

POSITION STATEMENT

Critical Analysis of Proposed Models of College Athlete Compensation¹

EXECUTIVE SUMMARY

The Drake Group² believes that the current pressure on higher education institutions to pay college athletes well beyond the full cost of education has been created by root failures of the National Collegiate Athletic Association (NCAA) to:

- articulate and implement an educational sport system that allows college athletes to be treated like non-athlete students with regard to employment other than employment as professional athletes and other economic opportunities outside the institution, including the right to exploit their own names, images and likenesses unrelated to those of their academic institutions;
- mandate that the use of the considerable revenues from the commercial success of college sports first be used to provide the 480,000 college athletes attending member institutions with adequate health, safety, and insurance protection rather than lavish and unnecessary athletics facilities and excessive compensation of coaches and administrators;
- prohibit the admission of college athletes through waiver of normal academic admissions standards by any member institution or that such waivers be proportional to athlete representation in the student body which would pressure professional football and basketball leagues to maintain their own viable minor league systems as compensation alternatives while, more importantly, removing the primary causative mechanism underlying fraudulent academic practices to keep these students eligible; and
- further limit the amount of time athletes spend in sports-related activities, eliminate transfer rule penalties and require non-revocable four-year scholarships which would ensure that college athletes (especially those in revenue-producing sports) be treated as students rather than employees.

¹ Preferred citation: Donna Lopiano, Gerald Gurney, Fritz Polite, David B. Ridpath, Allen Sack, Sandy Thatcher, Andrew Zimbalist, (2019) *The Drake Group Position Statement: A Critical Analysis of Proposed Models of College Athlete Compensation*. (February 27, 2019; revised March 2, 2019) Retrieve at: <http://thedrakegroup.org/>

² The Drake Group is a national organization of faculty and others whose mission is to defend educational integrity and freedom in higher education by eliminating the corrosive aspects of commercialized college sports. The Drake Group is "In residence" at the University of New Haven. For further information see: <http://thedrakegroup.org>.

The Drake Group believes that answers to the fair athlete compensation issue require addressing the above failures rather than tax-exempt educational institutions emulating professional sports businesses.

The Drake Group further notes that the NCAA's inability to address these system failures is rooted in the Football Bowl Subdivision's (FBS) control of the NCAA legislative process. In 1997, a majority of over 1,000 NCAA member institutions conceded to the threats of these 129 FBS members to leave the organization if the bulk of NCAA championship revenues were not returned to Division I members and again in 2015 if the most commercially successful FBS members within this group were not given autonomy to make their own rules. In reality, the NCAA's adherence to the "amateurism" mantra is the method invented to control college athlete compensation. NCAA amateurism rules keep college athlete labor costs low while preserving FBS monopolization of what in reality is a minor league professional sport system for elite high school football and basketball players. This professional sport system of questionable academic integrity is being conducted by mostly tax-exempt non-profit institutions of higher education whose faculties, presidents and boards of trustees appear content to look the other way. Given this reality, only intervention by a Congress sufficiently upset by higher education institutions' use of their tax-exempt statuses to conduct such sport businesses may provide a comprehensive solution.

Further, The Drake Group strongly believes that these NCAA failures have driven the athlete compensation issue into the courts, which is the wrong place upon which to depend regarding the development of any coherent and educationally defensible solution to fair economic treatment of college athletes. Courts by nature and purpose make piecemeal decisions for a limited number of class actions of plaintiffs based on a narrow set of principles and facts. "Rules of evidence, constrained testimony, limited briefing, and artfully constructed oral arguments are not conducive to full analyses of all the stakeholders' information, positions, and implications thereof necessary to resolving these important public policy matters."³ They make incremental changes and often do not have a full understanding of impact of such changes on the larger whole. For example, any court decision that allows compensation decisions to be relegated to athletics conferences simply changes the driver of the Division I "arms race" from the richest institutional athletic programs to the richest athletic conferences, effectively accelerating its pace and increasing gaps between the "haves" and "have nots."

The paper explains the differences between educational sport and professional sport, exposes the myth of amateurism and details a College-Athlete-as-Bona-Fide-Student model that should replace the current NCAA compensation model. Also examined are the weaknesses of three college athlete compensation models currently being offered by others: (1) a College-Revenue-Sport-Athlete Special Compensation model being advanced by several anti-trust lawsuits brought by college athlete plaintiffs, (2) an Institutional-Athlete-Employee

³ Jayma Meyer and Andrew Zimbalist. (2017) "Reforming College Sports: The Case for a Limited and Conditional Antitrust Exemption." *The Antitrust Bulletin*, p. 20.

model proposed for those intercollegiate sports that are “self-supporting,” that might exist inside the institution’s tax-exempt education organization as an auxiliary enterprise and (3) a College-Athlete-and-Affiliated-Professional-Sports-League Operating Outside the NCAA System model designed to supplement college athlete income.

BELIEFS ABOUT “AMATEURISM” AND THE UNIQUE NATURE OF EDUCATIONAL SPORT

“Amateurism” Does Not Exist. The Drake Group acknowledges the nebulous and ever-changing definition of “amateurism” that has historically plagued Olympic (open amateur) and educational sports. “Amateurism” rules in Olympic sports were developed to advance the myth that there were those who played for the love of the sport as opposed to those who played for money, and to suggest that the former was more “pure” and therefore of higher value. However, the existence of unpaid or uncompensated athletes was seldom true, even in the early days of the Olympic Games. Today, “amateurism” no longer exists in Olympic sports. Professional athletes are allowed to participate and members of national teams are paid annual salaries to train and play for their respective countries. Amateurism rules in educational sport do prohibit the participation of professional athletes who are paid salaries to play team sports or who compete for prize money in individual sports. However, these rules have arbitrarily expanded the definition of professional athlete to include being paid in any way by any outside entity related to the use of athletic skills (being a coach or receiving fees for lesson) or notoriety (modeling or participating in advertising using the athlete’s name, image or likeness), retaining an agent to explore professional sports or other opportunities or testing the college athlete’s value by participating in a professional sport draft, even if they are not selected or decide not to sign a professional sports contract. In fact, “amateurism” does not currently exist within collegiate sport and has not since the advent of non-need-based college athletic scholarships in 1957. “Amateurism” most likely did not exist before that date because money was routinely given “under-the-table” to college athletes by appreciative alumni. The advent of one-year scholarships in 1973 (instead of 4-year grants tied to the achievement of an undergraduate degree) further exploded the “amateurism” myth. Additionally, the notion of amateurism was made moot by the numerous exceptions legislated by NCAA rules. Thus, it is accurate to say that colleges and universities compensate talented athletes who participate in their programs, but they do not use the professional sport vehicle of “salaries” and “employment.”

Compensation System Differences Between Education-Based and Professional Sports. The primary difference between intercollegiate athletics and professional sports lies in the quid pro quo construction of their compensation systems. Professional team sports businesses pay salaries to athletes and provide extensive athletics injury insurance coverage and other benefits pursuant to collective bargaining agreements with players’ associations or individual player or event contracts. The value of professional athlete salaries and benefits in team sports roughly approximates 50% of the revenues generated by the events in which they participate. These players must attend practices and competitions, and their employment is subject to termination due to poor performance or other terms of their employment agreements. Other than minimal public relations appearances and abstaining from certain high-risk physical activities, professional athletes do not have obligations other than maintaining their fitness to practice and play. In individual sports, events are conducted that offer pay to appear and participate and prize money is awarded based on place or finish.

Colleges and universities provide their athletes (who must be full-time students) with “grants” that cover their educational expenses: books, tuition, fees, room, board, and cash stipends to cover miscellaneous living and other expenses like computers and transportation from home to campus. Other benefits college athletes don’t have to pay for are also provided, such as tutoring assistance, rehabilitation, minor medical treatment as well as postseason prizes and privileged housing, dining and transportation services. Thus, it is accurate to say that both college and professional athletes are compensated in recognition of their athletic skill, and they are both expected to practice and compete as a condition of such compensation. In this respect, other than the level of cash remuneration, which is significant, both receive compensation. What makes college sport unique are the following differences:

1. Intercollegiate athletics grants-in-aid are capped by the requirement that scholarship values do not exceed educational costs -- as opposed to being pegged to the revenues generated by athletic events or marketplace value.
2. College athletes must demonstrate that they meet certain academic standards as a condition of such financial support and in order to practice or compete and each year they must demonstrate consistent progress toward earning an undergraduate academic degree.
3. When five-year athletic scholarships (not currently required) are received by college athletes, they are not subject to termination based on the quality of their athletic “performances” – only on their willingness to practice and compete and abide by code of conduct rules.
4. College athletes are supposed to be treated as students and not employees.
5. The time college athletes spend on athletics is limited by athletic governance association rules in order to make sure they have adequate time to devote to their academic obligations.

Failures of the Education-Based Compensation System. The Drake Group believes that the current call to treat college athletes like professional athletes is based in large part on the failure of the education-based sport system, predominantly among the Division I’s most commercialized athletic programs, to fulfill the educational promises listed above. Specifically:

- The NCAA and its member institutions have failed to adopt and enforce strong rules prohibiting academic fraud and the pursuit of less demanding academic programs for the purpose of keeping athletes eligible for college sports participation. As a result, many institutions have failed to prepare college athletes for meaningful careers, also causing great damage to the universities’ academic integrity and reputation and the educational experience of non-athlete students.
- The college athlete compensation package does not adequately cover the physical risk of athletics (inadequate insurance and other health protections) despite the extraordinary media and other revenues generated by college sports that could provide for those costs, but are being used for excessive salaries to coaches and administrators, and the building of lavish athlete-only facilities for the purpose of coaches winning the recruiting wars.
- Other than prohibiting employment as a professional athlete (or receipt of pay on the basis of participation, place or finish in athletic events), current NCAA rules unreasonably prevent college athletes from employment outside the university. NCAA rules prohibit employment related to a college athlete’s athletic talent (e.g., running their own sports camps, providing individual instruction to others on a fee-for-lesson basis, etc.) or notoriety (exercising the right to economically exploit their own names, images and likenesses (NIL). Such employment or exploitation of NILs is denied even if athletes do not use their affiliation with the college or university in such efforts. Non-athlete students who similarly excel in the performing arts do not have such employment or NIL restrictions.
- The NCAA and their member institutions have failed to adopt and enforce rules that prohibit coaches from abusing sport time limitations resulting in college athletes being required to

engage in athletics-related activities with upwards of 30-40 hours per week during the regular academic year and year around with regard to coach mandated strength and conditioning programs. Coaches in the higher competitive divisions have been allowed to treat athletes more like employees than students.

