



FOLLOW-UP NOTES

Webinar #40

NCAA v. House/Hubbard/Carter Proposed Settlement: The Current Legal Landscape

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

Thanks for attending or registering for our September 19, 2024 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. Questions may be slightly revised to be more generic or to combine similar questions.

1. Webinar #40 RECORDING

In case you missed any part of the September 19, 2024 webinar, you may access the recorded video here:

“NCAA v. House/Hubbard/Carter Proposed Settlement: The Current Legal Landscape

[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 (TDGEF) and The Drake Group experts and/or panelists. Answers include any panelist or attendee responses from the chat area deemed helpful. General comments by attendees not phrased as questions are not included.

Q1: Has The Drake Group considered filing an amicus brief in any of these matters, including but not limited to House?

A1: No, but TDG materials prepared for Congress are being used by third parties who are preparing amicus briefs and other formal objections to the settlement. The Drake Group (TDG) is the sister organization of The Drake Group Education Fund (TDGEF) that focuses on educating and influencing Congress and the Executive branch. When the proposed settlement was announced, TDG gathered economic and legal experts and spent a month producing a comprehensive [Congressional Briefing Paper](#), knowing that there would be incredible pressure on Congress to give the NCAA an antitrust exemption and declare that college athletes are not employees. TDG also saw a need to meet with the Office for Civil Rights to request issuance of formal guidance about the way NIL collectives were operating and how Title IX covers employment and compensation, such as proposed settlement revenue-sharing and NIL payments. Few members of Congress understand how college athletics operates so factual information on how the settlement will affect institutions is critically important.

Q2: Is there a problem with or rationale to support roster limits for softball and women's lacrosse which have been reduced compared to their male counterparts(i.e., women's lacrosse 38 vs. men's lacrosse 48)?

Q2: Two important points about Title IX: (a) Title IX does not compare one sport to another sport even if the same sport exists for male and female athletes. Comparisons are always the treatment of all male vs. the treatment of all female participants. Thus, roster limits would be examined as they affect all males vs. all females with regard to whether equal proportion of males and females were negatively affected by roster limits. The male and female athlete “proportional to male and female undergraduate full-time student “Prong One” standard would apply. Thus, the extent that new roster limits changed overall male and female participation would be the issue. We also note that a school cannot use roster limits or other rules of a governance organization to justify providing female athletes with less than their gender equity entitlement. Thus, the fact situation at each institution is always determinative.

Q3: Could NCAA scholarship limits be eliminated whether or not the House settlement is approved? It seems like an easy, no-cost change by the NCAA. Schools can decide what they want to do with each team.

Q3: Yes, the Title IX issue will always be whether financial assistance in the aggregate to male and female athletes respectively, is proportional to their athletic participation. We note that the function of scholarship limits by sport is competition equity between sport teams of different sizes playing against each other. Scholarship and operating expense limits also function as incentives for broad sports programs—supporting many sports rather than concentrating all resources in a few sports. The impact of moving from scholarship to roster limits might be reduction of walk-on or non-scholarship athlete opportunities.

Q4: Are you hearing ideas on how the NCAA or conferences or schools will try to evade Title IX for past damages...what is being suggested?

A4: Ideas range from distributing funds from third parties direct to athletes rather than using schools and suggesting that only school-direct-to-athlete distributions must adhere to Title IX's gender equity obligation, that past damages simply shouldn't be matched (even though these payments are for payments that would have been made to male or female athletes were it not for NCAA rules at the time, and the most recent amended version of the proposed settlement of House-Hubbard-Carter, which would prohibit any athlete who received settlement payments from bringing a Title IX lawsuit related to the distribution of the settlement.

Q5: Can the University of Tennessee's 10 percent add-on to football ticket prices be considered NIL or is it pay-for-play?

A5: Neither—this is the price of a football ticket. Revenues are neither NILs nor pay-for-play. Revenues come into the institution and then the institution determines how they are used. The institution is obligated to comply with Title IX with regard to the financial assistance it distributes to athletes. Whether this assistance is tethered to educational expense like traditional scholarships, paid for NIL publicity rights, or paid outright re: pay for play or revenue-sharing, the Title IX standard will apply—whether all financial assistance in the aggregate by sex is proportional to percent athletes of each sex. Donors, as opposed to ticket buyers, could restrict their donations for a specific purpose (construction of new facilities, scholarships, and even pay-for-play in addition to educationally tethered scholarships. However, if the institution accepts the restricted donation for a men's sport, the institution must be sure that equal benefits are provided for women under the provisions of Title IX.

