



FOLLOW-UP NOTES

Does Baker's Proposal Invite the Power 4 to Leave the NCAA and What Might Happen If It Does?

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



Thanks for attending or registering for our January 18, 2023, webinar on critical issues in intercollegiate athletics. A regular feature of our webinar series is “Follow-Up Notes” which provides links to the recorded webinar, 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. Webinar #31 RECORDING

In case you missed any part of the January 18, 2024 webinar, you may access the recorded video here:

“Does Baker's Proposal Invite the Power 4 to Leave the NCAA and What Might Happen If It Does?”

[ACCESS RECORDING HERE](#)

2. UNADDRESSED QUESTIONS FROM WEBINAR ATTENDEES

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

and/or panelists. All audience questions specific to NIL Education were answered during the webinar. The following questions were not and relate to NIL collectives and Title IX.

Q1: What are your concerns for the concept of "Fair Play" at the Power 4 level? Will College sports end up like MLB and the Dodgers and Yankees spending all of the money? Or, can college provide NIL and revenue sharing while balancing the playing field like the NFL?

A1: We don't think "fair play" will be achieved in any world – current or future – where there is so much money at stake. It is theoretically possible that the Power 4 will separate from the NCAA entirely and set up revenue sharing agreements that aim for financial equality and competitive balance, but if that happened, we would be surprised.

Q2: College club sports have coexisted alongside varsity sports for a long time and operate by a . quite different model that avoids many of the problems now afflicting NCAA-governed sports. E.g., there is no "arms race" motivated by club sports, there are no paid coaches so no overinflated salaries or coach abuse, no academic waivers are given to club athletes, they involve no booster collectives, they operate like other student extracurricular activities, no general student fees are used to support them, no TV revenues generate unhealthy imbalances between athletics and academics, etc. Yet college clubs have their own national organizations (like College Club Swimming) that run regional and national championships. (It was set up with the help of US Masters Swimming .) So, in many ways, it represents the true "amateur" model of college sports. If increasing costs pressure colleges to convert varsity to club teams, is that a bad thing or actually an improvement?

A2: We can certainly see the logic in returning to a club model for some sports. However, it seems an unlikely outcome for any sport that is already generating revenue under the status quo or is an Olympic sport for which there is significant public support. A more likely scenario is gradual change. For example, athletic departments may create multiple funding tiers instead of treating all sports equally. The lowest tier may be funded at a level closer to the support of club sports, may have part-time rather than full-time coaches, and award either no scholarships or a small percentage of maximum allowable scholarships. Rather than drop current varsity sports to club status, generations of alumni who participated in that sport would likely be solicited to regularly contribute to enable the continuation of varsity status. See [*Restructuring a College Athletic Program to Protect Olympic Sports During Financial Uncertainty*](#).

Q3: It seems like the ultimate resolution is athletes of at least the Power 4 football and basketball programs being employees (of "an" entity) and unionized. That way, avoid all of the antitrust litigation. Additionally, collective bargaining can create competitive balance. What is the resistance to this model and why?

A3: Collective bargaining would at least in theory lead to competitive balance, yes. However, the path to Power 4 football and basketball employee status, and then unionization thereof, is riddled with potholes. If they are employees, how much does each player earn? If a football player earns, e.g. @150,000/yr, does a women's basketball player need to earn the same for the university to be in Title IX compliance? Currently, only private schools/organizations can unionize under the federal law (NLRA) while public institutions are subject to state laws. And so on...Can only state employees unionize?

Kavanaugh's concurring opinion in *Alston* suggests that there will be further attempts to go down this path, but it significantly challenges the model of "educational sport," to which the NCAA and its member schools still hold dear. (Cf. Kavanaugh wrote: "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.") Other alternatives may exist. What if the NCAA was governed by an equal number of institutional and athlete representatives, mirroring a collective bargaining environment, necessitating neither athlete "employees" nor traditional unions? All of these options are currently being explored.