- The NCAA and their member institutions have failed to adequately control physical and mental abuse of college athletes and other professional misconduct of coaches.
- College athletes have not been permitted the academic freedom enjoyed by non-athlete students (e.g., transfer to other institutions without penalty, choosing majors which might conflict with practice obligations, being instructed to select less-demanding classes and majors, participate in other extracurricular and culture events on campus, etc.).

If intercollegiate athletics is to remain as a defensible bona fide extracurricular developmental activity for students, these failures must be fixed because there are 480,000 NCAA athletes affected; 306,000 of whom participate in Division I and II institutions, which award quid pro quo athletic scholarships via this education-based model. Further, even in Division III, these NCAA member institutions prohibited from awarding athletic scholarships, often provide college athletes with preferential financial aid packages that contain more non-repayable aid than non-athletes.

Why College Athletics Must be Fixed. The Drake Group maintains that the voluntary choice of college athletes to enter into a quid pro quo arrangement that combines participation in highly competitive athletic programs, with being a full-time student pursuing a bona fide undergraduate academic degree, is a unique and valuable developmental experience and, for a large number of participants, a special opportunity to have all or part of the cost of going to college paid for with non-repayable grants-in-aid. These system failures must be fixed so that participation in education-based sport does not have a negative impact on student safety and academic achievement or choices or unfairly impede external economic opportunities.

Why the NCAA Education-Based Model Should be Retained and Repaired as Opposed to Morphing into a Market-Driven Professional Model. Accepting the position that there is much to be fixed in the current NCAA model of intercollegiate athletics, the Drake Group believes there is significant value in the continued existence of education-based sport in which:

- compensation of the college athlete is inseparably tied to both educational costs and the primacy of earning an undergraduate degree;
- college athletes should be treated as close as possible to the treatment of non-athlete students;
- the national governance organization, conferences, and higher education institutions are obligated to protect the health, safety and well-being of athletes, including adequate insurance protections; and
- the commercial proceeds of NCAA national championships are used to provide benefits to 480,000 athletes in over 1,000 member institutions, who participate in more than 33 sports. These benefits vary depending on Division membership, but include provision of transportation and lodging to national championship competitions, catastrophic injury insurance, student assistance funds helping lower socio-economic level athletes deal with family and other emergencies, academic assistance funds and allocations to member institutions based on numbers of athletes served and scholarships offered.

Again, we acknowledge the imperfection of the system with regard to commercial revenue distribution. We contend that the current distribution system is wholly deficient in meeting athlete health and safety needs and permits the institutional misuse of revenues on lavish facilities, and the provision of excessive salary and benefit packages for coaches and administrators. If these issues are remedied, we strongly

believe that the education-based model has much to offer. Morphing the college-based system into a form of minor league professional sports where a significantly smaller number of elite athletes, in a very few sports, will be provided with educational benefits, receive salaries, and be adequately protected, while the remaining college athletes continue to be inadequately protected or served is indefensible. In short, the current NCAA system should be reformed to remedy its deficiencies. Creating a better athlete-centric and education-focused college athletic program, and permitting compensation from outside sources for NIL and other now-prohibited employment (as discussed herein), should ease the pressure to employ college athletes, and force professional sports leagues (that currently impose age restrictions for draft entry) to fund their own minor league and developmental alternatives as options for high school graduates.

With the Exception of Professional Sports, College Athletes Should Enjoy the same Outside Employment Rights as Non-Athlete Students. The Drake Group believes that the NCAA should not prohibit, as is currently the case, college athletes from using their athletic talent for employment outside the institution as teachers or owners of sports camps, providing individual instruction to others on a fee-for-lesson basis, etc., or exercising the right to economically exploit their own names, images and likenesses (NIL), as long as they do not infringe on the use of their affiliation with or marks of their educational institutions, do not have such employment arranged by the institution or its representatives of athletics interests, and the income from such employment is transparent and commensurate with marketplace value. In these respects, college athletes should enjoy the same outside employment rights as non-athlete students. Similarly, playing professional sports prior to enrolling in college should not be penalized, except for retention of current rules which restrict years of eligibility based on years of experience in organized sport following completion of high school and prior to enrollment in college.

Why Professional Sports Employment Simultaneous with College Sports Education-Based Participation Should Continue to be Prohibited or Limited. The Drake Group believes it is reasonable for college athletes to be prohibited from a narrow definition of professional athlete employment **simultaneous with their enrollment in college classes/college sport** for the following reasons:

- **Combining Full-Time Student and Elite College Athlete Development has Evolved into a Full Year Commitment.** During the regular academic year, college athletes, like other full-time students, are typically expected to devote 45 to 60 hours per week to their academic responsibilities. Yet, NCAA 2015 research demonstrates that the median numbers of hours per week spent on academics by athletes in all competitive divisions, ranged from 38.5 in Division I to 40.5 in Division III. The median number of hours spent on athletics ranged from 34 in Division I to 28.5 in Division III. Further, the advertised NCAA limit of 20 hours per week on athletics has huge loopholes for team travel and is seldom enforced. For example, PAC 12 surveys report athletes in all sports averaging 50 hours per week spent on athletics activities. Every weekend and vacation period during the regular academic year, while classes are in session, usually demands heavy effort in both academics and athletics. The regimen required to pursue an academic degree simultaneously with excellence in sport is not a five-day work week. It's more like a seven-day work week with regular overtime. Likewise, in Division I football and basketball, but also in other sports and membership divisions, institutions regularly enable their athletes to stay on campus and enroll in classes during the summer by financially supporting their housing and meals during this less stressful period. College coach led college athlete summer practices are prohibited with limited exceptions, but institutions are allowed to provide expert strength and conditioning coaches to oversee voluntary athlete workouts and athletic trainer and medical services. These athletes are often encouraged to take minimum full-time academic

loads during the regular academic year, and use summers to take more demanding courses, or to keep on track with normal progress, GPA, and other academic eligibility requirements.

- **Meeting the Simultaneous "Demands of Two Masters" is an Unreasonable Expectation.** It is unreasonable to expect 18- to 22-year-old college athletes to meet the competition and training demands of both college and professional coaches. From a physical standpoint alone, the doubling of training demands, and addition of professional sport contests on top of a college schedule, heighten the athlete's risk for overuse injuries, injuries that are the result of fatigue, or injuries simply resulting from increased risk exposure (participating in an increased number of competitions). The mental and physical health impact of excessive athletic training and competition demands should not be ignored.
- **Even Single Athletic Events Require Time Away from Campus.** Even individual sport athletes, who wish to enter a weekend competition or single event competitions and accept prize money, must travel internationally or across the U.S., which creates stress and fatigue because such trips are often three to four-day efforts.
- **Athletes Can Participate in Both Education-Based and Professional Sports, Just Not Simultaneously.** Participation in professional sports prior to college enrollment should not disqualify athletes from college sports participation contrary to current NCAA rules in this regard. The Drake Group believes that a student should not be penalized for having been a professional or Olympic athlete receiving pay or prizes in the past, as long as he or she is not a professional athlete during his or her college experience. An athlete can enroll in college and play college sports, delaying professional sports participation to an appropriate developmental or more economically beneficial time.
- **Athletes Who Choose Professional Sports Participation can still Pursue a College Education.** Athletes who choose the professional sports option can attend college in the off-season or postpone college until the end of their professional athlete careers. Notably, recently developmental professional league alternatives to college sports have been launched, which allow an athlete to enter professional sport immediately after high school or after one to three years of college sport. In fact, it is not uncommon for athletes to play in Canadian leagues or the professional leagues in Europe or other foreign countries.
- **Retaining the Primacy of Education.** A primary purpose of the college sport model is to retain the primacy of education, and protect institutional academic integrity from the corruption inherent from extraordinary commercial success. Few doubt that 18-22 year-olds faced with choosing between attending class or fulfilling academic commitments, or possibly making more money playing professional sports or participating in events offering sizable purses, will choose making money and placing a higher priority on the sports training effort required to achieve such riches at the moment.
- **Enhancing Future Professional Sports Success.** Prohibiting professional sports participation during college enrollment does not have a negative impact on the college athlete's future professional athlete goals because the quality of college coaching and training, and the experience of highly competitive college athletic events are considered by most to be an advantageous development environment for preparing professional sport prospects. This is especially true for college athletes who have not yet reached physical or psychological maturity. Moreover, the athlete can leave college sports at any time to pursue professional sports opportunities.

