



# THE DRAKE GROUP EDUCATION FUND

Realizing The Promise  
Of College Athletics

## FOLLOW-UP NOTES

### Proceedings of The Allen Sack National Symposium – Advancing Integrity in College Sport

**The Drake Group Education Fund Webinar Series – Critical Issues in College  
Athletics  
Hosted by 2aDays**

*Thanks for attending in-person or registering for one or more of the four separately offered national webinars that encompassed the full proceedings of the inaugural Sack Symposium, held on May 19, 2022 in Washington, D.C. at the National Press Club. A regular feature of our webinar series is “Follow-Up Notes” which provides links to the recorded webinars, answers to questions from the audience which panelists did not have the time to address, or those emailed to us from telephone participants), and information on our next webinar.*

## **1. SACK SYMPOSIUM RECORDINGS**

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In case you missed any part of the May 19, 2022 Sack Symposium, see [official event program here](#) which provides information on all of our panelists. We thank them all for their participation in the symposium. Access the video recorded sessions here:

**SESSION 1 – “GIVING COLLEGE ATHLETES THE RIGHT TO UNIONIZE”**

**SESSION 2 – “MANDATING A COLLEGE ATHLETES’ BILL OF RIGHTS”**

**AWARDS LUNCHEON – “A VISION FOR THE FUTURE”**

**SESSION 3 – “NAME, IMAGE, AND LIKENESS – CHAOS OR OPPORTUNITY?”**

## **2. UNADDRESSED QUESTIONS FROM THE NATIONAL INTERNET AUDIENCE**

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Following are answers to questions from the audience that our symposium panelists did not have time to address. Responses are from Drake experts and not from the panelists.

***PANEL 1 – Giving College Athletes the Right to Unionize  
UNANSWERED Q&As***

**Q: If college athletes, either through the receipt of an athletics scholarship or the treatment and benefits (training table, tutoring, etc.) received as college athletes were classified as “employees,” what would be the tax implications of such compensation?**

**A:** The following *Labor Law Journal* article addresses the tax ramifications to both college athletes and their institutions of higher education if college athletes were classified as “employees”:  
Busch, Joel, J.D. (2017) “Student or Professional Athlete – Tax Implications in the United States if College Athletes Were to be Classified as Paid Employees.” *Labor Law Journal* (68:1), Spring 2017, pp. 58-63. Retrieve from:  
<https://www.proquest.com/openview/98b74ef14f9b97b8f47b8aa4a827ede7/1?pq-origsite=gscholar&cbl=41326>

**Q: How does [S. 1929, the College Athlete Right to Organize Act](#) (and its House companion bill [H.R. 3895](#) - same text) establish a collective bargaining right without an employee/employer relationship?**

**A:** Congress may act to amend any law such as the National Labor Relations Act or the Fair Labor Standards Act to create exceptions or extend rights beyond existing laws. For example, S.1929 would have the NLRBA apply to public and private colleges and universities in the case of college athletes, extending the reach of the NLRA to public institutions in this limited way. Currently the NLRA does not apply to public organizations. Similarly, the proposed Act would redefine the meaning of “employee” as it applies to college athletes, specify appropriate bargaining units for college athletes, not permit athletic scholarships to be treated as wages, and tailor the requirements of the law to working conditions of college athletes.

**Q: What message does it send to the general public, college athletes, and institutions of higher education, if the federal government does not intervene to reform this system on a holistic level?**

**A:** The more complicated a bill, the more difficult it is to garner enough votes for passage. Thus, it is not unusual for bills to be narrowly focused. That being said, there is so much that is broken in college athletics, that The Drake Group believes that a more holistic approach is essential, such as the approach taken by the 1975 Presidents’ Commission on Olympic Sports which undertook a three-year comprehensive examination of the governance of non-school sports in the United States and produced the 1978 Ted Stevens Olympic and Amateur Sports Act (TSOASA), a federal law which completely reorganized the governance systems of non-school sports. The TSOASA established a federally chartered non-profit organization, the U.S. Olympic Committee, to replace the Amateur Athletic Union (AAU) which had proven to be a governance failure. Many believe that a similar situation exists and a similar solution is necessary to address the numerous

governance failures of the NCAA. The Drake Group is working with members of Congress to produce a bipartisan bill that would establish a Congressional Advisory Commission to undertake such a holistic study and recommend solutions.

