



## **FOLLOW-UP NOTES**

### **WEBINAR #5**

## **“TITLE IX AND THE NIL MARKETPLACE: Subterfuge or Opportunity to Remedy Historical Inequities?”**

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

*Thanks for registering for our November 17 webinar. A regular feature of our webinar series is “Follow-Up Notes” which provides a link to the recorded webinar, answers to questions from the audience which panelists did not have the time to address (prepared by Drake Group experts), and information on our next webinar.*

### **1. WEBINAR #5 RECORDING**

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In case you missed any part of *Title IX and the NIL Marketplace: Subterfuge or Opportunity to Remedy Historical Inequities* webinar:

**[ACCESS THE RECORDED NOVEMBER 17 WEBINAR HERE](#)**

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

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**Q:** If/when we get to a federal solution for NIL regulation, what “guard rails” do you see as necessary especially as it relates to protecting/enhancing gender equity (or at the very least, not exacerbating current inequities)?

**A:** If the NCAA or any other national athletic governing organization or conference was serious about gender equity, compliance with Title IX would be a condition of membership for any of these entities. The NCAA Division I certification program, discarded in 2011, accomplished this function with an accreditation-like assessment model: institutional self-evaluation by non-athletics faculty and staff followed by external peer review by colleagues from other NCAA member

institutions. Gender equity was one of the areas examined and the standards and assessment methodology mirrored a Title IX assessment. If institutions were found deficient, remedies were identified and a one-year gender equity plan to achieve compliance was mandatory. The penalty for failure to complete the gender equity plan resulted in penalties up to and including suspension from membership. Unfortunately, the NCAA certification program was replaced with a presidential “dashboard” of comparable institutional data that is of little or no utility -- Title IX has nothing to do with the compliance status of other institutions. Further, dashboard data is not transparent in that the president of the institution is only allowed to designate a limited number of individuals with dashboard privileges. Such a certification guardrail could be specified by Congress as a condition of Higher Education Act funding of the institution (the same enforcement mechanism as Title IX). For example, the guardrail could specify that “institutions of higher education that are recipients of federal funds must be a member of a governance organization that requires Title IX compliance as a membership obligation and provides for a regular peer review assessment process to determine the compliance status of members.”

**Q: Did the California state NIL law have any language requiring compliance with civil rights laws in regard to structure of NIL market in institutions? Can OCR develop guidance or even regulations that will enforce Title IX across a variety of state NIL laws and institutional differences?**

**A:** No. However, some states like California have gender equity laws that mirror Title IX. This being said, the plain language of the Title IX federal law is applicable to areas of NIL inequities in which the institution consults, constructs, steers, arranges, or otherwise benefits from a third-party entity acting on its behalf to provide recruiting benefits, as was discussed during the webinar. However, the NIL marketplace is so new, the U.S. Department of Education Office for Civil Rights (OCR) has not had the time to provide guidance via a formal interpretation of Title IX’s application to the NIL space. The Drake Group has issued an extensive position statement regarding what it believes such guidance should be: see [\*NILs and Title IX: Educational Institutions Must Fix their Promotion, Publicity, and Recruiting Inequities Critical to the NIL Monetization Success of College Female Athletes and Must Not Use Third Parties to Evade Their Title IX Obligations\*](#)

**Q: Do we need to seek state-by-state provisions in NIL laws to address NIL gender equity concerns?**

**A:** Amending an existing state NIL law is always an option to address such concerns, especially if an OCR interpretation is not likely to happen soon. It may be helpful ask your state senator or representative to pressure OCR to provide such an interpretation or to co-sponsor a federal statute to address NILs that includes clear gender equity language.

**Q: What’s the Oklahoma/Lululemon deal mentioned during the webinar?**

**A:** The NCAA, in response to an inquiry from the University of Oklahoma, ruled that a Lululemon proposal for OU athletes to participate in its “team program” would not be permissible. The program allows accepted teams to purchase discounted apparel without having to do anything other than participating on a team. In order for OU athletes to participate in such a program without violating NCAA rules, the athletes would need to perform some type of quid pro quo service such

as performing social media postings, etc. Without the quid pro quo provision, the NCAA would consider this to be the provision of special treatment to the athlete based solely on his/her athlete status.