Q6: How much revenue on DraftKings and other betting sites are generated from wagering on college sports? The athletes they are betting on, such as those in this lawsuit, do not benefit and in fact must endure angry fans who are affected by their gambling losses.

A6: The American Gaming Association generates [monthly gambling reports](#) reporting revenues on different types of betting. Gambling was prohibited in the USA by federal law until 2018 when the Supreme Court ruled the law as unconstitutional. Individual states now control gambling, generating billions each year for state coffers with legislative appropriations determining their use. Some colleges initially entered into sponsorship agreements with betting sites, some even accepting a bounty paid for each student who established a betting account (see Univ. of Maryland/Howard Univ. Report "[Gambling on Campus](#)"). TDGEF is considering a major project to address the gambling issue because of the following statistics:

- 71% of students living on campus are bettors and tend to bet at a higher frequency;
- 41% of college students who bet on sports have placed a bet on their school's teams;
- 35% have used a student bookmaker;
- Athletes are at high risk for sports gambling because of their competitive personalities and they are also prime targets for match fixers; and
- 55% of male athletes and 38% of female athletes had placed bets in the last 12 months according to a [2016 study](#).

Most observers agree that in addition to being a public health threat (an estimated 7 million people in the U.S. have a gambling problem, with one in five problem gamblers having attempted suicide, see [National Institutes of Health](#) and [National Council on Problem](#)

[Gambling](#)) gambling is an existential threat to competitive sport if fans believe the outcome of contests are predetermined. Congress is also beginning to address the problem (see the [SAFE Bet Act](#) filed in both the House and Senate).

Q7: Given the harm the NCAA has caused by restricting athletes rights to earn outside income in the past and still inadequately funding scholarships, medical, and other benefits for athletes generating revenues, can the NCAA be trusted as a rules enforcer? Along with legislation, don't we need a new federal overseer?

A7: A few of the NIL bills currently before Congress include provisions for non-NCAA oversight such as from federally chartered independent organizations and the Federal Trade Commission. See The Drake Group's [NIL bill analysis here](#). To date, Congress has not been receptive to NCAA requests for an antitrust exemption which would allow it to make and enforce rules in the NIL space.

Q8: What is the best thing that coaches, especially of smaller sports, can do to support female athletes in relation to the outcome of the settlement?

A8: The answer to this question varies according to competitive subdivision. The Football Championship and DI-AAA (non-football playing institutions) subdivision members are giving serious consideration to an alternative governance model for their athletics programs:

- [Video recording: Session 2: "Designing a new model for D-I college sports in the face of legal realities"](#)
- [Presentation Deck: Session 2: "Designing a new model for D-I college sports in the face of legal realities"](#) (see proposal here)

Football Bowl Subdivision (FBS) schools that desire to compete with the going-forward proposed settlement that would mandate Power Five (Four) schools making significant and some would say unlimited NIL and revenue-sharing payments (pay-for-play) in addition to existing athletics scholarships tethered to educational expenses), are faced with financial decisions related to prioritizing funding of revenue-producing sports. Because more women participate in non-revenue sports than men and such prioritization is likely to result in reduced budgets for non-revenue sports or even termination of such programs, consideration should be given to the following actions:

- Educate institution administrators on the danger to the institution of dropping any sports programs. Such actions will inevitably ignite generations of alumni who participated in those sports to object in a myriad of ways. Protests will be amplified by the media which might have negative implications for the institution's brand. These alumni often threaten or actually stop making financial contributions to the institution. The most influential among these alumni put pressure on boards of trustees to reverse such decisions. Female athletes who are often underrepresented may file Title IX lawsuits – a likely outcome given the fact that over 90 percent of all institutions are not in compliance with Title IX participation requirements.
- Educate athletic department and institutional administrator on how funding for sports can be reduced without terminating any sport programs (see the "how to" of [structuring sports programs into varying financial support tiers](#))
- The proposed settlement may not be approved by the court if enough athletes opt out contend that the settlement is unfair. Athletes should be educated that they are members of

the class and automatically included unless they opt out. If the settlement moves forward, immediately after the court's decision to grant "preliminary approval" there will be a period for athletes to "opt out" which may cause the court to reject the settlement. Only athletes who opt out can bring or join a lawsuit related to the settlement. This action might be attractive to most female athletes because of payout sums:

Table 2. Rascher Expert *House* Report Estimate of Differences in Payments to Male and Female Athletes²²