Q4: If "student-athletes" get paid, should they still get scholarships? Will scholarships be part of the benefits of employment? Couldn't education benefits be incorporated into a CBA?

A4: This is an open question, and may be dependent on future court rulings or actions of Congress. If athletes are employees who unionize and enter into "collective bargaining agreements," scholarship benefits could be included as a benefit in addition to salary. The Drake Group has offered [a new governance framework](#) that maintains the existing scholarship structure. Further, the public may not be aware that the *Alston* SCOTUS decision specified significant additional allowable compensation conditioned on being tether to education such as institutions paying for internships, study abroad, up to \$5,980 in cash awards for academic achievement, etc.

Q5: Re: the trains moving down the multiple tracks for a determination of athlete-employment status: what is the reality on timing for Congress to act versus a court or NLRB decision to be made?

A5: Most observers agree that it is highly unlikely that Congress will act in 2024 because bills addressing the athlete employee issue are not bipartisan. Most of the NIL bills announced or filed in this 118th Congress (2023-24) do not address the athlete employee issue. Those that do or address athlete collective bargaining are:

- An [untitled bill draft by Senator Cruz](#) would specify that athletes are not employees as would the most recent [discussion draft of the FAIR College Sports Act](#) by Representative Bilirakis.
- Sen. Chris Murphy (D-CT) and Rep. Lori Trahan (D-MA) have proposed [The College Athlete Economic Freedom Act](#) which would require that institutions obtain group licensing rights from athletes for use of their NIL and inform them how much the institution will receive from these media rights agreements which might lead to athlete negotiations.
- Sen. Chris Murphy (D-CT), Sen. Bernie Sanders (D-VT), and Elizabeth Warren (D-MA) in the Senate and Rep. Jamaal Bowman (D-NY-16) would recognize “college athlete employees” with their proposed [College Athlete Right to Organize Act](#).

Similarly, the courts are not close to resolving the athlete employee issue. None of the major antitrust lawsuits currently being litigated are close to resolution and completion of any appeal process:

- Not one federal court of appeals has ruled that any college athletes are statutory employees under either the FLSA or the NLRA. The employee and collective bargaining issues will be a long process – “if this, then that, if this, then that.” In other words, there's no light switch whereby there is a declaration of employee status one day and institutions of higher education or their conferences will start paying them the next day.
- There are state labor laws that would require a federal preemption (Congressional action) even if federal courts of appeal were to decide they are statutory employees under federal law. As just one example, Michigan and Ohio exclude college athletes from the definition of "employee." Given the NIL experience, there is a likelihood that other states might follow their lead.
- The SCOTUS Alston decision did not address the question of whether the NCAA could set any limits on compensation to athletes such as the current prohibition of institutional “play for pay” and ineligibility of NCAA defined “professional athletes.” (The new Kessler Carter antitrust lawsuit is posing that question.) The plaintiffs did not appeal Wilken’s and then the 9th Circuit decision that the NCAA could set limits on the amount of athletic scholarships and other compensation related to athletic performance but could not limit the education-related benefits. Wilken had held that this struck the right balance to preserve the popularity of college sports (and rejected the pro-competitive justification of preserving competitive balance).
- The SCOTUS Alston decision noted that the NCAA had “dramatically increased the amounts and kinds of benefits to athletes including grants-in-aid up to cost of attendance and “benefits incidental to athletics participation.” SCOTUS agreed with Wilken that some of the NCAA’s limits have “procompetitive effect to the extent that they prohibit compensation unrelated to education, akin to salaries seen in professional sports leagues.” The Court also noted that Wilken enjoined only those restraints that would “not blur the distinction between college and professional sports and thus impair demand.” It also noted

that Wilken stated that the NCAA had considerable leeway in developing its own definition of benefits related to education and could see modification of the court's injunction to reflect that definition and that it could continue to fix education related cash awards so long as those limits are never lower than the limit on athletic performance awards (the NCAA's limits on the value of cash cards, gifts, trophies and awards received from the institution or post-season events). Also, Wilken noted that the education benefits had to be "legitimate" educational activities—e.g., not phony internships—and it could have a "no-Lamborghini rule." The decision only applied to limits on the schools and conferences – not on third party payments.