**Q: The BYU deal clearly violates the NCAA Division I Football Bowl Subdivision (FBS) grant-in-aid limit of 85 in football, even if it doesn't violate Title IX. Comment?**

*A: Background: Built Brands LLC, has an existing sponsorship relationship with BYU athletics. Separately, but apparently with BYU's rules compliance advice related to allowable NIL deals, the company created an NIL program to provide compensation up to the value of tuition in return for individual athlete NIL services. The agreements were with BYU football scholarship athletes as well as walk-ons.*

Comment: This is an NCAA rules compliance question and it appears the NCAA is being silent on any case in which there is an outside NIL agreement with a third party. This leaves the NCAA member institution like BYU without guidance as to whether an institution that provides “regulatory” clarification to an inquiring third party sponsor is committing an NCAA rules violation when they follow that advice. Our only comment is that no response is a failure of the NCAA’s “governance” responsibility to its members.

**Q: Is it expected that NILs will help keep more high-profile athletes competing for their colleges, such as Missy Franklin and Katie Ledecky in swimming who both stopped competing for their college teams at Cal and Stanford after their sophomore year in order to pursue lucrative NIL-type opportunities? (It remains uncertain whether such athletes while competing for their colleges could accept prize money in competitions sponsored by companies like Arena, TYR, Speedo, etc. where both pro and amateurs compete together.)**

A: Yes, to the question of keeping our Olympic superstars and other highly talented athletes in the college sport space. Now they don’t need to make the tough choice of delaying college during that short window of opportunity when they are in the best position to monetize their NILs because they would be violating NCAA “amateur status” rules. With regard to “pay for play”, the prize money you describe still falls within the NCAA rules of making an athlete a professional but, like with NIL questions, the NCAA has not, to our knowledge, issued any new ruling or clarification on this issue.

**Q: Under current NCAA rules boosters are not allowed to have direct contact with athletes or parents (except under special circumstances, such as a booster working at a college fair). Booster collectives would seem to breach this rule of no direct contact, right?**

A: We presume that if the collective initiates a deal to employ the athlete as a speaker for any of its events that this would be allowed. We similarly presume that a representative of athletics interest would still be restricted from offering inducements to attend or remain at the institution or extra benefits outside allowable NIL and outside employment. We similarly presume that current NCAA rules would apply to other than these situations.

**Q: Where are the Learfield/IMG and PlayFly companies, entities that represent the schools and conferences, in the NIL marketplace?**

**A:** There are numerous sports marketing and media agencies who appear to be “playing the middle,” not acting or seeking to be athlete “agents” which would require their certification and registration under many state laws, but simply offering NIL deals to athletes. We know of no state law or requirement which requires the athlete to have an agent. Thus, these companies appear to be free to offer deals on behalf of their clients. These companies play the same role with the institution, getting companies to enter into sponsorships (institutional NIL deals). The gray space is co-licensing and group licensing where the institution is knowingly giving use of its NILs to the athlete to monetize – even if the third party, like a video game manufacturer, separately contracts with and pays the athlete and then separately contracts with and pays the institution. We contend that these arrangements are clearly within the purview of Title IX and that whatever the institution does to benefit male athletes must also be done for female athletes.