Settlement Recovery Information by Class and Type of Claimed Damages			
Class	Type of Claimed Damages	Estimated Number of Unique Athletes (approximate)	\$ Value of Claims (rough estimates)
Football and Men's Basketball	BNIL (no claim required)	19,000	Average approx. \$91,000. Range from \$15,000 to \$280,000.
Football and Men's Basketball	Videogame (no claim required)	18,000	Range from approx. \$300 to \$4,000 per athlete.
Football and Men's Basketball	Lost Opportunities ¹¹	3,000	Average approx. \$17,000. Range from less than \$1 to approx. \$800,000.
Football and Men's Basketball	Additional Compensation (no claim required)	14,000	Average approx. \$40,000.
Women's Basketball	BNIL (no claim required)	3,000	Average approx. \$23,000. Range from \$3,000 to \$52,000.
Women's Basketball	Lost Opportunities ¹²	400	Average approx. \$8,500. Range from less than \$1 to \$300,000.
Women's Basketball	Additional Compensation (no claim required)	2,000	Average approx. \$14,000.
Additional Sports	For FB/MBB players, Videogame (claim required)	26,000	Range from approx. \$300 to \$4,000.
Additional Sports	Additional Compensation (claim required)	390,000	Average approx. \$80 (see breakout by subcategories in chart below).
Additional Sports	Lost Opportunities ¹³	6,000	Average approx. \$5,300. Range from less than \$1 to \$1,859,000.

- If the female athlete is in the last two "additional sports" categories, they are unlikely to be motivated to fill out a form to get receive the \$80 "additional compensation" claim and may not have the brand recognition to apply for a "lost opportunities" payment (amount is unspecified presumably based on a computation of fair market value. Opting out should be an easy decision because it would leave open receiving Title IX matching funds to women from institutions based on settlement payments made to men, joining a lawsuit against institutions for their

failure to make such Title IX payments, or suing the NCAA or its conferences for unfair settlement amounts.

- Female athletes in the women's basketball category may wish to opt out because they might receive more being eligible to join another antitrust suit against the NCAA and Power Five conferences (such as *Fontenot*, which is similar to *House/Hubbard/Carter v. NCAA*) or be a part of a lawsuit against their institution for their failure to make Title IX matching payments.
- At the very least, female athletes and their coaches should immediately write to Judge Wilken expressing outrage that this new amendment precludes only female athletes unless they opt out from pursuing a Title IX based lawsuit related to the settlement.

Q9: I have heard from DI P5 membership colleagues that Title IX does not apply to the revenue-sharing portion of the settlement. Will any such effort to evade the application of Title IX be successful?

A9: We believe the cost of the settlement for past damages to institutions must include additional Title IX matching payments to female athletes estimated to be close to 87 percent of the settlement funds distributed to the plaintiffs' classes, 90 percent of which are going to male athletes. Similarly, future revenue sharing (injunctive relief going forward ten years) must be provided to male and female athletes proportional to their participation in the athletics program. We also believe that Title IX cannot be evaded by funneling the payments through non-school entities. Cash payments are both financial assistance and treatment and benefits that must be proportionally provided to women and men. More specifically, while Title IX regulations clearly cover all NCAA member institutions that are recipients of federal financial aid, they also cover entities controlled by and comprised of the member institutions such as conferences and the national governing organization. Title IX applies to all forms of financial assistance provided to college athletes whether labeled scholarships, revenue-sharing, pay-for-play, NIL payments, employment, or similar classifications of cash payments or benefits. Current law requires that male and female athletes are entitled to equal amounts proportional to their percentage of athletics participants—and is not suspended for any past amounts due or any question about continued applicability in future years in which settlement payments for past damages are made or revenue shared in the future. Representatives of The Drake Group have met with OCR staff to discuss these concerns. See Section VII of The Drake Group's [Congressional Briefing Paper](#) for more specific details.

Q10: Regardless of the settlement, how will application and adherence be equitably monitored and enforced?

A10: A "claims administrator" will be appointed by the Court to ensure that the past damages sums are paid to athletes authorized as members of the class. The Court would not appoint either the Defendants or Plaintiffs to perform this role. Regarding injunctive relief going forward, these payments will go directly to the athlete from the institution. These payments will be disclosed on each institution's NCAA's annual member financial report which will be provided to and reviewed by the athletes' class legal counsel.

Q11: How will the settlement influence the employment and salaries of support personnel in athletics departments such as strength and conditioning coaches?

A11: See Section III, Table 2 of The Drake Group's [Congressional Briefing Paper](#) for the computation of estimated past damages institutional settlement costs Table 4 for going forward injunctive relief. Section IV of this report examines the impact of the proposed settlement on the NCAA, its competitive divisions and college athletes.