For all of these reasons, we take no position at this time on whether college athletes are statutory "employees." Those determinations will be made according to various state and federal laws, such as the National Labor Relations Act, the Fair Labor Standards Act, state worker's compensation acts, and the interpretation of such laws by state and federal courts and agencies. Drake acknowledges that any student can be both a student and employee and that the current mechanisms of institutional control of athlete time, compensation, and participation meet the common definition of employee. However, we believe that student academic obligations must take priority over athletics time commitments which must be reduced and the compensation and participation control mechanisms (fear of scholarship nonrenewal and removal from team) can and should be addressed. We are hopeful that changes in NCAA governance and Congressional bipartisan deliberation may provide a path for a statutory definition of "college athlete employee" appropriate for higher education institutions.

Q6: The NLRB decision will focus on team control over athlete time, schedule, speech etc. Is anyone thinking about what level of reduced control would keep athletes as non-employees? e.g, could skip practices to study for exams.

A6: Many ideas have been floated such as skipping practices to study for exams, closing the huge loopholes in the NCAA's current 20-hour limit for athletics related activity (athletes in all competitive divisions are spending 30-50 hours in athletics-related activities), etc. However, the fact that athletes receive compensation is also considered in the definition of employee with the NLRB's legal counsel pointing not only to scholarships, but travel benefits, training table, per diems, etc.). But "push back" arguments are also being raised. Every athlete (scholarship or non-scholarship) in every competitive division is receiving athletic program benefits (e.g., travel, per diem, training table, etc.) and is under the control of the institution that imposes conditions of eligibility (required full-time status, minimum GPA, demonstrated progress toward a degree, etc.). Coaches require class/practice attendance as a condition for athletes to be selected to play in contests. Arguably, then any athlete in any division could be an employee. High school athletes should be similarly categorized. Such benefits and controls exist in many extracurricular activities, e.g., are essential for the conduct of performing arts events. Consider any student participating in drama/theatre productions, choir, band, or orchestra performances. Whether on talent scholarships

or not, they receive the benefits of performing in the extracurricular activity (e.g., travel, per diem, etc.) and are under the control of the institution (e.g., required attendance at rehearsal as a condition of participation, etc.). Arguably, these students could be categorized as employees. These points are made to support the position that the open market definition of “employee” does not appear appropriate for these extracurricular activity settings.

Q7: Why hasn't the NCAA proposed using some of their profits from March Madness to help schools qualify for "Project D1" as opposed to forcing the institutions to cover the funds? Understanding that will reduce the NCAA staff and impact certain NCAA's other initiatives in the process but will lessen the burden of their proposal.

A7: We recommend this good explanation of [where the NCAA gets its money and how it is distributed](#). March Madness funds are already distributed to Division I members in various forms. We also point to the fact that the College Football Playoff revenues do not belong to the NCAA and are used only by FBS members (75% to the Power 5/now4 and 25% to the Group of Five). We can only guess that Baker’s proposal tests the ability and willingness of institutions to meet a high threshold for splitting up the FBS into “pay for play” institutions and those who cannot afford to do so.

Q8: Rather than looking at conferences leaving the NCAA, why not deal with the elephant in the room and have the NCAA eliminate FBS football from the list of sports that are sponsored and supported?

A8: [The Knight Commission has long advocated for this solution](#) or to have the FBS schools pay the NCAA for football-related outlays.

Q9: Do winning teams enhance enrollment of the best students or just more students? When Rutgers went big-time, it lost the best students who started going to the College of New Jersey instead.