Allowing Professional Sports Participation or Play for Pay During the Summer or Intersession When College Athletes are Not Enrolled in Classes. Even though there are sound safety and academic reasons for restricting professional athlete employment during the time college athletes are enrolled in courses,

The Drake Group believes there is a professional sport participation question that should eventually be addressed: If an athlete is in good academic standing and making required progress toward the degree, completing all coursework during the regular academic year and does not need to enroll in courses during the summer or intersession, should that athlete be precluded from professional sports participation or entering single sport events and receiving pay to participate, place, or finish either during these periods or on weekends during the academic year? Following, are the reasons we believe addressing this question should be delayed:

1. The impact of allowing college athletes full employment and NIL exploitation rights outside of their educational institutions, including being able to participate in professional sports without penalty before college enrollment, should be carefully assessed with regard to the outside compensation needs of college athletes. In such a system, the college athlete would be able to retain an agent to assist in obtaining appropriate employment opportunities. Agents may even be willing to pay athletes considerable annual sums while the athlete is in college in return for long-term representation agreements, based on their estimates of the future revenue potential of the athlete. If athletes are able to earn outside compensation sufficient to meet their needs under these provisions, and elite college athletes are also provided with loss of income insurance protection, they may agree with the current Drake belief that the increased physical risk and stress of trying to combine college sport and professional sport in the same year is not in their best long-term strategic interest from either an injury risk or economic perspective.
2. The market is currently responding by providing more developmental professional sports opportunities for football and basketball players (e.g., G league, Yee Pacific Pro Football League, the XFL, the HBL basketball league) available immediately after high school. It is not clear whether the Alliance of American Football league, which will be offering \$250,000 contracts over three years, will accept players immediately after high school. Whether these leagues are better able to meet the developmental needs of aspiring professional athletes should be determined. As well, will the availability of these leagues reduce the pressure on college sports to recruit, waive regular admissions standards, and incentivize academic fraud, all of which are critical academic integrity issues not currently being addressed by the NCAA model?
3. If NCAA reform results in a more athlete-centric distribution of NCAA national championship revenues and cost controls, the provision of better short and long-term athletic injury, and loss of income insurance protection for athletes may be important considerations that affect the athlete's choice of the education-based model and any decision regarding participation in summer professional sports leagues.
4. If professional sports participation or single events offering prize or appearance money are permitted during any time period in which the athlete is not enrolled in courses, it is reasonable to expect a proliferation of events invented by entrepreneurial third-party promoters that will fill these spaces and entice athletes (e.g., top five college basketball shooters versus their professional counterparts, etc.), putting further pressure on the primacy of education objective.

Thus, this delayed consideration is based on the Drake belief that educators should err on the side of protecting college athlete health and well-being, and the primacy of education if choosing to treat athletes differently than non-athlete students, whenever we realize that the physical risk of sport and the financial temptation to cheat is different than non-athlete student activities.

COMPARISON OF VARIOUS PROPOSED MODELS OF COLLEGE ATHLETE COMPENSATION

It is within this context that The Drake Group examines the strengths and weaknesses of the following current proposed models of college athlete compensation:

1. **College-Athlete-as-Bona-Fide-Student Model.** The Drake Group has taken what it considers to be the NCAA's failed model of scholarship grants-in-aid as education-based athlete compensation, and attempted to define how to fix its current flaws to better realize the potential of intercollegiate athletics as a unique and powerful developmental opportunity. The repaired model is explained and examined. NOTE: The Drake Group believes that the question of whether professional sports participation should be permitted during summers or intersessions when the college athlete is not enrolled in classes, should be considered in the future after the impact of the following new college athlete benefits and rights have been implemented: (a) permitting all employment other than playing professional sport, including exploitation of NIL rights unrelated to affiliation with their colleges or universities, (b) providing adequate college athlete insurance, including loss of income insurance, (c) allowing the employment of agents, (4) allowing such agents to voluntarily subsidize athlete needs based on the agent's estimate of future value and (5) the new professional football and basketball developmental leagues have been implemented.
2. **College-Revenue-Sport-Athlete Special Compensation Model.** Recently, several anti-trust lawsuits have been consolidated and litigated as the National Collegiate Athletic Association Athletic Grant-in-Aid CAP Antitrust Litigation. Plaintiffs' counsel, representing a class of Division I Football Bowl Subdivision football and Division I men's and women's basketball players, has proposed operating within the current NCAA rules system, but either eliminating all rules that limit compensation or increasing the maximum athletic scholarship amount in various ways that are tethered to education/incidental to participating in athletics, and/or also allowing the compensation form and level to be determined by the athletic conferences. While the decision in that case has not yet been issued by Judge Claudia Wilken in the Northern District of California, the various compensation proposals are examined.
3. **Institutional-Athlete-Employee Model.** Various groups have proposed that athletics grants-in-aid be replaced with an institutional athlete employment model for only those intercollegiate sports that are "self-supporting," meaning that they are not being subsidized by either general funds or mandatory student fees. This program would exist inside the institution's tax-exempt education organization as an auxiliary enterprise.
4. **College-Athlete-and-Affiliated-Professional-Sports-League Operating Outside the NCAA System.** A model originally developed for the use of Historically Black Colleges and Universities (HBCU) to enable their full-time college athletes that play basketball to earn salaries from an outside professional sports league wholly or partially owned by the institution, in addition to receiving traditional academic scholarships. The league initially would be funded by venture capital investment that would pay the athletes' and coaches' salaries and other expenses. Eventually, the league would be funded by sponsorships and media contracts. Schools could share in any profit pool.

1. COLLEGE-ATHLETE-AS-BONA-FIDE-STUDENT MODEL

The Drake Group has taken what it considers to be the NCAA's failed model of "amateurism" and scholarship grants-in-aid as education-based athlete compensation, and attempted to define how to fix its current flaws to better realize the potential of intercollegiate athletics as a unique and powerful developmental opportunity. The repaired model is as follows.

A. Philosophical Model

1. Tax exempt education institutions operate extra or co-curricular intercollegiate athletics programs that enhance student development and contribute to building campus community. However, the primary mission of accredited education agencies to provide the opportunity and environment that enables students to earn bona fide undergraduate and graduate degrees must never be usurped by athletic programs, or corrupted by their commercial success.
2. Protecting the health, safety, and welfare of college athlete participants, and ensuring that college athletes are permitted to fully engage in educational choices available to all students are critical obligations of the education institution.
3. Generally, the principles of institutional compensation, financial aid, treatment and benefits to college athletes should be consistent with the treatment of non-athlete students with the exception of protection against risks or conditions related to athletics injuries.
4. The costs of athletic programs should be controlled via a limited antitrust exemption and Congressionally mandated sound education conditions; so that mandatory student athletic fees are not excessive, and institutional subsidization of athletics does not have a negative impact on the institution's academic programs.
5. The opportunity to participate, receive athletics financial aid, and other athletics-related treatment and benefits must be equally provided to male and female athletes consistent with federal law (Title IX), and are not, by law, conditioned on whether the sports are revenue-producing or are paid by third parties.
6. College athlete participants must be full-time students pursuing academic requirements for an undergraduate degree and meeting additional academically-related eligibility rules:
 - a. Minimum required high school GPA and/or SAT at matriculation or other related standards for first year eligibility
 - b. Demonstration of minimum progress toward the degree (hours completed)
 - c. Hours devoted to athletically-related activities do not exceed 20 hours per week
 - d. Other rules promulgated by the faculty governance structure at the institution that specify maximum number of classes missed due to athletic participation, and prohibition of regular season competition during final examination periods, etc.
7. Athletes should not be isolated from the rest of the student body by unnecessarily lavish athletes' only facilities, special housing, academic support, or eating facilities.
8. Salaries and benefits to athletics employees and lavish athletics facilities should not be excessive consistent with the standards of tax-exempt organizations.
9. College athletes should be treated as students and not employees. Furthermore, these athletes should enjoy all the rights and freedoms of non-athlete students and be subject to the same standards of student behavior and discipline.

B. College Athlete Compensation

1. College athletes should be prohibited from employment by a professional sports team, or participation in an athletics competition, or exhibition for pay, or remuneration during any year in which the athlete is participating in college athletics and enrolled as a full-time student for the reasons cited on pp. 4-5 of this paper with the question of allowing pay for play when the athlete is not attending classes during the summer or intersession left open for further study.
2. In order for an athletics grant-in-aid (athletic scholarship) NOT to be considered a contract for hire, such financial aid should:
 - a. be guaranteed for five years or until graduation, whichever occurs first;

- b. be conditioned on maintenance of a required GPA and normal progress toward the degree with a standard selection of courses based on the student's choice, but conditioned on prerequisites applicable to all students;
 - c. be conditioned on participation in an extracurricular or co-curricular sport program and compliance with rules of conduct applicable to all students, but not be withdrawn for reasons of physical injury, unsatisfactory athletic performance, non-compliance with rules of conduct not applicable to the general student body, or not adjudicated via regular student disciplinary procedures or improper pressure to withdraw from the team; and
 - d. not exceed the highest scholarship amounts awarded by that institution to non-athlete students
3. With the exception of athletics scholarships based on the full cost of attendance, whose maximum value should not exceed the maximum value of scholarships available to non-athlete students, college athletes should not be employed by or receive additional pay from their institutions, or representatives of athletics interests, to play their intercollegiate sport at any time.
4. Other than participation as a professional athlete, college athletes should be permitted to earn pay for work actually performed, and at a rate commensurate with the going rate in that locality for services as coaches, fee-for-lesson sport instructors, or sport camp counselors in any sport. College athletes should also be allowed to be employed or otherwise accept remuneration for the commercial use of their non-college game related names, images or likenesses (NILs) in advertisements, appearances, modeling, or speaking engagements, and for endorsement of commercial products related to any sport conditioned on required institutional review of the written terms of such employment to ensure inclusion of the following stipulations or conditions:
 - a. Use does not include the name, marks, institutional colors, or affiliation, implied or otherwise, with the student's institution, or the use of its facilities or properties for such engagement;
 - b. Verification that the institution's employees, or others engaged by the institution (athletic program sponsors, or advertisers or representatives of its athletics interests), were not involved in obtaining employment (i.e., identification of possible employment opportunities, introductions, etc.); and
 - c. Statement of remuneration, demonstrates that compensation is commensurate with the going rate in that locality for services, and will be paid only for work specifically described and actually performed.
5. National governance association rules should specify special circumstances related to extraordinary occurrences for which the institution may provide reimbursement of expenses unrelated to athletics participation (i.e., transportation related to death of family members or teammates, etc.), or the conduct of fundraising events to benefit affected athletes, provided all similarly situated athletes in all sports are treated equally, and such purposes are consistent with institutional efforts to assist non-athlete students.
6. National or conference governance association rules should specify nominal limits on the value of any one-time non-cash gifts related to athletes' participation in special events or commemorative performance/participation awards provided by the institution. Athletes in all sports should be equally treated.
7. The education institution and/or national athletic governance association should be required to provide benefits and treatment necessary to protect the health and well-being of college athletes including basic athletic injury insurance, catastrophic injury insurance, long-term disability insurance, lost income insurance, and access to medical treatment and physical

therapy required for the treatment of athletics injuries without any limitation related to pre-existing conditions.