Power Five. To the extent that Power Five institutions are unable to generate sufficient additional revenues or convince their institutions to increase athletic program subsidies to absorb the \$20-22 million per year for ten years going-forward injunctive relief to cover the minimum cost of \$22 million per year for ten years athlete revenue-sharing and NIL payments and the estimated \$1 million per year over this period in lost NCAA revenues (because the NCAA is paying the Power Five's upfront cost for past damages) athletic program budgets will have to be reduced. The impact of such reductions are unlikely to affect dedicated staffing of basketball and football programs that will be protected because of their revenue-production value. However, the staffing and budgets for all other men's and women's sports will be at risk for reduction or even termination of programs.

Group of Five, FCS, and D-I AAA (non-football). Institutions in these subdivisions are not defendants and are not obligated to make injunctive relief payments going forward. To the extent they are unable to generate sufficient new revenues or convince their institutions to increase athletic program subsidies to offset the \$1 billion loss of NCAA distributions (because the NCAA is paying this amount over the next ten years for past damages portion of the settlement for these non-Power 5 conferences). The annual loss of NCAA revenues is estimated to be \$430,000 for Group of Five institutions, \$282,000 for FCS institutions, and \$346,000 for D-I AAA institutions. These schools face more severe budget reduction decisions because their revenues and athletic program budgets are so much smaller and more dependent on institutional subsidies.

Voluntary Decisions by Non-Power Five Schools to Provide NIL or Revenue-Sharing Payments. The "wild card" is whether and to what extent the non-Power Five institutions will attempt to compete with Power Five programs that will be required to offer the new and significant revenue-sharing and NIL payments to highly sought after prospects. DI-AAA will be tempted to compete against Power Five basketball programs for the Final Four basketball championship and some schools in the Group of Five might do the same in basketball and to a lesser extent in football. All of these new payments must be matched by proportional payments to female athletes. We also understand that the new roster limit mandate of the settlement will not apply to those institutions that decide not to offer NIL or revenue sharing payments.

Q12: Will athletes in revenue sports have their own personal preparation specialists especially since they can more easily move from school to school now?

A12: This answer is conjecture. This practice of professional athletes hiring their own strength trainers, nutritionists, etc., especially during the off season, is a function of income. The NFL or NBA top prospects, now in line for significant college pay-for-play and external NIL collectives' income may have the resources to invest in such support contingents to better position themselves for professional drafts.

Q13: What school that sponsors football is actually Title IX compliant?

A13: You can look up an assessment of the Title IX compliance status [here](#) for any higher education institution with an athletics program (data based on Equity in Athletics Disclosure Act participation, scholarship, and recruiting data). [The Drake Group analysis](#) of Congress' General Accounting Office examination of Department of Education Office for Civil Rights enforcement effectiveness also may be of interest.

Q14: How did the *NCAA v. House* decision interpret Title IX's application to college athletics, and what impact did it have on gender equality in sports? Has the case influenced Title IX enforcement?

A14: There is no decision in the *NCAA v. House*, *NCAA v. Hubbard*, or *NCAA v. Carter* antitrust cases because they are on hold pending consideration of the proposed settlement of all three cases. The Department of Education Office for Civil Rights has been asked for but has not yet issued guidance specific to the proposed settlement. The Drake Group (TDG) has met with OCR officials to discuss such applications. See Section VII of TDG's [Congressional Briefing Paper](#) for more specific details on the TDG position. Regarding whether these cases have influenced OCR Title IX enforcement, we have seen no evidence of this.

Q15: Is there a revenue sharing model that treats female athletes fairly but may create the very bad optic of requiring male football and basketball athletes (who are disproportionately Black) to share revenue with sports like golf and women's field hockey?

A15: Any institution may choose, as it does now, to treat men's basketball and football like kings conditioned on the Title IX requirement that an equal proportion of female athletes be treated like queens (which is not being done). We note that institutions are not providing female athletes with the promotional or publicity support to develop their NIL brands or the revenue producing capability of their sports. We also note that institutions are not making the same concerted effort to recruit male or female athletes of color in the vast majority of NCAA sports in which athletes of color are underrepresented. If the institution does not insist that athletic programs exhibit a DEI commitment or invest in the revenue development of men's or women's sports other than football and basketball, there will always be a false flag perception that all other sports are being built on the labor of football and basketball players. We also note that institutions are only too ready to recruit and economically exploit athletes of color but have not been criticized for failing to deliver on the promise of a meaningful degree of the athlete's choosing, miserable graduation rates, or answering the criticism of recruiting academically underprepared athletes without an equal commitment to remediate academic deficiencies. See the [recent research report](#) of The Drake Group Education Fund on what Division I programs should be doing to support the academic success of D-I basketball and football players.