A9: It depends who you ask. Colleges will typically say it does help enrollments. Scholars who study the matter disagree somewhat. Here are several references that may help:

- Griesbach, Rebecca. (Feb. 2, 2024) Nick Saban’s lasting impact on Alabama’s campus, students: ‘That pride shows.’ *AL.com* Retrieve from: <https://www.al.com/educationlab/2024/02/nick-sabans-lasting-impact-on-alabamas-campus-students-that-pride-shows.html>
- Peterson-Horner, E., & Eckstein, R. (2015). Challenging the “Flutie Factor” Intercollegiate Sports, Undergraduate Enrollments, and the Neoliberal University. *Humanity & Society*, 39(1), 64-85. Retrieve from: https://journals.sagepub.com/doi/pdf/10.1177/0160597614552900?casa_token=gCUw9T

mzdX0AAAAA:DetG0t4bl-lkrlNZJZIUrpc9F-lwOA1O18Qkul-PwXrOSP_2yW6R62w9p8SO5G3oKV1wt7mGVQ

- Pond, A., & Greenwell, T. C. (2023). Re-Visiting the Flutie Effect: An Exploration of Athletic Success and its Impact on Student Enrollment Decisions. *Journal of Issues in Intercollegiate Athletics*.
<https://web.p.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=c5e06020-6286-40af-9677-94ce80c3e455%40redis>

3. OUR NEXT WEBINAR

“Conference Realignment – What Does It Mean?”

OUR NEXT FREE WEBINAR! Thursday, February 15, 2024 – 2:00-3:30 p.m. EST

[REGISTER HERE](#)

Another historic phase of college football conference realignment occurred in 2023. The Big 12, Big Ten, and Atlantic Coast Conference all embarked on another round of expansion that destroyed the 108-year-old Pac-12 Conference. Two new super-conferences were created in the South and Midwest. The new national map of college football will exist for the foreseeable future. Expert panelists will explore this historic conference realignment and its impact on college athletes. Join us to discuss issues like increased time demands, impact on academic commitments, elimination of historical rivalries, increasing gaps between well-resourced and less-resourced schools, impact on Title IX, and exacerbation of an already unsustainable financial model.

4. ACCESS RECORDINGS OF PREVIOUS WEBINARS

[CLICK HERE](#) to see the table of contents of The Drake Group Education Fund Video Library for recordings of all 30 previous webinars including the full proceedings of the 2022 and 2023 Allen Sack National Symposium.

5. QUESTIONS ABOUT THE DRAKE GROUP EDUCATION FUND AND 2aDAYS.com

The Drake Group Education Fund (TDGEF) is a new 501(c)(3) non-profit education sister organization of The Drake Group (TDG) whose mission is to ensure that the promise of college athletics is realized for all stakeholders. TDGEF produces *The Allen Sack National Symposium on Integrity in College Sports* and the *Critical Issues in College Sports Webinar Series*, conducts fact-based research on intercollegiate athletics and develops position papers and other educational

materials that influence public discourse on current issues and controversies in college sport. To access a full library of print and video educational materials on current issues in intercollegiate athletes, visit www.thedrakegroupeducationfund.org. All educational materials are available free of charge. If you believe The Drake Group Education Fund is doing good work, please also consider making a tax-deductible donation to support our webinars, educational research, and programs. You can donate and learn what we do [HERE](#).

The Drake Group (TDG), a sister organization to TDGEF, is a 501(c)(4) non-profit organization whose mission is to educate policymakers and advance legislative initiatives that foster academic integrity and athlete well-being in intercollegiate athletics. For the most current information on The Drake Group and college athletics related bills being considered by Congress, visit TDG [HERE](#). TDG needs volunteers to contact their senators and representatives to advance collegiate athletics reform legislation. Learn about legislation and [VOLUNTEER/JOIN HERE](#).