**Q: Did stakeholders (governance associations, college athletes, coaches, and institutions of higher education) anticipate what currently appears to be the outcome of the June 2021 SCOTUS Alston decision?**

A: The key to the Court’s decision is that the NCAA and its member institutions do not receive any special treatment in Sherman Act cases. The NCAA had for many years argued that amateurism entitled them to a justification that the Court said would no longer carry as much special weight. If the NCAA had known that the result would reduce their ability to defend antitrust cases against them in such an impactful way, one would suspect they would not have petitioned for certiorari to the Court. Indeed, the plaintiffs in the case did not petition even though they had failed to obtain full success in the Ninth Circuit to have the free market control all the NCAA’s compensation rules. As a result of the decision and also the DOJ’s meetings with the NCAA challenging its use of amateurism as a defense, in antitrust cases the NCAA has remained administratively frozen since June 2021 with regard to implementing comprehensive rules regarding NILs despite years developing them and being on the verge of voting on them. Instead, the NCAA implemented two rules relating to NILs: They could not be used to induce (or retain) athletes or used as pay for play. Since July 2021, the NCAA has not brought any actions relating to these rules and has essentially given up on its national athletics governance organization function with respect to any compensation-related rules or other rules that might violate the antitrust laws. A January 2022 NCAA constitutional convention resulted in a transfer of rules making, rules enforcement and revenue distribution authority to its three competitive divisions. The NCAA national organization that once governed all three competitive divisions has effectively become an administrative shell that conducts national championships and promulgates rules of play in sports in which it conducts championships. Because the “transformation committees” for the competitive division are not due to report until August 2022, the NCAA has remained rudderless with regard to the enforcement of current inducement and extra benefits rules with no attempt to control the current chaos created by boosters establishing NIL collectives for the express purpose of advancing the recruiting interests of their respective athletic programs.

**Q: Could we use different terms than “unionization” and “collective bargaining” so there isn’t an automatic assumption that all college athletes must be treated as employees first and students second?**

A: Speakers on the various panels appeared to suggest that there was a need to define a new “social contract” that, as the questioner suggested, would be “neither fish nor fowl.” Speakers appeared to agree that college athletes needed a voice, more protection, and mechanisms that would give them greater control regarding their “working conditions” short of replicating current workers’ unions. Speakers also acknowledged that the development of such athlete protection organizations would take hard work among all the stakeholders.

**Q: If college athletes get special rights and consideration, shouldn't similarly situated undergraduate and graduate college students receive similar rights?**

A: This question was raised but went unanswered. Clearly, S. 1929 provides an organizing construct tailored only for college athletes.

**Q: Isn't the argument that college athletes from revenue producing teams should be paid or maintaining that revenue-producing teams are supporting non-revenue-producing teams be questioned on the basis that only a few of these teams (the top 20-25 Division I athletic programs which comprise less than two percent of all NCAA member schools) actually generate more money than they spend? Aren't colleges and universities subsidizing most athletic programs with student tuition dollars and mandatory student activity fees rather than athletics generated revenues?**

A: The cost of Division I football and the annual financial losses at these institutions are significant ([click here for a quick College Sports Economics 101 review](#)). Most observers attribute institutional aspirations to join Division I, despite the certainty of major annual operating losses, to the false belief that athletics is a front porch driver of relationships with wealthy alumni and advances the value of the institutional brand. The financial challenges are not just about Division I. The extensive subsidization of more than 98% of 2,000 athletics programs in higher education institutions have become a burden borne by students who pay tuition and mandatory student activities fees and whose average debt upon graduation exceeds \$30,000.

There are some institutions who strategically utilize athletic programs to advance enrollment goals. For example, Division II institutions regularly use the award of partial scholarships to athletes to obtain close to full tuition paying students and coaches are recognized as prime contributors to enrollment with regard to their athletics recruiting roles. In Division III, although no scholarships are awarded, the athletics coach is also considered to be an enrollment driver, especially at smaller institutions where athletics participants constitute a large percentage of total enrollment. A snapshot of the extent of each institution's athletic program subsidy can be obtained on the [DOE Equity in Athletics Disclosure Act database](#).