8. The education institution should be required to provide college athletes with academic advising, academic remediation, and tutoring under the supervision of the institution's academic authorities during the regular academic year in the same manner as all other students, and in the same facilities as are available to all students.
9. During summer or other non-regular terms, education institutions should be allowed to provide college athlete scholarships covering all educational costs (room, board, books, tuition, and COA) related to completion of educational coursework countable toward a degree. Additionally, for any college athlete admitted via a waiver of normal admission standards, academic remediation, without such aid counting against sport scholarship limits as long as such support is provided to all similarly situated students (without regard to gender or sport).
10. College athletes should not be provided with exclusive or lavish facilities whose cost is inappropriate for a tax-exempt, non-profit educational institution. Facilities afforded college athletes should be open to all students. The isolation of college athletes from the general student body should be avoided whenever possible (e.g., dormitory facilities, eating facilities, academic support areas, social areas, etc.).
11. The parents and friends of college athletes should not be provided with transportation or lodging expenses incurred for the purpose of attending athletic events in which their children are participating. However, the athletic department should be permitted to provide such expenses for parents if the athlete suffers a serious injury as a result of athletics participation and requires hospitalization, and such benefits are provided equitably to all teams.
12. It is the legal duty of the tax-exempt non-profit, higher education institution's board of directors to prohibit excesses in compensation, benefits, or treatment of any individual or group of individuals such as college athletes, coaches, or athletics administrators.
13. Hotel, travel, and per diem expenses for college athletes and athletic staff should be consistent with general university policies used for all students or staff engaged in off-campus travel paid for by the institution, and should not exceed actual and necessary expenses with exceptions limited to the use of charter aircraft that reduces class time missed.
14. As long as similarly-situated athletes in all sports are treated equally, college athletes should be permitted to accept money from the NCAA Student Assistance Fund (SAF) for emergency expenses actually incurred with such funds not included as countable athletics financial aid during a regular term (tuition, required fees, room and board, required course-related books during regular term, and cost of attendance as determined by the institution's office of student financial aid). Prohibited use of SAF should continue to include salaries and benefits related to student employment or unearned stipends, competition-related travel for students not eligible to travel with a team, outside athletics skill development opportunities (e.g., participation in a sports camp or clinic, private sports-related instruction, greens fees, batting cage rental, outside foreign tour expenses) for current student-athletes with remaining eligibility.
15. Provision of scholarships and/or graduate assistantships to support completion of undergraduate or graduate education following completion of athletics eligibility may be offered conditioned on equal treatment of male and female athletes in all sports.
16. Following completion of athletics eligibility, if the institution engages in commercial exploitation of former college athlete NILs, the institution (or third party) is obligated to obtain permission from each former college athlete for each specific use, and to pay the former college athlete licensing fees or royalties, or at the request of the athlete, make a charitable donation of such income to the institution or other non-profit entity.

17. Current NCAA rules limiting the years of eligibility for college sports of participants who participate in organized non-college sports following high school and preceding college enrollment should be retained except they should be applicable to all sports.
18. Student access to college athletic participation, and the scholarships and benefits that accompany such participation, should be protected by rules mandating that college athletes have the right to receive the following with no athletics-related penalties:
 - a. Transfer to another institution without restrictions, or athletic participation ineligibility, or other penalty conditioned on that college athlete meeting all academic and athletic participation eligibility requirements at the original institution at the time of transfer. There should be a 30-day grace period for an athlete to change his or her decision, if such decision is made prior to the end of post-season play; acknowledging the possibility that such decision may be premature or impulsive. Such decision not to transfer would protect the athlete's scholarship renewal rights.
 - b. Transfer to any institution, including those within the athletic conference of the institution in which the athlete is enrolled.
 - c. Receive learning disability testing, remedial education, and other remedies for academic under-preparedness at no cost, if the athlete enters college via an institutional waiver of normal admissions standards.
 - d. Experience fully the institution's academic opportunities and responsibilities, such as participating in class projects, attending classes and special recommended campus events, or taking examinations; even if these experiences result in missing practices or competitions, without athletic department interference, penalty, or threat of loss of scholarship.
 - e. Enter a professional draft but decide not to pursue a professional sports contract.
 - f. Engage an agent to explore the feasibility of a professional sports career, or to obtain commercial opportunities related to the use of the athlete's name, likeness, and image (that do not identify the athlete's institutional affiliation).
 - g. Receive institutionally financed prevention education and baseline and/or monitoring assessments for sports-related injuries and risks (e.g., neurological baseline assessments related to concussion, presence of sickle cell trait, review of susceptibility to dehydration, etc.). College athletes predisposed to injury risk due to the nature of their sports participation shall receive these services, as recommended by the American College of Sports Medicine, the U.S. Centers for Disease Control and Prevention, or other nationally recognized medical authorities.
 - h. Be protected from injuries caused by blows/impacts to the head or other vulnerable body parts through the adoption of (a) policies and practices that limit physical contact during practice, and (b) competition rules promulgated by national governance associations and enforced by qualified sport officials.
 - i. Receive exercise and supervision guidelines for identified potentially life-threatening health conditions.
 - j. Receive a determination by a licensed physician for return-to-play and return to learn following any injury or other medical decision affecting the athlete's safe participation.
 - k. Be protected by an ethics code, applicable to coaches and other employees, prohibiting sexual or other relationship misconduct with athletes, physical or mental abuse, or pedagogical practices that endanger athletes' health and welfare.
 - l. Be protected from discriminatory treatment because of disability, gender, national origin, race, religion, or sexual orientation regarding governance policies, participation

- opportunities, treatment and benefits, educational programs, and activities and employment policies, as required by law.
- m. Have full access to, and be fully integrated within, the common student experience at the college athlete's institution without being required to use or being offered the use of exclusive 'athletes only' academic support, housing, dining (training tables), transportation, lounge, game room and other facilities.
 - n. Receive the services of an NCAA funded "Athlete Welfare Advocate," whose function should be to provide independent legal advice, at no cost to athletes, their parents or legal guardians, regarding the application of NCAA rules and the athlete's due process rights when athletic eligibility or access to athletics related financial aid is threatened. Such Advocate should be funded by the NCAA, but hired and supervised by an independent blue-ribbon panel of former college athletes.
 - o. Be provided with the same investigation, adjudication, and appeals process applicable to all non-athlete students for any institutional decision that limits the athlete's participation in athletics or results in non-renewal or termination of financial aid, including institutional "declarations of ineligibility" for violation of NCAA rules other than academic eligibility or drug tests. Such process should not include the participation or presence of an athletic department staff member(s), at which the athlete should be entitled to be represented by an attorney or, alternatively, to receive the assistance of an "Athlete Welfare Advocate."
 - p. Receive the option of binding arbitration in the case of a reduction to an athlete's financial aid dollar amount or award period. Binding arbitration should also be available for athletes seeking reinstatement of their athletic eligibility for reasons other than an insufficient grade-point average, failure to make satisfactory progress toward a degree or similar academic failure, or a non-athletics-related institutional determination concerning sexual abuse, sexual harassment, academic discipline, or other student misconduct. Binding arbitration should be available in the circumstances described because of the need for timely decisions regarding the withdrawal of time-limited participation benefits or of financial aid intended to meet an athlete's educational expenses.
 - q. Receive "whistle blower protection" from retaliation for reporting to a non-athletics institutional employee or to an employee of a national athletic governance association, a coach, other athletics personnel, faculty, administrators, or college athletes for alleged misconduct, or for violating institutional rules or the rules of a national sport governing body.
 - r. Be subject to team and athletic department disciplinary rules that are consistent with student welfare best practices, as determined by an annual review by a faculty oversight committee appointed by the institution's faculty governance entity.

C. Commercial Rights of the Non-Profit Education Institution

The Drake Group maintains that the following policies and practices should apply to the institution's commercial rights related to the operation of its athletic program or other extracurricular activities:

1. Higher education institutions should have the right to own and commercially exploit performance events involving students participating in the institution's co-curricular and extracurricular activities through the sale of tickets, parking, game or event programs, advertising and sponsorship rights, and rights to live and delayed electronic telecasts. The revenues from such activities should be used to defray the costs of the extracurricular activity, or otherwise advance the mission of the non-profit higher education institution.
 - a. Institutions should be required to obtain the consent of students for the use of their names, images, and likenesses (NILs) if such extracurricular events are to be audio or videocast (e.g,

- television, streaming, etc.), or otherwise recorded for live or delayed electronic distribution, photographed, sketched, or in any other way reproduced for print or digital publication.
- b. The institution may properly condition the participation of students in such commercially exploited extracurricular events on consent to the use of their NILs without compensation for such use.
 2. The institution should not otherwise exploit current student NILs for non-extracurricular program activities, such as entering into licensing agreements using current student NILs for videogames, licensed apparel, licensed products, etc. Such institutional or third-party exploitation of students is ethically inappropriate for a non-profit, higher education, institution. However, the institution should be unfettered with regard to the commercial exploitation of its own name and registered marks for the purpose of marketing the institution or generating revenues subject to the provisions of the federal unrelated business income tax (UBIT) on such non-profit organization commercial activities.
 3. It is appropriate for institutions to use the names, likenesses, and images of students, faculty, college athletes, and coaches in publications sold in conjunction with school extracurricular events, commemoration of students' graduation, or other purposes supporting current student activities (e.g., yearbooks, concert or recital programs, athletic event programs, etc.), assuming student consent for such use. Logically, in the case of current athletic events, such publications may include historical records or photographs (e.g., performance records and photographs of prior championship teams, who may not currently be participating). However, such historical license should not extend to commercial documentary products that exist separate from the current athletic event.

