



THE DRAKE GROUP

Advancing Positive Legislative Change
In College Athletics



January 10, 2023

TO:

Ambassador Susan E. Rice
Director, Domestic Policy Council
1600 Pennsylvania Ave NW
Washington, DC 20500

Dr. Miguel Cardona
Secretary of Education Office for Civil Rights
400 Maryland Avenue, SW
Washington, DC 20202
ocr@ed.gov

Catherine Lhamon, J.D.
Assistant Secretary for Civil Rights
400 Maryland Avenue, SW
Washington, D.C. 20202 - 1100
Catherine.lhamon@ed.gov

Suzanne B. Goldberg, J.D.
Deputy Assistant Secretary for Strategic
Operations and Outreach
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202 - 1100
Suzanne.goldberg@ed.gov

FROM: Andrew Zimbalist, Ph.D.
President, The Drake Group
65 Ward Avenue
Northampton, MA 01069
(413) 320-1810

RE: REQUEST FOR ISSUANCE OF TITLE IX ATHLETICS GUIDANCE APPLYING EXISTING OBLIGATIONS IN THE NEW COMMERCIALIZED ARENA OF INTERCOLLEGIATE ATHLETICS INCLUDING REITERATION OF GUIDANCE RELATING TO PROMOTION, PUBLICITY, FINANCIAL AID AND RECRUITING INEQUITIES

College athletics are in a gigantic state of disruption, with athletes receiving substantial compensation that was unavailable a year or two ago. This disruption has been caused by state

legislation and federal court orders, plus an unwillingness by the NCAA to police the area after suffering some litigation losses.

We do not write to suggest that OCR stem this flow of cash to college athletes, but rather to alert OCR that this cash is, with the blessing and/or cooperation of the 1000+ universities in the NCAA, flowing predominantly to men. Such inequitable financial aid, treatment and benefits provided to men are a violation of Title IX. OCR must provide guidance to the schools that this is improper and will be pursued with enforcement proceedings as necessary.

The schools, for their part, seem either happy to allow this gender disparity, or simply confused as to their obligations. In either case, OCR guidance is badly needed, and quickly. The schools have never been enthusiastic about gender equality in sports, having unsuccessfully attempted to exempt revenue-producing sports like football from Title IX, and having dragged its feet for decades on gender equality. The “Wild West” scene we see today, involving compensation for athletes’ names, images, and likenesses, has simply provided the schools an opportunity to feign ignorance or confusion as to the implications for women athletes. OCR should eliminate that ignorance and clarify any confusion. To be clear, we do not seek any statutory or regulatory amendments. The activities of many of the schools working hand in hand with boosters violate Title IX. We seek only that OCR promulgate clear guidance as to what does, or does not, implicate Title IX concerns in the new NIL space.

For decades college athletes were not allowed to monetize their athletic skills and fame by selling or licensing their names, images, and likenesses. Any such activities, such as entering into an endorsement contract with Nike, or with a local car dealer, or signing autographs, made the athletes “professionals” in the eyes of the NCAA and eliminated their college athletic eligibility, which was based on questionable principles of “amateurism.”

Beginning in 2020, many state legislatures began to pass laws that declared that college athletes had NIL rights, and that their eligibility for athletics could not be taken away due to their exercise of those rights. A series of federal court cases challenging NCAA amateurism restrictions, culminated on June, 21, 2021, with a Supreme Court decision in an antitrust case called *Alston*. Although *Alston* did not involve NIL, it did involve compensation and other benefits provided to athletes. The decision sent shockwaves through the NCAA and the college sports world by questioning the NCAA’s long-standing amateurism rules and permitting schools to provide unlimited educationally tethered benefits to athletes. *Alston*’s only reference to Title IX was Justice Kavanaugh’s prescient comment in his concurring opinion that Title IX presents a difficult practical and policy problem in the context of commercialized college sports. He was right.

Although most of the state laws and what little guidance provided by the NCAA enabled what is called “third party NIL” – payments to athletes from entities not affiliated with the university, like Nike or a local grocery store – the process quickly morphed into a system involving

third party NIL and other arrangements made by boosters of the universities to funnel money to athletes disguised as the newly permissible third party NIL payments. These payments actually were incentives for the athlete to matriculate at, transfer to, or stay at a particular university. Individual boosters or what became called “collectives” of boosters raised money and dangled it in front of athletes to assure that those athletes would play at their school, rather than another. Consider a few illustrations of how this system is currently operating.