***PANEL 2 – Mandating a College Athletes' Bill of Rights  
UNANSWERED Q&As***

**Q: Isn't the educational exploitation of Division I athletes primarily affecting Black athletes who enter the institution via waiver of normal academic admissions standards? Isn't this the reason institutions then steer such students to friendly professors and less challenging courses and majors?**

A: See The Drake Group report: [A Continuing Disgrace: Intercollegiate Athletics Race Issues](#) for a comprehensive analysis of these issues, Drake Webinar #7 – [Racial Exploitation in College Sports](#), and a comprehensive analysis of the ways in which the NCAA purposely obscures actual graduation rates of minority athletes – [Why the NCAA Academic Progress Rate \(APR\) and the Graduation Success Rate \(GSR\) should be Abandoned and Replaced with More Effective Academic Metrics](#). The issue is not special admissions per se; rather it is excessive use of special

admissions in the revenue sports and the institution's failure to assess and remedy academic deficiencies in order to enable specially admitted athletes to compete in the classroom against better prepared peers. Instead, the institution chooses academic fraud (friendly professors, less challenging courses and majors, etc.)

**Q: Why is the approach of an “athletes’ bill of rights” better than allowing unionization of college athletes so they will be able to obtain those rights and benefits and improve their conditions through collective bargaining?**

A: A college athletes’ bill of rights would mandate basic health and medical protections for all college athletes as opposed to relying on the skills of 18-22-year-old athletes to organize on a conference-by-conference, school by school, or team by team basis. Calls for unionizations often fail to acknowledge the fact the college athletes are often intimidated by the power of 7- and 8-figure salaried coaches who control renewal of scholarships, allocation or playing time, and instructional attention. Coaches are often considered artful in the mechanisms of retaliation.

**Q: Where is the money going to come from to pay for lifetime scholarships for college athletes or athlete compensation beyond current scholarship levels? Giving the huge subsidies now buttressing athletic programs, will campus academic program needs continue to subverted in the name of pursuing winning athletic programs?**

A: Given the fact that currently more than 98% of all athletics programs receive significant institutional subsidies, great care must be taken to understand the economics of college sports, control excessive expenditures (including coaches’ salaries and benefits and fancy football-only facilities), and prioritize the allocation of funds to ensure adequate health protections and realizing the promise of a meaningful undergraduate degree. Guarantees of five-year scholarships and remediation of academic deficiencies that support the promise of earning meaningful degrees are essential elements of that priority commitment. Focusing on lifetime scholarships to allow completion of a degree sends the message of “don’t worry about academic achievement now, we will support your education later.” Current economic practices cannot be ignored such as the excessive expense of on- and off-campus recruiting, construction of lavish athletes-only facilities, and out-of-control coaches’ salaries and exit payments.

**Q: Is there a sense of urgency to get athletes’ rights legislation passed before the mid-term elections? Is there enough bipartisan support on these issues to enact legislation regardless of party control?**

A: It appears highly unlikely that bills related to athlete unionization, athlete compensation, control of the NIL chaos or significant athletes’ rights bills will be passed in the current session. However, The Drake Group believes that more limited athletes’ rights and protection bills such as the following have a chance to come to the floor for a vote prior to the end of the 117<sup>th</sup> Congress:

- Companion Bills – NCAA Enforcement - To establish due process requirements for the investigation of intercollegiate athletics, and for other purposes.  
[S.3943](#) — 117th Congress (2021-2022) NCAA Accountability Act of 2022 Sponsor: Sen. Blackburn, Marsha [R-TN]

[H.R.5817](#) — 117th Congress (2021-2022) NCAA Accountability Act of 2021 Sponsor: Rep. Kustoff, David [R-TN-8]

- To examine current NCAA operated practices and programs such as championship tournaments and student programs and make recommendations on improvement of gender equity.

[H.R.7336](#) — 117th Congress (2021-2022) Gender Equity in College Sports Commission Act Sponsor: Rep. Maloney, Carolyn B. [D-NY-12]

**Q: What about the role of boosters in all of these issues?**

A: Senator Booker’s [College Athletes Bill of Rights Framework](#) specifies minimal restrictions to athletes’ NIL rights and freedom to transfer without restriction. These are the two areas in which boosters and booster collectives have operated without restraint. It is unclear whether final legislation will seek to solve the problem of boosters operating as recruiting piggy banks.