2aDays.com. Interested in helping high school and college athletes learn more about athletic programs at institutions they are considering attending – and the ratings of coaches in these sport programs? Check out our webinar partner 2aDays.com. An important note from 2aDays: It is also important to mention, given the focus of Congress on athlete health and welfare, that 2aDays gives athletes the opportunity to rate their coaches and also view ratings of athletes of other coaches. This information could prevent an athlete from playing in unhealthy educational environments.

6. THANKS TO OUR WEBINAR #31 PANELISTS



AARON MILLER, Ph.D., is an educator, author, podcaster, and leadership coach. He is also a Lecturer in the Department of Kinesiology at California State University, East Bay, an Associate Adjunct Faculty, Department of Kinesiology, St. Mary's College of California, and creator/host of the podcast, *The Power of Sports*. Miller has authored *Discourses of Discipline: An Anthropology of Corporal Punishment in Japan's Schools and Sports* and *Buying In: Big-time Women's College Basketball and the Future of College Sports*. He is the author of numerous op-eds, essays, and journal articles and book chapters about education, sports, culture, power, violence, and social justice. He has been a Visiting Scholar at Stanford University and a Visiting Professor at Waseda University. Miller received his B.A. from the University of California Los Angeles and M.Sc. and Ph.D. from Oxford University. Dr. Miller is a member of The Drake Group Board of Directors.



CARRY BANKS, JR., Ph.D., NCAA Faculty Athletics Representative, Norfolk State University. Dr. Banks is also the Department Chair and an Associate Professor in the Department of Engineering Technology in the College of Science, Engineering and Technology. He is a former member of the NCAA Division I Legislation Committee, the NCAA Division I Committee on Academics, the NCAA Div. I Academic Executive Council, the HBCU and LRSI Advisory Executive group, and numerous other NCAA committees. Dr. Banks is a member of the Mid-Eastern Athletic Conference (MEAC) Delegate Assembly and is a former member the MEAC Executive Council and MEAC Basketball Championship Committee. He received his B.S. from Elizabeth City State University, M.A. from Ball State University, and Ph.D. from Pennsylvania State University.



OLIVER LUCK, Chairman, Altius Sports Partners. Luck provides leadership experience spanning collegiate and professional athletics. His roles have included Commissioner of the XFL, Executive Vice President for Regulatory Affairs and Strategic Partnerships of the NCAA, and Athletic Director of West Virginia University. Additionally, he has been in leadership roles with the Houston Dynamo of Major League Soccer and the National Football League and was Chief Executive Officer of the Harris County-Houston Sports Authority, where he oversaw the financing, construction and management of professional sports and entertainment infrastructure in Houston, including Minute Maid Park, Reliant Stadium and Toyota Center



ERIC PRISBELL, National College Sports Business Writer, On3. Over most of the past two decades, Prisbell has covered virtually every angle of college sports for outlets including *The Washington Post* and *USA Today*. Prisbell has covered 15 Final Fours, a half-dozen national title college football games, the Super Bowl, the World Series, and the NBA Finals. His work has been honored seven times in the Associated Press Sports Editors' national contests. Four of his stories received honorable mention recognition in the *Best of American Sports Writing* anthologies. Most recently, he spent three years at *Sports Business Journal*, where he covered Major League Baseball and the NBA.



MADDIE SALAMONE, J.D., Attorney. Salamone is a college athlete advocate, and former Duke University scholarship lacrosse player who, during college, served on and eventually chaired the NCAA Division I Student-Athlete Advisory Committee (SAAC). In that role she served on rules working groups and legislative and leadership councils within the NCAA. Ms. Salamone also successfully advocated for college athletes to be granted voting power in the new NCAA governance structure and was awarded the ACC President’s Award for Exemplary Service in 2017 for the lasting impact of her advocacy. A leading voice for NCAA reform and college athletes’ rights, she works with sports leaders across the country and delivers public presentations on the major issues in college sports. She recently testified before Congress on issues related to name, image, and likeness (NIL) and player health and safety. She hosts the “Speaking of Athletes” podcast and “WYE Channel” on YouTube.