The founder of the University of Florida collective, *Gator Guard*, an auto industry innovator worth a half-billion dollars, donated \$1 million and stated, ““What I’ve learned is, everybody is doing it now, the landscape is, if we [Florida fans] don’t get the money, we’re going to lose players. No matter how well a kid likes Florida, if a school comes in at the last minute and says, ‘We are going to pay you \$100,000’ and we have \$10,000, they’re gone.”¹

Many collectives have been formed to assist only one or two men’s sports such as the *Irish United*² men’s basketball (University of Notre Dame) collective, the *Twin Cities*³ football (University of Minnesota) collective, *Arizona Assist*⁴ men’s basketball (University of Arizona) collective, or the *Lions Legacy Club*⁵ football (Pennsylvania State University) collective.⁶ See also the *Business of College Sports* national tracker of collectives⁷ and *On3*’s national guide⁸ to view other single sex entities. Institutions are openly encouraging support of organizations that discriminate on the basis of sex.

In 2021-22 at Michigan State University (MSU) the men’s basketball and football teams—numbering 133 athletes—received \$500 monthly for promoting United Wholesale Mortgage (UWM), a company owned by a former MSU basketball player, and was criticized for “blatant

¹ Dellinger, Ross. (May 2, 2022) Big Money Donors Have Stepped Out of the Shadows to Create ‘Chaotic’ NIL Market.” *SI.com*. Retrieve from: <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting>

² Irish United. Supporting & Partnering with Notre Dame Student-Athletes. *IrishUnited.com*. Retrieve from: <https://irishunited.com/>

³ Twin Cities NIL Club. Welcome to the Twin Cities NIL Club – Financially supporting Minnesota student-athletes and join the ultimate fan experience. *Twincitiesnilclub.com*. Retrieve from: <https://www.twincitiesnilclub.com/>

⁴ Arizona Assist. Be Part of the future of Arizona men’s basketball – Help ensure the players get rewarded and the program remains competitive. *Arizonaassist.com*. Retrieve from: <https://arizonaassist.com/>

⁵ Lions Legacy Club. Connect with football student-athletes at Penn State. *Lionslegacyclub.com*. Retrieve from: <https://www.lionslegacyclub.com/>

⁶ For data on 331 university-specific collectives, see NIL Network. NIL Collectives & University Specific Platforms. Retrieve from: <https://www.nilnetwork.com/nil-collectives-and-university-specific-platforms/>

⁷ Business of College Sports. Tracker: University-Specific NIL Collectives. Retrieve from: <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/>

⁸ On3. (August 25, 2022) “The On3 guide to NIL collectives around the nation.” Retrieve from: <https://www.on3.com/nil/news/on3-guide-to-nil-collectives-around-the-nation/>

sexism.”⁹ In 2022-23, UWM extended its program to 17 women’s basketball and 12 volleyball players. Equitable treatment under Title IX requires an equal proportion of all female athletes to receive equal benefits. MSU is assisting by assigning the social media promotional posts to be delivered by each athlete.¹⁰

At an institution’s football stadium club luncheon for hundreds of influential businesspeople, LSU’s football coach was more direct than others: “We’re paying players now: name, image, and likeness. So, if you guys wanna start paying our players, you can go ahead!”¹¹ Attendees understand exactly what is being suggested, and no mention or effort is made regarding female athletes

A South Florida businessman offered ninety University of Miami football players \$500 a month to endorse American Top Team, his chain of mixed martial arts training gyms and founded *Bring Back the U*, a collective focused on football. The businessman explained, “The NIL legislation is an amazing opportunity for businesses and fans to directly impact the lives of these players and the national reputation of our team. I originally planned to just enter into deals with a few players and then it hit me that there is a way bigger play here. With the right contacts, effort and financial commitment, we can reach every player and get this city firmly behind this team where it should be. We can BRING BACK THE U.”¹²

Ohio State University hosted an event at which the head football coach asked 100 attending business leaders to contribute \$13 million to keep the football team roster together.¹³ Again, women athletes were not mentioned, nor was a comparable ask made elsewhere.