**Q: Sportsbooks and casinos have gotten into the NIL action, with Drew Timme of Gonzaga’s men’s basketball team teaming up with Northern Quest Casino and MaximBET partnering up with female athletes in Colorado. How can college athletes promote these entities, and vice versa, without running afoul of NCAA regulations prohibiting certain gambling activities among student-athletes?**

**A:** We cannot speak to NCAA regulations and whether entering into an NIL agreement with those companies violates NCAA prohibitions. We can amplify any concern with regard to the current environment in which gambling entities are compensating athletes through NIL deals and athletic departments through sponsorships. History tells us that this intertwining of sports and gambling means that we are a heartbeat away from match-fixing scandals. Other countries are far ahead of us, having installed national sports gambling safeguards while the USA has none. Since the U.S. Supreme Court declared the federal law prohibiting sports gambling unconstitutional in 2018, Congress has failed to come back with the legislative fix clearly outlined by the Court. As a result, we are in the midst of gambling regulation chaos created by a proliferation of differing state laws and extensive internet and television advertising of gambling houses. We have expressed this concern to and urged members of Congress to act to confront this larger than NCAA or NIL problem.

Some but not all state NIL laws expressly prohibit college athlete NIL agreements with what are deemed “objectionable product categories.” See The Drake Group’s [State-by-State NIL Database](#). The majority of state NIL laws and some institutional policies governing athlete NIL agreements, prohibit deals with sports betting or gambling entities. The NCAA did not address nor prohibit any specific categories in its [interim NIL guidelines](#). However, the NCAA does permit institutions to create their own restrictions regarding the nature of athlete NIL agreements beyond what is stated in the NCAA guidelines and their own state laws, as long as such restrictions do not conflict with their respective state laws. For example, the Colorado NIL law is silent regarding any objectionable categories but it does prohibit athletes from entering into agreements that conflict with existing team contracts at their respective universities. Thus, since the University of Colorado has an existing agreement with PointsBet, a gambling entity, its athletes cannot enter into agreements with gambling entities. This complex current reality of varying state laws and institutional policies further shows the pressing need for Congress to produce a comprehensive uniform policy applicable to colleges and universities in all states.

**Q: Do you think that schools will take their athlete education responsibilities seriously and address the purposeful promotion of female athletes as sex objects (rather than as accomplished athletes) in the NIL space?**

**A:** We can only hope that institutional education programs about athletes developing their personal brands includes a caution to this first generation of NIL female athletes not to follow in the footsteps of the 1970's and 1980's when collegiate sports media guides regularly depicted female athletes in non-athletic apparel and sexy stereotypical poses.

**Q: The use of internet streaming and extra effort to increase the institution's promotion and publicity of female athletes doesn't appear to be much of an "offset" to balance the provision of regular national exposure on major sports channels provided to men's football and basketball players. This is especially true when the existing and historical levels of promotion of women's sports is still extremely limited. Is this really a fair Title IX solution?**

**A:** The institution has many options. We agree that the two easiest solutions to pursue are to include women's sports in every television package negotiated for male athletes. If that doesn't happen, it would be preferable for the institution to use its television media rights fee to buy television time and production to air women's sports with the same reach. If they negotiate such a time buy at the time they arrange the men's contract, there would be an excellent opportunity to negotiate discounted fees. This isn't happening because there is little commitment at the institutional or conference level to prioritize gender equity and Title IX compliance with regard to promotion and publicity treatment.

The 2021 Women's Final Four debacle, followed by the Kaplan Report, was a good example of the NCAA devaluing the women's Division I championship (at \$0), with the NCAA succumbing to the myth that there is no television audience for women's sports. The Kaplan Report estimated the Women's Final Four to be valued at over \$100 million. Moreover, the future in sports viewership is much more than television. It is all the more critical to address these inequities now as we know internet media rights are continuing to grow at a fast pace given advances in technology, competition among various viewing platforms, and ever-widening viewership. We cannot let the gap widen further. As female athletes realize they are being shortchanged during the regular sport season and post-season championships with regard to promotion, publicity, and television exposure, the Title IX complaints and lawsuits will follow. The NIL era will do much more than simply benefit athlete outside employment.