**Q: Given the concerns expressed about working conditions and the profit motives superseding the wellbeing of workers, is there any morally defensible argument against categorizing college athletes as workers?**

A: The Drake Group believes that the student/educational institution relationship must be prioritized over any college student as worker paradigm. Teaching assistants and work study students manage this by limiting working hours. The Booker Framework does not address time spent on athletics-related activities but the final form of this legislation may do so. Maintaining the current 30- to 50-hour athletics workweek is indefensible. There is little hope of restoring an emphasis on the college athlete obtaining a meaningful education if athletics hours are not significantly reduced.

**Q: Providing for the medical expenses of college athletes injured during participation in extracurricular athletic programs appears logical on its face, but what about students injured in other extracurricular programs such as club sports or intramurals? Why should college athletes receive better benefits?**

A: The elite level of athletics competition and intense training required by most intercollegiate athletics program does pose an increased risk for injury. However, injuries do occur in intramurals and club sports which are more recreational in nature. The NCAA mandates that college athletes be covered by athletic injury insurance but most institutions require the athlete to be covered first by their own or their family’s insurance policies with regard to primary coverage.

**Q: What is full compliance with Title IX? Is it meeting all three “participation prongs” of the law?**

A: Title IX requires that schools need only satisfy one of the three prongs in order to meet the requirement of equal participation opportunities. But with respect to the first prong-- providing female athletes with participation opportunities proportional to the percent of full-time undergraduate female students, the opportunities must be genuine—cannot be manipulated. They must meet the interests and abilities of females. In other words, schools cannot choose the cheapest



sports that accommodate the largest female participants in order to meet equitable participation requirements – which schools have commonly done when in a variety of ways including adding rowing teams with enormous rosters rather smaller and more expensive per capita sports like lacrosse. These teams must also compete at the same competition level as men’s teams. For example, a red flag is raised under Title IX if men’s teams travel all over the country to meet the best competition in their competitive division while women’s teams are limited by insufficient budgets to conference and regional play. Further, separate from the requirement of equal opportunities to participate (the three participation prongs), scholarship dollars must be awarded proportional to the percent of male and female participants. And lastly, female athletes must be provided with the same treatment and benefits with regard to sports equipment and supplies, equal access to optimal practice and game times, equal travel and per diem allowances, the same opportunity to receive quality coaching and tutor support, equal quality practice and competition facilities, locker rooms, medical and training facilities and services, provision of housing and dining benefits, and equal promotion and publicity. E.g., coaches of women’s teams must have recruiting budgets that enable them to recruit the same quality athletes as coaches of men’s teams. In order to receive Higher Education Act funding from the federal government, institutions must represent that they are meeting ALL of these gender equity requirements each and every year.

***PANEL 3 – Name, Image, and Likeness – Chaos or Opportunity?  
UNANSWERED Q&As***

**Q: Many public universities have been claiming FERPA in response to FOIA requests from media companies attempting to find out the specifics of college athlete NIL deals? Does FERPA apply?**

A: See Romano, Robert J., (2022) “Does FERPA bar schools from disclosing NIL deals to 3<sup>rd</sup> parties?” *The Successful Registrar*, (March 11, 2022), pp. 1-4. Retrieve from: <https://onlinelibrary.wiley.com/toc/19437560/2022/22/2> In short, the article suggests that courts typically side with the student in document privacy disputes and that it is likely that once a copy of any NIL agreement is provided to and maintained by the institution, it meets the broad definition of an “educational record” and there is no legislation making an exception for NIL agreements. Those opposed to this position argue that there is nothing educational about an outside commercial agreement.

**Q: Does employment status affect whether schools are obligated to respond to FOIA requests for disclosure of college athlete NIL deals?**

A: Colleges and universities are obligated to protect the privacy of a student’s educational records under state and federal privacy laws whether the student is also an employee or not.

**Q: How do you “thread the needle” between student-athlete privacy and permitting oversight since many state NIL laws currently prohibit college athlete NIL deals from conflicting with institutional NIL deals?**

A: In states with laws prohibiting college athlete NIL deals from conflicting with institutional NIL contracts, it appears that the institution would have the right to review the athlete’s NIL agreement

for that purpose, and if FERPA applies as previously suggested, the athlete’s privacy is protected with regard to outside FOIA requests. A number of federal bills have proposed that all NIL deals be reported to a third party governmental or non-governmental agency with oversight powers. It is unclear whether such proposals address athlete privacy rights.