The Matador Club, a non-profit Texas Tech collective offered 85 scholarship players and 20 walk-ons football players one-year, \$25,000 contracts in exchange for community service, with Cody Campbell, a member of the Club’s Board of Directors, explaining, “This is kind of a base

⁹ Fox 2 Detroit. (September 9, 2021) United Wholesale Mortgage to sponsor Michigan State football, basketball athletes. *Fox2detroit.com*. Retrieve from: <https://www.fox2detroit.com/news/united-wholesale-mortgage-to-sponsor-michigan-state-football-basketball-athletes>

¹⁰ Businesswire. (September 8, 2022) United Wholesale Mortgage Expands Massive NIL Deal with MSU Athletes. *Businesswire.com*. Retrieve from: <https://www.businesswire.com/news/home/20220908005353/en/United-Wholesale-Mortgage-Expands-Massive-NIL-Deal-With-MSU-Athletes>

¹¹ Dellinger, R. (August 26, 2021) The First Thing to Understand About NIL Is That Nobody Fully Understands NIL. *SI.com*. Retrieve from: <https://www.si.com/college/2021/08/26/ncaa-recruiting-name-image-likeness-daily-cover>

¹² Barnett, Zach. (2021) “Miami booster offers NIL deal worth \$6,000 apiece to entire Canes roster: The Offer is the first from a startup organization aimed at recruiting businesses to do deals with Hurricane athletes.” *FootballScoop.com*. July 6, 2021. Retrieve from: <https://footballscoop.com/news/miami-booster-dan-lambert-nil-deal-hurricanes-roster-american-top-team-bring-back-the-u>

¹³ Lesmerises, Doug. (June 2, 2022) “Ohio State coach says team needs \$13M in NIL money to keep its football roster together.” *MLive*. Retrieve from: <https://www.mlive.com/news/2022/06/ohio-state-coach-says-team-needs-13m-in-nil-money-to-keep-its-football-roster-together.html?outputType=amp>

salary for the guys. They're not going to be restricted from doing any other NIL stuff with anybody else. In fact, we're going to encourage and help them do that."¹⁴ No mention was made in providing female athletes similar NIL opportunities.

A Georgia Tech Assistant Athletic Director explained how TiVo dealt directly with the school to provide an NIL deal for every football player to receive silk pajamas, yellow jackets, prepaid debit cards worth \$404, and a streaming device from TiVo in exchange for promoting TiVo on social media. In addition, TiVo provided the university with an upgrade to its audio/visual equipment, worth reportedly \$100,000.¹⁵ No mention was made that female athletes would be provided with similar NIL opportunities.

As these examples demonstrate, although the schools briefly watched this activity from the sidelines, when the NCAA declined to take any action or issue any guidance, the schools began to frequently assist the collectives in their efforts. After many months of activities, the NCAA issued some guidance about these activities, but it did not prohibit university involvement or encouragement; in fact, it gave guidance as to how the schools could facilitate the deals. Certainly, there was no guidance as to how the schools might satisfy Title IX and there is virtually no evidence that the schools are even bothering to encourage the third parties to provide equal benefits to women.¹⁶

¹⁴ Riker, John. (July 22, 2022) NIL Deals – Over 100 Red Raider football players will receive \$25,000 for community service. *BusinessofCollegeSports.com*. Retrieve from: <https://businessofcollegesports.com/name-image-likeness/texas-tech-footballs-matador-club-partnership-continues-trend-of-team-wide-nil-deals/>

¹⁵ TiVo.com (October 21, 2021) Triple Threat: How TiVo and Georgia Tech Football Transformed NIL Deals. *Tivo.com*. Retrieve from: <https://blog.tivo.com/tivo-for-consumer/what-to-watch/triple-threat-how-tivo-and-georgia-tech-football-transformed-nil-deals/>