Postscript

The Drake Group believes that all of these elements must be part of a larger intercollegiate athletics reform package mandated by Congress because these reforms cannot be accomplished using normal NCAA legislative processes and some require a limited antitrust exemption (see G below for description of limitations). The current NCAA governance structure is controlled by institutions with the richest and most commercialized athletic programs, namely the 129 schools in the Football Bowl Subdivision. These are the institutions that most benefit from restraining the costs associated with providing athletic scholarships and health and welfare protections to college athletes, and keeping the bulk of media revenues for their own use for spending on lavish facilities to aid in recruiting talent, excessive coach salaries, enormous athletic department staffs, and an incredibly expensive and uncontrollable "arms race." These institutions will resist any reform package that results in a redistribution of athletics commercial profits that places the highest priority on the legitimate needs of college athlete: adequate short and long-term insurance against debilitating athletic injuries, the highest standards of medical care, the right to change institutions without penalty, more generous athletic scholarship support, the unbiased rules enforcement that protects the academic integrity of member institutions and supports the offering of a bona fide education to college athletes.

The Drake Group believes that such a reform package must include the following requirements because of the past and anticipated threats of NCAA Football Bowl Subdivision members to leave the national governance association if such association does not accede their financial distribution and autonomy demands:

- A. **Higher Education Act Funding of Educational Institutions to Conditioned Specific Educationally Defensible Minimum Conditions Applicable to Athletic Program Operations and National Governance.** To amend the Higher Education Act of 1965 to ensure that higher education institutions, that receive federal funds, provide students participating in commercialized athletic programs with sufficient health, medical, academic support, and due process protections that prevent their academic or financial exploitation. Such action must be taken by Congress because of the unprecedented commercialization of these intercollegiate athletics programs, and the conflict of interest evidenced in the current governance structure that has threatened the academic success of college athletes, and the integrity of higher education institutions, and created excessive institutional expenditures and burdensome student fees. Congressional legislation should (1) provide remedies addressing these issues, including increased scholarship support and injury and medical benefits to college athletes, (2) restore the ability of national governance associations to combat commercial excesses and maintain a clear line of demarcation between collegiate and professional sport, and (3) better enable institutions to comply with the athletics provisions of Title IX of the Education Amendments of 1972.
- B. **National Athletic Governance Association Membership of Highly Commercialized Athletic Programs.** In the case of four-year institutions of higher education that have an intercollegiate athletic program with total generated revenues in excess of \$1 million annually, a requirement that they be members of a national nonprofit college athletic association (“Association”) that conforms to the minimum educational integrity and athlete protection standards. If an institution with an athletics program annually generating \$1 million or more voluntarily discontinues membership in the national association imposing these conditions, the Secretary of Education should authorized to find the institution out of compliance with the Higher Education Act of 1965, thereby rendering the institution not eligible for Higher Education Act funding. (Note: This provision allows Division I, II, and III membership to remain unchanged, but eliminates the threat of departure of commercially successful athletic programs if the organization as a whole does not concede to their demands).
- C. **Independent Governance.** Such Association must be governed by a Board of Directors consisting of expert “independent directors” not currently employed by any member institution, and who reflect the interests of all athletics program stakeholders (presidents, trustees, athletic directors, tenured faculty, and college athletes), and diversity of gender, race and ethnicity. All membership/competitive divisions (and subdivisions within each division) shall be equally represented.
- D. **Model Sports Medicine Policies as a Condition of Membership.** As a condition of membership, institutions must be required to adopt policies and provide medical treatment, physical therapy and prevention services necessary to protect athletes, as specified by industry standard model sports medicine policies promulgated by medical authorities, annually updated and distributed by the Association.
- E. **Exclusive Ownership of and Use of Revenues Derived from National Championships.** The Association must be the exclusive owner of all national championships, the revenues produced by which shall NOT be distributed on the basis of selection, place, finish or wins, and shall be first used to provide for the operating costs of the association and the following athlete safety, educational and due process benefits to all college athletes of member institutions:

1. basic and long-term disability athletics injury insurance and medical cost program that removes current reliance on student and parent provided insurance and expense coverage without any limitation related to pre-existing conditions;
2. basic and annual enhancements to catastrophic athletics insurance;
3. provision of academic enhancement funds to member institutions;
4. provision of student assistance funds to institutions,
5. payment of expenses associated with the conduct of national championships, and expenses of participants to attend such championships;
6. subsidies to conferences and institutional members of highest competitive division to assist them in providing long-term disability insurance, lost income insurance, and athletic scholarships, covering the full cost of education under federal definitions.
7. subsidies that enable institutions serving exceptional athletes who are prospective professional athletes to provide loss of future income athletic injury insurance

F. Due Process Protections. Specific due process protections must be provided by the Association before suspending a coach, athlete, or other athletics staff member from participation or suspending any member institution's or conference's membership or telecommunications privileges except for ineligibility based on properly determined academic standards.

1. With regard to the investigation and adjudication of any serious rules violation, retired judges with Congressionally granted subpoena power and third-party independent investigators must replace the existing enforcement system.
2. Meaningful penalties must be imposed that represent strong disincentives to deter the corruption inherent in any system in which the monetary stakes are so high (e.g., serious violation of athlete compensation or recruiting provisions for the purpose of inducing the attendance of an individual to participate in the institution's athletic program or the commission of academic fraud for the purpose of retaining the eligibility of a college athlete to compete resulting in a mandatory suspension of membership for a specified number of years).

G. Limited Antitrust Exemption for Education or Athlete Protection Purposes. Such Association should receive an antitrust exemption limited to any rule adopted whose primary purpose is to enhance educational opportunities for athletes, protect athlete health or welfare, or make athletic programs compatible with the tax exempt non-profit educational purposes of member institutions, including cost-control measures that better enable member institutions to use financial resources for its primary academic purposes (e.g. addressing exorbitant salaries, excessive spending on facilities, etc.). The exemption would not, for instance, allow the NCAA to form cartels for the purpose of selling national radio, television or streaming rights to regular season games or sell the licensing rights for its athletes or its members.

H. Members' Use of Revenues from Collegiate Athletic Events.

1. Institutions, conferences, national governance association, and third-party event hosts should continue to be permitted to sell media rights, event tickets, and event sponsorships and retain these and other event-related revenues, but these should be conditioned on the institution's national governance association having sole authority to offer national championships or related play-off events.
2. The national governance association, conferences, and member institutions should be required to retain five percent of gross annual media rights fees to establish an Academic Trust Fund to be used to disburse education-based grants to permit college athletes to complete

baccalaureate or advanced degrees following completion of athletic eligibility and to provide funding for non-athletes' institutional financial aid.

- I. **Minimum Legislative Conditions of Educational Athletic Program.** Minimum educational conditions such as the following should also be considered:
 1. Maximum full athletic scholarships to athletes in highest competitive division set at full cost of attendance under federal definitions.
 2. "Whistle blower" protections to college athletes, faculty and other institutional employees who disclose unethical behavior or rules violations.
 3. Required institutional participation in Association "certification" program.
 4. Athlete academic counseling and support program must be under direct control of institution's academic authority.
 5. Limitation on compensation and outside income of coaches and athletic directors.
 6. Athletes must have cumulative GPA of 2.0 to participate, and if lower, are restricted to maximum of 10 practice hours per week.
 7. Athletes whose cumulative GPA falls below 2.0 for two consecutive semesters shall not be eligible for athletics financial aid which may be restored upon return to 2.0 standard.
 8. Freshman ineligibility for any incoming student with high school GPA or test scores more than one standard deviation below academic profile of entering class, limit of 10 hours of practice per week and required academic skills remediation.
 9. Athletes denied participation eligibility for reasons other than academic standards have a right to appeal by binding arbitration.
 10. Institutions not in compliance with Title IX shall not be eligible for Association post-season competition unless deficiencies remedied with one year.
 11. Institutions must adopt policies approved by their respective faculty senates to minimize regular season athletic contest schedule conflict with class attendance and prohibit such contests during final exams.
 12. Construction and exclusive use of "athletics only" practice, competition, conditioning, academic support, housing, dining and other facilities is prohibited.
 13. All athletics-related financial aid extends to graduation of maximum of five years, and cannot be reduced, or cancelled, based on athletics performance, physical condition, or injury.
 14. Institutions must have faculty only Committee on Academic Oversight annually reporting to its faculty senate.⁴
 15. Institution may not use mandatory student fee revenues to support athletics without vote, and consent of student government (at least once every four years).

⁴ The Drake Group strongly believes that academic integrity, and the prevention of academic fraud, requires diligent tenured faculty oversight and transparency at the campus level that requires the annual and transparent examination of the academic progress and qualifications of college athletes, and when possible, to compare such data to non-athletes, including average SAT and ACT scores by sport, Federal Graduation Rates by sport, graduation success rates by sport, independent studies taken by sport, a list of professors offering the independent studies and their average grade assigned, admissions profiles, athletes' progress toward a degree, trends in selected majors by sport, average grade distributions of faculty by major, incomplete grades by sport, grade changes by professors, and the name of each athlete's faculty advisor.