3. OUR FALL WEBINAR SCHEDULE

Mark your calendars to join us for these scheduled TDGEF webinars:

Webinar #41	How will the Evolving Landscape of College Athletics affect the US Olympic Sports Development System	Oct. 17, 2024	THURSDAY 2:00-3:30 pm ET
Webinar #42	Employee Status and Athlete Organizing in College Sport	Nov. 21, 2024	THURSDAY 2:00-3:30 pm ET
Webinar #43	Political Assaults on DEI Programs: Implications for College Athletics	Dec. 12, 2024	THURSDAY 2:00-3:30 pm ET

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 40 previous webinars including the full proceedings of the 2022, 2023, and 2024 Allen Sack National Symposia.

5. QUESTIONS ABOUT THE DRAKE GROUP EDUCATION FUND

The Drake Group Education Fund (TDGEF) is the 2-year-old 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.thedrakegrouppeducationfund.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, was founded in 1999, and 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](#).

6. THANKS TO OUR WEBINAR #40 PANELISTS

MEET OUR PANELISTS



LUKE FEDLAM - MODERATOR, Partner, Head of the Sports Law Practice Group, Porter, Wright, Morris & Arthur, LLP. As a sports attorney, he regularly advises and counsels professional athletes and sports related businesses. Fedlam also is a highly sought after speaker and thought leader on the changes impacting college sports, most specifically, changes to Name, Image and Likeness laws and regulations. He is also the Managing Partner of Advance – an educational consulting firm focused on educating teams of athletes, coaches, and athletic administrators at the professional, college, and high school levels. Fedlam is a member of the Board of Trustees for Capital University, the Board of Directors for the Columbus Clippers minor league baseball team, and is an active life member of Alpha Phi Alpha Fraternity, Inc. He also authored the sports law treatise “Sports Law: A Practical Guide to Protecting the Interests of Athletes.”



JAMES BRYANT, founder, Chairman, National Litigation Law Group. He led the litigation against the NCAA that enabled a small NAIA school in Texas to become a full member of the NCAA Division I without waiting the full probationary period, which ultimately led many other institutions to follow. Bryant also fashioned the use of immunity for the first time in an NCAA investigation that not only preserved a student-athlete’s eligibility at what is now a Big 12 football program but also resulted in lessening the sanctions against that university’s athletic program. He has also served in-house positions at a number of universities, including The Tuck School of Business at Dartmouth College and Union Theological Seminary in New York City. He was Special Counsel to the Boards of the University of Iowa and The Regents for the Oklahoma Agricultural and Mechanical Colleges (Oklahoma State University).



AMANDA CHRISTOVICH, Reporter, Front Office Sports. Her work has previously appeared in USA TODAY and The Wall Street Journal. Christovich covers the business of the sports industry with a specific focus on college sports, reporting and writing on breaking news, scoops, features and investigations. She leads industry coverage of multiple topics including name, image, and likeness, athlete employment/compensation legal issues, and NCAA gender equity. Her work has been cited/featured in multiple news outlets including The Athletic, CBS Sports, and On3. Christovich regularly appears on radio shows and podcasts across the country, including NPR, local ESPN affiliates, and SEC Network. She holds a M.S. in Journalism from the Columbia Graduate School of Journalism and a B.A. in English from Georgetown University.



JAYMA MEYER, 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. She is an experienced antitrust litigator and currently a Title IX advocate litigating and negotiating Title IX settlement agreements with high schools throughout the US including litigating a landmark 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.



ANDREW ZIMBALIST, Ph.D., Robert A. Woods Professor Emeritus of Economics, Smith College, The Drake Group Past President. Dr. Zimbalist has consulted in Latin America for the United Nations Development Program, the U.S. Agency for International Development, and numerous companies and, in the sports industry, for players' associations, cities, companies, citizens groups, teams and leagues. He has published several dozen articles and twenty-seven books, including *Unpaid Professionals: Commercialism and Conflict in Big-time College Sports* (1999), *The Economics of Sport, I & II* (2001), *Unwinding Madness: What Went Wrong with College Sports and How to Fix It* (2017) with Gerry Gurney and Donna Lopiano, and *Whither College Sports* (2021).