¹⁶ At the very least, the NCAA is obligated not to promulgate rules that discriminate on the basis of sex. When the NCAA does not enforce the promotion, publicity, financial aid and recruiting rules designed for this purpose, this failure is tantamount to permitting sex discrimination. It is important to understand the NCAA rules mechanism that enables member institutions to comply with Title IX. Prior to third party NIL, donors and boosters were prohibited from involvement in recruiting or providing cash or other incentives to prospective or enrolled athletes as incentives to remain or attend by NCAA rules promulgated by its member institutions who are obligated to comply with Title IX. Only a specified number of coaches in each sport were allowed to recruit. Additional rules constrained the permissible number of contacts, times during the year when certain types of contact could occur, limits related to expenditures on prospect visits to campus, provision of tickets to college events, and other parameters of recruiting efforts. NCAA rules explicitly prohibited donors from providing cash or other gifts and benefits to athletes (or their families), contacting the athletes (or their families), or donating funds to the institution restricted to specific individual athletes. As a result, donors who wished to provide financial aid to athletes (an important component of recruiting success) or contribute funds to support recruiting efforts, could only do so by contributing money to the institution which allowed the institution to apportion equal support to male and female athletes (although schools openly flouted this obligation). Separate NCAA rules that allowed donors and boosters to provide legitimate employment outside the institution without funneling money through the institution under certain conditions that were defined as legitimate outside employment. These rules and conditions still exist but are not being enforced with regard to third party NIL: that work be actually performed, compensation be commensurate with going rates, and the offer of work not be a recruiting/retention inducement. DOE/OCR clarification of the obligation of the NCAA to enforce rules promulgated by its member institutions as

Institutions also started operating in ways not previously permitted under NCAA rules by entering into third party sponsorships, co-licensing and group licensing agreements that included compensation, exposure, and/or other benefits to athletes.¹⁷ Some institutions are also permitting athletes to use their institution's logos, brands, or other assets for the athlete's commercial NIL deals at no cost to the athlete, facilitating and encouraging this male-predominated NIL-collective activity.¹⁸

With no guidance from the NCAA for months, followed by weak guidance, this form of college-endorsed NIL seems here to stay. The Drake Group does not object to the monetization of athlete NILs through legitimately independent third parties, or even with cooperation and encouragement of the universities, but once there is university cooperation and involvement, Title IX requires equal treatment of women. OCR must make this point, loudly and clearly. A compounding factor is that most institutions have failed historically to support equally male and female athletes in publicity, promotion, recruiting, and athletics financial aid, failures that are compounded by this NIL inequality.¹⁹

The Drake Group believes that the current NIL chaos can be relieved by DOE/OCR clearly and precisely warning institutions, their conferences and national governance organizations of their obligations under existing Title IX requirements, explaining how those requirements apply to these new NIL-related activities, and warning that actions by "collectives" will be attributed to the universities when appropriate. The purpose of this letter is to request that the DOE/OCR take such action.²⁰ The Drake Group stands ready to assist OCR in creating this warning, or to answer any questions OCR may have about the details of NIL activities, collectives, or the role of the universities.

well as institution's improper institutional support of collectives should reestablish the conditions which enabled Title IX compliance. Third party organizations created by institutions obligated to comply with Title IX should not be used as subterfuge to violate federal law. The passage of the Civil Rights Restoration Act of 1987 (CRRRA) clarified the intent of Congress to interpret "program or activity" applied to third parties created by recipient entities (e.g., conferences, national governance associations, etc.).

¹⁷ It also threatens the college athletes' student/teacher relationship to the university, potentially converting it into an employee/employer relationship.

¹⁸ While the IRS appears to have turned a "blind eye" to the practice or may have insufficient resources to deal with this new practice, it seems that the DOE might express concern related to protection of the educational institution's non-profit status.

¹⁹ Fifty years after the passage of Title IX, approximately 90 percent of intercollegiate athletic programs are still discriminating on the basis of sex. Female athletes are being annually shortchanged by \$1 billion in athletics scholarship dollars, \$162.5 million in recruiting support, and 148,030 in sport participation opportunities.

²⁰ Recognizing the complexity of these new NIL-related activities, The Drake Group offers its assistance to meet with DOE/OCR staff to respond to questions regarding the concerns expressed in this memorandum and recommendations offered regarding DOE/OCR guidance.