2. COLLEGE-REVENUE-SPORTATHLETE-SPECIAL-COMPENSATION MODEL

The National Collegiate Athletic Association Athletic Grant-in-Aid CAP Antitrust Litigation case (commonly referred to as Alston/Jenkins/Kessler v. NCAA and Consolidated Action Plaintiffs v. NCAA) is currently in the process of being decided by the United States District Court Northern District of California Oakland Division (Judge Claudia Wilken presiding). Attorneys representing the plaintiffs' class of college Division I Football Bowl Subdivision football and Division I men's and women's basketball athletes have argued that the Court should find that all restrictions limiting in any way compensation to college athletes are anti-competitive. They propose that the Court eliminate all NCAA compensation rules. Alternatively, the Plaintiffs propose two less restrictive alternatives to existing NCAA restrictions on maximum college athlete compensation if the Court reaches that issue: 1. Full conference autonomy to determine appropriate rules. 2. Conference autonomy to permit additional education and health-related benefits without NCAA interference. (Plaintiffs' closing brief at 42). Further, the plaintiffs argue that the available benefits in the second proposal should not have to be "incidental to participation." (Plaintiffs' brief at 43). Finally, in response to the Court's request, the Plaintiffs refused to suggest an appropriate safe harbor amount. The Drake Group offers the following response:

A. The issue of applicability to Division I football and Division I men's and women's basketball alone

Drake Position:

- **If the Court, as expected, issues a judgment applicable solely to the plaintiff's class (Division I Football Bowl Sub-division football and men's and women's Division I basketball), an equal proportion of all male and all female athletes must be equally treated per Title IX requirements.**

Reasoning: Title IX of the Education Amendments of 1972 reads as follows:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. -- 20 U.S.C. § 1681(a).

In 1974, the U.S. Congress considered and rejected, on multiple occasions, various amendments that would have excluded revenue-producing sports from the application of Title IX's equality mandate. On July 1, 1974, Senator Javits proposed an alternative to one of these efforts (the Tower Amendment) requiring the Department of Health, Education and Welfare (now the Department of Education) to issue regulations that included "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports." (Sen. Conf. Rep. No. 1026, 93rd Cong., 2nd Sess. 4271 (1974)) The Javits Amendment was specifically addressed by the 1979 Title IX Policy Interpretation as being limited to sport operating expenditures and not athletics financial aid or participation:

Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment" to Title IX which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics. Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/ upkeep requirements of those facilities.

Moreover, all Title IX government guidance makes it clear that assessments of equality must compare the treatment of all female athletes to the treatment of all male athletes, rather than sport-to-sport comparisons. If schools financially tier their programs to provide different competition levels to various teams (for example supporting some sports to compete in Division I and some sports to compete in Division II or some sports to compete nationally versus some sports to compete regionally), there must be an equal proportion of male and female athletes (not numbers of sports) accommodated within each competition level. For example, if 10% of all male athletes are provided with the opportunity to compete in Division I or on a nationally competitive level, 10% of all female athletes must be provided with that same opportunity.

If only football and men's and women's basketball (or only revenue sports) were allowed special additional compensation or treatment, this would violate a central tenet of Title IX given the extraordinary number of male athletes compared to female athletes participating in these sports. It appears clear that if special compensation provisions were permitted by the Court for football and men's and women's basketball (the plaintiff's class), that Title IX would also require the institution, under federal law, to ensure that such benefits, as determined by dollars in the aggregate, would be provided to an equal proportion of all male and all female athletes.

B. Use of the NCAA Student Assistance Fund for benefits such as loss of value or long-term disability insurance, vehicle repair, electricity bills or other purposes as determined by the institution's athletic conference.

Drake Positions:

- **If the Court, as expected, issues a judgment applicable solely to the plaintiff's class (Division I Football Bowl Subdivision football and Division I men's and women's basketball), with regard to use of the NCAA Student Assistance Fund for college athlete the benefits specified above, an equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements.**
- **OPPOSED to use of the Academic Enhancement Fund for these purposes. This fund should only be used for academic support purposes.**
- **SUPPORT only if Student Assistance Fund is expanded to meet the needs of college athletes in all sports in need of emergency assistance, the original purpose of the funds. Loss of value insurance is very expensive and appropriate for a limited number of college athletes, who are recognized professional athlete prospects and is not properly classified as an emergency assistance need.**

Reasoning: *The original purpose of the Student Assistance Fund was to assist students who did not have the financial resources to meet unanticipated family and medical crises. When the fund is depleted to provide assistance only to revenue-producing sport athletes for other non-critical reasons, it affects the institution's ability to assist college athletes in all of its sports during these times of critical need.*

C. The establishment of a "Healthcare Fund" for college athletes to be used for the sole purpose of paying for future medical costs that might arise as a result of injuries incurred from playing football and men's and women's college basketball, including concussions.

Drake Position:

- **STRONGLY SUPPORTS such Healthcare Fund only if gender and sport neutral medical criteria are established and applicable to all athletic program participants.**

Reasoning: Concussion risk is experienced by numerous sports, not just football and men's basketball. In fact, females are at higher risk than males for concussion. Such a fund that can deal with the long-term consequences of head trauma or any serious injury that may require medical treatment beyond the normal term of athletic injury insurance policies should be an institutional obligation.

- D. **Academic Incentive Payment:** Conferences or colleges would have the option to provide an incentive payment of up to \$10,000 for each school year in which the athlete completes at least 1/5th of the units required to earn a degree and also has a GPA at or above what is required for NCAA eligibility. The payment would be made in installments.

Drake Positions:

- If academic incentive payments are permitted by the Court, an equal proportion of male and female athletes (not just football and men's and women's basketball), must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements).
- **STRONGLY OPPOSED** in concept to the payment of any bonus or stipend related to a normal and minimum expectation of full-time student academic performance.

Reasoning: All revenues that accrue to the institution from athletics belong to the institution and not the athletics program. Generally, it is inappropriate for a non-profit tax-exempt education institution to use its resources for bonuses to employees or students. Philosophically, paying any student to achieve an absolutely minimal academic standard is an anathema that should be opposed by accreditation agencies, faculties and higher education leaders. Additionally, installing such a system will create incentives for academic fraud that exceed the current pressures to place athletes in less demanding courses or academic majors, or in classes with less demanding faculty, in order to ensure their eligibility for athletic competition. All should understand that giving colleges the "option" to provide an extra payment or benefit even at a level limited by the institution's conference soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant conferences will continually increase any caps to maintain recruiting dominance, especially because many NCAA financial distributions based on athletic performance are conference based. Conference rules will be the new instrument of the "arms race," previously conducted by powerful coaches wielding institutional resources.

- E. **Graduation Incentive Payment:** Conferences or colleges would have the option to provide a one-time incentive of up to \$10,000 for an athlete who earns an undergraduate degree. This incentive would be available for athletes who earn their degree after their eligibility expires.

Drake Positions:

- If graduation incentive payments are permitted by the Court, an equal proportion of male and female athletes (not just football and men's and women's basketball) must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements).
- **STRONGLY OPPOSED** to the payment of any bonus or stipend related to the normal expectation of completion of an undergraduate degree.
- **SUPPORTS** only if the institution provides such an incentive to all students or a particular cohort of underprivileged students in which athletes are not overrepresented.

Reasoning: All revenues that accrue to the institution from athletics belong to the institution and not the athletics program. Generally, it is inappropriate for a non-profit tax-exempt education institution

to use its resources for bonuses to employees or students. Philosophically, paying any student to achieve an undergraduate legitimately earned degree is an anathema that should be opposed by accreditation agencies, faculties and higher education leaders. Further, installing such a system will create incentives for academic fraud that exceed the current pressures to place athletes in less demanding courses or academic majors or in classes with less demanding faculty in order to ensure their eligibility for athletic competition. All should understand that giving colleges the “option” to provide an extra payment or benefit even at a level limited by the institution’s conference soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant conferences will continually increase any caps to maintain recruiting dominance, especially because many NCAA financial distributions based on athletic performance are conference based. Conference rules will be the new instrument of the “arms race,” previously conducted by powerful coaches wielding institutional resources.

- F. **Post-Eligibility Undergraduate Scholarship:** Conferences or colleges would have the option to provide scholarships that athletes could use at any academic institution, to finish their education after their athletic eligibility expires. Former players could use these scholarships to complete their undergraduate degree at their current school or at another university, e.g., a university closer to their home or family, or to get training at an accredited technical or vocational institution.

Drake Positions:

- If post-eligibility undergraduate scholarships are permitted by the Court, an equal proportion of male and female athletes (not just football and men’s and women’s basketball) must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements).
- **STRONGLY OPPOSED** to any carte blanche “come back anytime” promise because it undermines the primacy of academic effort and achievement during the period in which the athlete is engaged in intercollegiate athletics.
- **STRONGLY OPPOSED** to any non-profit entity providing resources for a student to attend another educational institution because it is not within the mission of the institution.
- **SUPPORTS** the establishment of a post-athletic eligibility “academic support fund,” which may only be used to attend classes at the institution, making such an award one to which athletes in all sports can apply with award decisions being based on merit, extenuating circumstance and need according to established criteria.

Reasoning: *A promise of unlimited funding to complete an undergraduate degree is a recruiting promise that invites abuse because it can be misused as an incentive to spend exorbitant time participating in intercollegiate athletics, and not spending the time required to fulfill academic responsibilities during the years the athlete is eligible. Any award of a scholarship beyond an initial five-year commitment should be on the basis of merit or extenuating circumstance, equally available to athletes in all sports, and determined by a panel of faculty appointed by the faculty senate. All should understand that giving colleges the “option” to provide an extra payment or benefit even at a level limited by the institution’s conference soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant conferences will continually increase any caps to maintain recruiting dominance, especially because many NCAA financial distributions based on athletic performance are conference based. Conference rules will be*

the new instrument of the “arms race,” previously conducted by powerful coaches wielding institutional resources.

- G. Work Study Payment:** Conferences or colleges would have the option to provide athletes, who would have otherwise met the financial-need requirements for their college’s work-study program, the average amount that other students on the school’s work-study program receive. This payment would replace work study income unavailable to the athlete because of [his/her] commitment to the team.