**Q: How can NCAA rules regarding outside employment compensation “commensurate with going rates,” “extra benefit” rules, payment only for services rendered, or rules prohibiting deals that include inducements to attend or remain at an institution be enforced if there is no central database where NIL deals must be reported?**

A: Yes, it is difficult to enforce such rules if there is no central database. But to the extent state or federal laws prohibit NCAA or member institutions from limiting outside NIL compensation in any way, a limited antitrust exemption may be required to allow a governance organization to require submission of all deals to a central database and enforce such rules. Prior to the *Alston* decision discussed above, the NCAA relied upon the “rule of reason” under the Sherman Act to justify such rules. As noted, the force of the NCAA’s justifications has now been greatly curtailed. Thus, any NCAA actions that might restrict compensation are more susceptible to antitrust cases. We believe it would be most helpful for a central database mechanism to be established for the purpose of providing oversight which would include mandating that institutions require its athletes to submit NIL deals for its review and the conference or national enforcement entity requiring the submission of such documents in any investigation of allegations of violations of such rules.

**Q: How can we keep athletics competition fair when boosters or booster collectives not under the control of athletic departments can offer prospective athletes lucrative NIL deals to attend an institution of the booster’s choice? Aren’t all of these deals outside the control of athletic governance association regulations – effectively creating an evasion of scholarship, extra benefits or recruiting limitations?**

A: The Drake Group agrees with the questioner that booster collectives which exist for the express purpose of assisting institutions in attracting prospective athletes evade such current rules. The Drake Group also believes that individual boosters should be permitted to engage athletes in NIL deals as long as services are actually rendered by the college athlete, compensation is congruent with some standard of fair market value and the athlete is not required to play at any particular school.

### **3. OUR NEXT ISSUE: WEBINAR #15 - “Critical Issues for Athletic Programs at Historically Black Colleges and Universities”**

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#### **DATE TO BE DETERMINED**

Panelists will explore those issues in intercollegiate athletics that are most significant for athletics programs at Historically Black Colleges and Universities (HBCUs). Topics, among others, will include the disproportionate impact of NCAA enforcement processes and NCAA Academic



Performance Program standards, impact of funding disparities between HBCUs and PWIs, whether the cultural significance of attending a HBCU is sufficient to retain Black coaches and administrators given their athletic program salary levels, whether corporate social justice programs represent new HBCU sponsorship opportunities, how former Black professional athletes returning to HBCUs are making an impact, and how the new NIL recruiting wars and NCAA restructure may impact HBCU athletic programs.

#### **4. LINKS TO RECORDINGS OF PREVIOUS WEBINARS**

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**[CLICK HERE](#)** to enter **The Drake Group Education Fund Video Library** for recordings of all previous webinars.

WEBINAR #1 -- "Wild West or Brave New World – National Experts Share Their Thoughts on College Athlete Compensation"

WEBINAR #2 -- "Millionaires or Minimum Wage? Current and Former College Athletes Speak on Athletes' Compensation"

WEBINAR #3 -- "Experts Speak Out on College Athletes' Mental Health"

WEBINAR #4 - "The Transgender Athlete in Girls' and Women's Sports: The Collision of Science, Law, and Social Justice Explained"

WEBINAR #5 -- "Title IX and the NIL Marketplace: Subterfuge or Opportunity to Remedy Historical Inequities?"

WEBINAR #6 -- "Keeping Everything We Love About Collegiate Sport While Fixing Its Failed Governance Structure"

WEBINAR #7 -- "A Continuing Disgrace: Addressing Intercollegiate Athletics Race Issues"

WEBINAR #8 -- "The Disintegration of the NCAA: The Price of Rejecting National Governance"

WEBINAR #9 -- "Lack of Accountability for Athlete Abuse in College Athletics"

WEBINAR #10 -- "College Athletes' Freedom of Speech and Expression – or the Lack Thereof"

#### **5. WAYS YOU CAN HELP**

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If you believe **The Drake Group Education Fund** is doing good work, please also consider making a tax-deductible donation to support our webinars and educational research and programs work. You can donate and learn what we do **[HERE](#)**.

Interested in becoming a change agent by working with **The Drake Group**, a sister organization of The Drake Group Education Fund? We need volunteers to contact their senators and

representatives to advance collegiate athletics reform legislation. Learn about legislation and [\*\*VOLUNTEER/JOIN HERE.\*\*](#)