**Q: The panel dealt with gender as intended, but not with the intersection of gender with race and class when it comes to being positioned to reap NIL benefits. Will women of color and women from lower income backgrounds be able to negotiate NIL deals at the average level for the Divisions in which they play—especially those in lower profile sports?**

**A:** Absent a Congressional NIL bill that establishes an independent [NIL Commission as originally proposed by The Drake Group](#), a clear path to getting data on NIL deals disaggregated by gender, race or socio-economic level is not evident. The data released by Opendorse ([see October 31 report](#)) and INFLCR ([see October 31 report](#)) does contain gender data because it breaks down

information on its clients by teams (which are separate sex), but each report contains only clients that used these two respective platforms. An independent Commission could collect all NIL data as could the NCAA via asking or requiring its members to report because institutions are requiring athletes to report their NIL deals. The key is that data be requested that includes information on race, gender, and socio-economic level among other athlete data that would help in assessing who is benefitting from NIL opportunities.

### **3. OUR NEXT WEBINAR – “Keeping Everything We Love About Collegiate Sport While Fixing Its Failed Governance Structure”**

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**SAVE THE DATE! Thursday, December 2 from 2:00-3:30pm.**

The NCAA has been frozen with indecision since the June U.S. Supreme Court decision limiting its “amateur status” rules. Fearful of legal responsibility, the organization is pursuing a constitutional convention restructure that reeks of throwing its conference and institutional members under the litigation bus. College athletics has lost its way because of a failure of governance – pursuing riches for coaches and administrators derived from the economic and educational exploitation of college athletes -- instead of firmly embracing educational sport. Panelists discuss a blueprint for getting athletic programs back on track while retaining the special contributions of college sport to individual athlete development and the excitement and community it brings to higher education campuses. Athletic program success does not have to come at the expense of athlete physical and mental well-being, better educational outcomes, race and gender justice, or financial balance.

### **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"



## 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](#).

## 6. THANKS TO OUR NOVEMBER 17 PANELISTS!

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### PANELISTS:



**JAYMA MEYER (Facilitator and Panelist)**, Counsel, Simpson Thacher & Bartlett; Visiting Clinical Professor, Sports Law, Indiana University; member of the Board of Directors, Sports Lawyers Association; Emeritus Member, Board of Directors, National Women's Law Center; Emeritus Trustee, former Vice President, Women's Sports Foundation; has negotiated Title IX settlement agreements that contain multi-year monitoring provisions with high schools throughout the US and is currently litigating a class action Title IX case against the Hawaii Department of Education; has co-counseled with the San Francisco Legal Aid at Work, California Women's Law Center, Hawaii ACLU and National Women's Law Center on Title IX matters; ranked among the top ten butterfly swimmers in the world in the 1970s.



**GLORIA NEVAREZ**, Commissioner, West Coast Conference; Member of the NCAA Men's Basketball Committee and Transfer Working Group; Member, Knight Commission on Intercollegiate Athletics; one of nine female conference commissioners and first Latin American in NCAA Division I; led WCC adoption of the "Russell Rule" - the first Division I conference to adopt this diversity hiring initiative; former Senior Associate Commissioner of Pac-12 Conference, Senior Associate Athletic Director/Compliance Director at the University of Oklahoma, and University of California-Berkeley Athletics Compliance Officer; former scholarship athlete in basketball at University of Massachusetts; JD from University of California-Berkeley Law



**JULIE SOMMER**, Attorney, fifteen years of experience litigating civil, administrative and criminal matters at the administrative, trial, and appellate levels; Member, The Drake Group Board of Directors; recognized as a Rising Star by Super Lawyers Washington in addition to being an active member of the Washington State Bar Association and the King County Bar Association; former four-time NCAA All-American swimmer at the University of Texas at Austin, USA Swimming National Team member and listed among the top ten in World Swim Rankings.



**DONNA LOPIANO**, President, The Drake Group; President, Sports Management Resources, a gender equity and sports management consulting group; former UT-Austin Women's Athletics Director and CEO of the Women's Sports Foundation; Adjunct Professor of Sports Management, Southern Connecticut State University; nationally and internationally recognized for her leadership advocating for gender equity in sports by the International Olympic Committee, the National Collegiate Athletic Association, the National Association for Girls and Women in Sports, Women Leaders in College Sports, and the National Association of Collegiate Directors of Athletics.