exemplary, Further. although Kansas State, Michigan State and Ole

Miss had some of the biggest graduation rate increases in the report, all three schools remain in a group [graduating less than half](#) of their black football and basketball players.

Similarly, Southeastern Conference commissioner Greg Sankey, also appearing to use the flawed NCAA Graduation Success Rate metric, claimed that the SEC had programs or universities that or at or near 100 percent graduation rate and we will trail down into the 80's. Perhaps the lowest, off the top of my head is in the high 70's." In 2019, in the Southeastern Conference, top-ranked Louisiana State University and fourth-ranked University of Georgia were at the bottom of the [SEC academic success and graduation rankings](#). Based on the entering freshman classes of 2009-2012 (which includes no players recruited by current UGA football coach Kirby Smart), UGA's Graduation Success Rate, or GSR, was 64 percent, which ranked last among the Southeastern Conference's 14 schools. Louisiana State University was next-to-last with a 71 percent GSR and also ranked last on the Federal Graduation Rate (the only metric that permits comparisons with non-athlete students), at 31 percent. LSU and the University of Florida, at 36 percent, were the only two SEC schools with a lower graduation rate than UGA's 44 percent. The three schools with the [lowest Black college athlete graduation rate](#) in Harper's 2018 survey were all part of the SEC and two of them—LSU and the University of Georgia — also saw the biggest drops in Black student athlete graduation rates between 2016 and 2018, falling more than 10 percentage points.

Dr. Michael V. Drake, Chairman of the NCAA Board of Governors and recently appointed University of California president, claimed that "athletes graduate at higher rates than our general student body," Federal grad rate for OSU is 84% 2018. FGR for 2018 was 74%. Drake used GSR and determined it was higher than FGR, a typical statement from those in athletics who express academic performance in the aggregate, including all athletes. This practice allows the inclusion of higher graduation rates of non-revenue sport athletes, effectively skewing the data higher and disguising the embarrassing graduation rates in men's football and basketball, sports which have the highest minority athlete participation as well as players who are admitted via waiver of normal academic admission standards and placed in less demanding majors and courses. For example, a 2018 [study](#) found that the Federal Graduation Rate among black male athletes at Ohio State University fell to 41 percent (down from 52 percent in 2016). That compares with the school's overall student graduation rate of 83 percent. Black men make up just 2.3 percent of undergraduates at Ohio State and their overall graduation rate is 66 percent—25 percentage points higher than the rate for Black male athletes. The graduation rates for Black basketball athletes was 18 percent and 50 percent for White basketball athletes. The graduation rates for Black football athletes was 43 percent and 46 percent for White basketball athletes. Several [schools](#) among the lowest graduation rates for Black football and basketball players were Ohio State University, the University of California, the University of Georgia, the University of Iowa, and the University of North Carolina, all of which have graduation rates for all athletes that are 25 to 35 percentage points higher.

It is within this context—the failure of our most respected institutions of higher education to fulfill their educational promise to predominantly minority athletes in football and basketball— who are responsible for the generation of upwards of ten billion dollars in annual revenues, that we express dismay over testimony suggesting that allowing athletes to earn NIL

income would negatively impact their educations or that 18 year-olds weren't mature enough to manage their time or finances. No concern was expressed over current NCAA rules that permit college athletes in all divisions to spend [35 to 50 hours per week in athletics related activity](#) despite NCAA promoting the fact that the Division 1 Manual includes a [laxly-regulated rule](#) which limits college athletes to 20 hours of countable athletically related activity per week. The Drake Group has repeatedly emphasized that it would be proper for the NCAA to promulgate a guardrail, including one that prohibited athletes from missing classes or exams during the academic year because of outside employment or NIL obligations. Higher education does not control the outside time of students and it shouldn't control the outside time of college athletes, especially when the institution regularly abuses athletes with excessive athletics time demands, including summer and weekday media days and interviews.

The Drake Group strongly supported the testimony of several panelists who expressed distrust of the NCAA ever receiving an anti-trust exemption to enable its continued control of college athlete compensation through the use of anachronistic definitions of amateur status. We believe that the NCAA operates more as a trade association to protect the commercial interests of its members than as a national governance association that protects the educational interests and health and well-being of college athletes. Athletes should continue to have the right to protect their interests by using the courts to prevent their interests. We also concur with panelists who contend that giving NIL rights to college athletes would increase booster involvement in recruiting. Boosters are currently prohibited from being involved in recruitment or offering inducements and this would continue. As long as NIL agreements are limited to fair market value for services rendered, are transparent and reported to an 'honest broker' independent agency created for the express purpose of monitoring and regulating NIL practices, abuse by boosters or other third parties should be controllable. The oversight agency should not be the NCAA and should receive a limited and conditional antitrust exemption for the express purpose of regulating and sanctioning abuse of NIL guardrails. The Drake Group has made [detailed recommendations](#) for the implementation of such an independent non-governmental and self-supporting agency.

Last, Drake agrees with the position of several panelists who effectively debunked any contention that athlete NIL rights would exacerbate recruiting advantages of large market institutions. There is approximately a \$4 billion revenue gap between the Power Five schools and Group of Five schools. According to [ESPN](#), richer schools tend to spend their money on trimmings, such as "private jets, on campus perks like barber shops and bowling alleys, on biometric gadgets for athletes, and on five-star hotel stays during travel." This slants the market of elite athletes to the richest programs. For example, all 31 five-star football recruits from the class of 2020 [have signed with a Power Five school](#). [In basketball](#), 23 out of the 27 five-star recruits from the class of 2020 has verbally agreed or signed with a Power Five program (the exceptions are Jalen Green, Daishen Nix, and Keon Johnson, who have opted for the G-League, and Makur Maker, who has verbally committed to Howard University). Since the [BCS format](#) was adopted in 1998, a Group of Five school has never won a national championship in football, and since the College Football Playoff format was adopted in 2014, no Group of Five team has

been chosen by the playoff committee for a semifinal game, even though two Group of Five programs managed to pull off perfect seasons leading up to the final selections (Western Michigan in 2016-17, and the University of Central Florida in 2017-19). [In basketball](#), only 14 Group of Five programs have won a national title since the tournament began in 1939. Competitive equity and interstate fairness is a myth in the NCAA, and it is unlikely that NIL access for athletes will change this dynamic, even if it affects recruiting to some capacity. The real issue here is not the competitive balance itself, but the possibility of fostering an open, competitive labor market for high school athletes that will undermine the educational goals of secondary and higher education.