Drake Positions:

- If such work study payments are permitted by the Court, an equal proportion of male and female athletes (not just football and men’s and women’s basketball) must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all need qualified male and female athletes respectively per Title IX financial aid requirements).
- **OPPOSES** for athletes predicting need who are on full athletic scholarship, and also recipients of the Pell Grant in addition to the full athletic scholarship grant.

Reasoning: *Work study programs are need-based and subject to maximum financial aid limitations. Thus, such work-study employment would not normally be available to an athlete on full scholarship, even if the athlete predicts need. Such grants would also undermine efforts to restrict athletic participation to a reasonable number of hours per week, and open the flood gates for additional unearned compensation based on the time spent on athletics, or athletes needing more rest because of the physical fatigue created by practice, competition and travel. All should understand that giving colleges the “option” to provide an extra payment or benefit, even at a level limited by the institution’s conference, soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant conferences will continually increase any caps to maintain recruiting dominance, especially because many NCAA financial distributions based on athletic performance are conference based. Conference rules will be the new instrument of the “arms race,” previously conducted by powerful coaches wielding institutional resources.*

- H. Off-Season Expenses:** Conferences or colleges would have the option to provide meals, housing, and other living expenses for pre-season, breaks, and vacations.

Drake Positions:

- If such off-season expenses are permitted by the Court, an equal proportion of male and female athletes (not just football and men’s and women’s basketball) must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements).
- **SUPPORTS** if students are engaged in allowable pre-season team practices or competitions or enrolled in coursework during non-regular semesters.
- **OPPOSED** if such a rule opens the door to year-round meals, housing, and living expenses without the student being on-campus and enrolled as a student.

Reasoning: *The tax-exempt, non-profit institution should not be using its resources to pay the expenses of any individual not engaged in bona fide educational activities, especially during those times in which athletes are not enrolled in classes and not permitted to be involved in their athletic programs. All should understand that giving colleges the “option” to provide an extra payment or benefit, even at a level limited by the institution’s conference, soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant*

conferences will continually increase any caps to maintain recruiting dominance, especially because many NCAA financial distributions based on athletic performance are conference based. Conference rules will be the new instrument of the “arms race,” previously conducted by powerful coaches wielding institutional resources.

- I. **Graduate School Costs: Conferences or colleges would have the option to provide scholarships that athletes could use for the cost of attendance for graduate school before or after their athletic eligibility expires.**

Drake Positions:

- If such graduate school costs are permitted by the Court, an equal proportion of male and female athletes (not just football and men’s and women’s basketball), must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements).
- SUPPORTS if NCAA Student Assistance Funds are used for this purpose, or if such awards are based on merit or other standards and are equally available to athletes in all sports and determined by a panel of faculty appointed by the faculty senate.

Reasoning: Any recruiting promise of unlimited funding of any benefit to an individual is inappropriate. Scholarships should be competitive, based on merit or the fulfillment of conditions based on need or promise. Also, all should understand that giving colleges the “option” to provide an extra payment or benefit, even at a level limited by the institution’s conference, soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant conferences will continually increase any caps to maintain recruiting dominance, especially because many NCAA financial distributions based on athletic performance are conference based. Conference rules will be the new instrument of the “arms race,” previously conducted by powerful coaches wielding institutional resources.

- J. **Post-Eligibility Study Abroad: Conferences or colleges would have the option to provide scholarships that athletes could use for study abroad programs after their athletic eligibility expires.**

Drake Positions:

- If expenses for post-eligibility study abroad are permitted by the Court, an equal proportion of male and female athletes (not just football and men’s and women’s basketball), must be equally treated (equal proportion of dollars expended in the aggregate must be provided to all male and all female athletes respectively per Title IX financial aid requirements).
- SUPPORTS if NCAA Student Assistance Funds are used for this purpose, and if such awards are based on merit, need or similar standards and equally available to athletes in all sports and determined by a panel of faculty appointed by the faculty senate.

Reasoning: Scholarship funds are never totally unlimited in amount or availability. Thus, such funds should be designed to discriminate on the basis of merit, need or other gender/race neutral standards, so as to be fairly apportioned. Also, all should understand that giving colleges the “option” to provide an extra payment or benefit even at a level limited by the institution’s conference soon becomes the rule rather than the exception because of the intensity of recruiting. Worse, permitting such additional benefits without concrete limits or caps applicable to all conferences does not recognize the fact that dominant conferences will continually increase any caps to maintain recruiting dominance for their institutions, especially because many NCAA financial distributions

based on athletic performance are conference based. Conference rules will be the new instrument of the “arms race,” previously conducted by powerful coaches wielding institutional resources.

3. INSTITUTIONAL-ATHLETE-EMPLOYEE MODEL

Various groups have proposed that athletics grants-in-aid be replaced with an institutional athlete employment model for only those intercollegiate sports that are “self-supporting,” meaning that they are not being subsidized by either general funds or mandatory student fees. This program would exist inside the institution’s tax-exempt education organization as an auxiliary enterprise. Each of the characteristics of the model are examined as follows:

1. **Establishment of an Auxiliary Enterprise.** An auxiliary enterprise is established consisting of a football and men’s basketball team, consisting of paid athlete employees. Each team would play football and basketball teams from other institutions that would be similarly constructed as auxiliary enterprises with athlete employees. The purpose of the auxiliary enterprise would be to provide sports entertainment for students, faculty and others, in order to develop a strong sense of community within the educational institution, and to enhance the marketing and public branding of the institution. The auxiliary enterprise would generate revenues by selling tickets to athletic events, entering into television and radio broadcast and cablecast rights agreements, selling advertising and sponsorships and accepting donations from alumni and members of the public. The two sports programs would be self-supporting with regard to their operating expenses. The institution would incur all capital expenses associated with the construction of all facilities used by the program and while no “rent” is charged to the auxiliary enterprise, the program would pay for its own utilities, maintenance, etc.

Drake Positions:

- The use of the term “enterprise” indicates an intent to establish a business similar to the institution running a bookstore or food service operation. While bookstores and food services operations are integral to operating an educational institution, the establishment and conduct of an entertainment program unrelated to an academic program is not. Thus, it may be legally required for this entity to exist as a separately incorporated business from the tax-exempt educational institution.
- Normally, such school/community entertainment events are provided by the institution in two ways:
 - The institution uses student fees or other funds to hire third party professional entertainers to come to campus for one-off performances. The institution does not own or operate such activities because it is not central to its mission. OR
 - The institution sponsors a co-curricular or extra-curricular activity such as a student symphony, a choir or an athletic program with bona fide students as participants, with the co-curricular or extracurricular educational purpose of providing them with a valuable performance achievement and cohort or team experience, which in and of itself, is justifiable as a student developmental activity. In addition to students taking a class to learn how to play an instrument, or learning to teach the acquisition of sport skills, the institution offers an opportunity to experience performance of those skills,

and to learn the value of working with teammates that enhances the development and performance of all.

- If the institution wants to enable such a professional sport business to operate on-campus, the institution can allow a separately operated business to operate on-campus (like a Starbucks), only if that business is not subsidized by, and receives no benefits or services from, the tax-exempt institution. The net proceeds of the business would be subject to UBIT, and any donations would not be tax deductible. The institution could not support the business with its assets or personnel. Thus, the business would have to pay for all of its own personnel (including payroll taxes, unemployment insurance and workman's compensation) and pay the institution fair market value to lease facilities, pay for utilities, etc.
- It is not clear whether the tax-exempt institution can allow the business to use its name and marks, even if the business entity pays a licensing fee for same. Cases related to institutionally branded credit cards for instance, permit such licensing arrangement only if the institution has no involvement in the credit card business. It is unclear whether housing the business on campus and creating a perception that the business is an institutional entity with events on campus, etc., would pass similar muster.
- Educational institutions cannot discriminate on the basis of sex in employment. If the business enabled only the offering of employment as athlete opportunities to males and not females, this would be a questionable and possibly impermissible activity. Additionally, the educational institution would not be allowed to house any business that discriminated on the basis of sex in employment or other aspects of its operation.
- If the sports were football and men's and women's basketball – mostly male and a few females, Title IX questions would probably be raised with regard to gender equity, if any of the employees were also students, even if the program was an entertainment and not an educational activity. It is doubtful that Title IX would allow the educational institution to act in a manner that creates a significant benefit (employment) for more males than females.

2. **Athlete Employee Compensation.** Athletes playing on these teams would be employed by this student/alumni entertainment/branding-marketing enterprise and paid salaries and benefits, rather than grants-in-aid, for educational benefits. The athletes would not have to meet any academic eligibility rules to play on these teams. As employees, they could organize into a union and negotiate a collective bargaining agreement with the institution in which the institution agrees to offer a minimum salary as well as a benefits package and pay taxes (insurance, pension, etc.), which may or may not include tuition free educational benefits. The value of the athlete employees' salary and benefits packages will be equal to a percentage of the revenues generated by the auxiliary enterprise or other negotiated amount. Each athlete negotiates their individual salary based on marketplace value.

Drake Positions:

- As explained in paragraph 1 above, if the employees were all male or mostly male, whether or not they were also students, such a university operated business operation would most likely run afoul of employment discrimination or Title IX laws.
- The operation of a department or entity within the tax-exempt educational institution wholly owned and operated by the institution, and paying employees within that department a percentage of what they raise, would face the same scrutiny as legal cases involving development department employees receiving a commission or salary based on revenues

generated. Judgments in such cases require that some portion of compensation must be base salary, and the bonus or portion based on total revenues obtained, should not exceed 20%. It appears that any compensation model based on determining total team salaries as a percentage of total revenues must conform to this limitation.

- Because the enterprise must be fully self-supporting, Drake questions the projected success and stability of the financial model because there are significant expenses, which must be factored into operations that are not currently incurred by current college athletic programs. For example:
 - a. The institution would have to pay off all current contracts to coaches (all of whom represent the highest paid employees in athletics) given the need to terminate such employment “without cause” for the coaches to work for the new entity which would be a for-profit employer. Such circumstances may invite a coach to change institutional affiliations, to take advantage of the employment termination financial windfall, and negotiate a new contract with the highest bidder especially since coach salary levels would most likely decline due to athletes receiving substantially higher compensation.
 - b. The new entity would incur the costs of salaries and benefits of all non-athlete employees, who previously supported these sports in the extracurricular athletic program (coaches, trainers, event personnel, etc.).
 - c. The new entity would now be faced with new expenses not charged to athletics in the extracurricular program model that would now have to be incurred (i.e., services of university accounting, human resources, legal counsel, etc.).
 - d. The new entity’s expenses for athlete employees would far exceed the cost of scholarships they previously received because they would include substantial salaries, athletic injury/catastrophic injury/disability insurance, workers’ compensation, unemployment insurance, Medicare and pensions, and other negotiated benefits.
- Unions may not be allowed at some institutions because of state laws.
- If the employees are also students, and working hours exceed those normally allowed of the institution’s student employees, or salaries exceed hourly wages generally provided to student employees, the compensation arrangement may be subject to legal scrutiny.

3. **Non-Self-Supporting Sports.** The extra-curricular athletic program would involve only those sports which are not self-supporting, meaning no sports that receive institutional subsidies from the general fund or student fees are included in the auxiliary enterprise. These institutionally subsidized sports will continue to be offered as part of an extracurricular intercollegiate athletic program that offers no or few athletic scholarships and operating budgets, limited by the extent to which the institution provides operational support, plus some earned revenues like gate receipts, sponsorships, and donations (with the latter not sufficient to fully fund the sport program).

Drake Positions:

- The action of the institution to remove educational scholarship support from the majority of athletes participating in its current extracurricular athletic program in order to provide non-educational benefits (salaries untethered to education) to a small number of non-students is contrary to the purpose of the educational tax-exempt entity and may involve challenges to the tax-exempt status of the educational institution.
- There is no sport which can be offered within such a business model that is “self-supporting” because all athletic facilities have been constructed via use of tax-exempt institutional resources and/or tax-exempt bonds. A one-time rental fee for use of University facilities would not be questioned. However, the institution, which used tax-exempt organization funds, tax-exempt bonds or project-restricted tax-exempt donations to build expensive

athletic facilities, and then offered the use of such facilities to a business at a rate unrelated to the taxpayer subsidized cost of that facility may raise significant red flags.

4. COLLEGE-ATHLETE-AND-AFFILIATED-PROFESSIONAL-SPORTS-LEAGUE OPERATING OUTSIDE THE NCAA SYSTEM

A theoretical model was proposed in 2017 by Andy Schwarz for the use of Historically Black Colleges and Universities (HBCU) to enable their full-time college athletes that play basketball to earn salaries from an outside professional sports league in addition to receiving traditional academic scholarships.⁵ The league initially would be funded by venture capital investment that would pay the athletes' and coaches' salaries and other expenses. Eventually the league would be funded by sponsorships and media contracts. Schools would share in any profit pool.

1. **College "Club Sports" League.** The professional sport league would be constructed as a "college club-sports league operating as a corporation." The basketball league would be owned by the Historically Black Colleges and Universities (HBCUs), who may choose to be league members and initially be funded by private investors, league and team sponsorships and broadcast/streaming rights revenues. League teams would be "club" sports to ensure they do not run afoul of NCAA rules, which only apply to varsity intercollegiate athletic programs. The operation of the league, and these HBCU sports clubs, would operate outside the current varsity intercollegiate athletic program structure.

Drake Positions:

- It would not be legally permissible for a 501 (c) (3) organization to be a for-profit corporation, or to have other than a passive investment relationship (purchase of shares) with a for-profit corporation. The institution could not be involved in the operation of the for-profit corporation. The corporation, as a for-profit entity, would be subject to corporate income taxes and no donors to such a corporation would receive a tax deduction.
 - It is not clear whether the tax-exempt institution can allow the business to use its name and marks, even if the business entity pays a licensing fee for same. Cases related to institutionally branded credit cards for instance, permit such licensing arrangement only if the institution has no involvement in the credit card business. It is unclear whether housing the business on campus, and creating a perception that the business is an institutional entity with events on campus, etc., would pass similar muster.
 - Such a corporation could designate the institution as a recipient of its donations or profits. However, current NCAA rules do not allow a professional sports organization to donate to an NCAA member institution.
2. **Full-Time College Student Requirement for Employment.** The league would formally employ college athletes, who will also be enrolled as full-time students at the Historically Black Colleges and Universities (HBCUs). When a school identifies athletes it would like to admit, it admits them, and

⁵ Note that Schwarz pivoted away from this plan after his own thinking evolved and he teamed up with the current Historical Basketball League (HBL) management team led by Ricky Volante to develop a single entity professional sports league independent of colleges and universities but whose players would be college students outside the HBL playing season. For more information on the Historical Basketball League, see <https://www.hbleague.com/>

provides these athletes with academic scholarships that include tuition, room and board and books. The HBCU member is sovereign in determining its admissions standards and practices. The league player contract includes a provision that employment is conditioned on remaining a student in good standing at the HBCU, as determined by the HBCU.

Drake Positions:

- **The institution would be prohibited from actively participating in the corporation. For example, by assisting in the identification of prospective athletes, or providing athletes with academic scholarships in any way related to their employment by league. Such scholarships would have to meet standard criteria for such awards (i.e., merit, need, etc.).**
 - **The institution would be prohibited from acting in concert with the league to determine eligibility for continued employment based on reporting the grades of the student. The student employee would have to obtain and voluntarily submit such proof to the employer.**
3. **Partnership with Players' Union.** Simultaneous with admission, the league would hire the athlete as an employee based on the league's wage scale, developed in partnership with a players' union; it would voluntarily recognize and also set and provide the benefits an employer typically provides for these services: pay, working conditions, etc. Because the athletes are all employees of a for-profit corporation, and not of public or private universities, if the league chooses to do this, union cards could be signed in a friendly environment, and the salary structure, and work environment could be worked out with the athletes in a spirit of partnership.
 4. **Reimburse Institution for Title IX Obligation to Match Financial Aid to Females.** As written and enforced, Title IX requires that the ratio of *financial aid* to male athletes versus female athletes be "substantially proportional" (defined as within 1 percentage point) to the ratio of male versus female athletic participation. If the pay provided to the league's college athletes is considered financial aid, then the league would need to provide matching funds to the HBCUs to ensure women receive higher financial aid, which could be in the form of more generous scholarships, or even in cash. Title IX has safeguards against creating a separate private organization to evade its requirements, so it is possible that even though the league's college athletes are not paid by their schools, they would still be required to treat that payment as subject to the financial proportionality law. Indeed, the league would set aside funds for schools to enhance funding to their women athletes in proportion to salaries paid to league athletes.
- Drake Positions:**
- **Agree that Title IX obligations are not obviated or alleviated by a rule or regulation of an outside organization or league. 34 C.F.R. § 106.6(c). Indeed, a recipient institution may violate Title IX when it assists an outside organization that engages in sex discrimination. As part of its broad prohibition on sex discrimination, the Title IX regulations prohibit recipients from aiding or perpetuating discrimination by providing significant assistance to any outside organization that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees. 34 C.F.R. § 106.31(b)(6). Similarly, a recipient institution that assists an outside organization in making employment available to any of its students must "assure itself that such employment is made available without discrimination on the basis of sex," and "not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices." 34 C.F.R. § 106.38(a).**
5. **"Amateurism" (definition of professional).** League athletes would not be precluded from signing professional contracts or participating in a professional draft, operating as an "education-based G-League, allowing athletes not-yet-ready for the NBA to sign with an NBA team and train for their

future career. Only at the point where the league athlete is placed on an active roster of a professional league, does the athlete cease to become eligible for the league. ‘Amateurism’ as it would exist in the league would be defined as never having played in a professional, non-education-based sports league.”

6. **Agent Certification Process/Athlete Exploitation of Their Own NILs.** The league would have an agent certification process similar to those operated by U.S. professional sports leagues and players would be encouraged to sign with a league-certified agent to maximize their off-court revenue, such as use of NILs in advertising commercials.
7. **Additional Education Consideration.** The league competition schedule would operate during the summer to minimize conflict with NBA or NCAA basketball games and conflict with student academic efforts during the regular academic year.

The Drake Group offers the following additional reactions to this model:

- **The Drake Group supports the development of any professional sports league by entities other than the educational institution. The educational institution should remain focused on its primary purpose, the provision of an accredited educational degree.**
- **The financial viability of such a league may be overstated:**
 1. **League profits would be fully taxable at the federal and state levels and in some cities, salaries, and wages would be subject to employee payroll taxes.**
 2. **Employers would be required to provide athletic injury, catastrophic and disability insurance, workmen’s compensation, and unemployment insurance.**
 3. **Athlete employee salaries would be fully taxable at the federal and state level, and athlete employees would have to pay unemployment taxes and social security; thereby, increasing pressure on the players union to demand higher salaries.**
 4. **The college or university may have to pay off existing collegiate long-term coaching agreements for coaches moving to the new league, while the league would have to negotiate new coaching agreements.**
 5. **The professional league coaching salaries presumably would be far less lucrative once athlete labor and other costs mentioned above are factored into the financial equation.**
- **The non-profit education institutions would have to charge the professional league fees to lease their stadia, weight rooms, locker rooms, and meeting spaces, and obtain the rights to use the institution’s names and marks. These fees would have to be substantial since the professional teams would be taking all earned revenues in those sports (gate receipts, media rights, advertising and sponsorship fees, concessions, parking, etc.) to support their business; revenue that previously accrued to the educational institution. The institution would need to set these fees at a level sufficient to include paying off existing capital debt in connection with athletic facilities, and to offset the anticipated decline of donated funds to the institution’s athletic program if the institution wants to continue supporting the retained non-revenue extracurricular athletic program. These substantial costs may reduce the attractiveness of the new professional college league to investors.**