



The Drake Group

ACADEMIC INTEGRITY IN COLLEGIATE SPORT

POSITION STATEMENT

College Athletes Should Give U.S. House NIL Bill a “C+” Grade: Kudos and Criticism of *The Student Athlete Level Playing Field Act*¹

October 19, 2020

The Drake Group² applauds the legislative effort of a bipartisan group of U.S. Representatives (Anthony Gonzalez (OH), Emanuel Cleaver (MO), Marcia Fudge (OH), Steve Stivers (OH), Rodney Davis (IL), Jeffrey Duncan (SC), Josh Gottheimer (NJ) and Colin Allred (TX)) to prohibit the NCAA and other national or conference governance organizations or their member institutions from declaring college athletes ineligible for participation because they enter into endorsement contracts or retain agents to represent them in obtaining such contracts. Lead sponsors Anthony Gonzalez (R) and Emanuel Cleaver (D) introduced [*The Student Athlete Level Playing Field Act*](#) on September 14, 2020.

Kudos. While the bill has several critical weaknesses that should be addressed, the Drake Group commends the following elements of the Act:

- Bans current NCAA amateur status rules that prohibit athletes from entering into endorsement agreements or hiring agents.
- Prohibits higher education institutions from compensating athletes for the use of their NILs, which could result in athletes becoming employees or business partners with their respective institution. Accordingly, thereby maintains the “student” relationship between the higher education institution and the college athlete.

¹ Preferred citation: Donna Lopiano, Gerald Gurney, Emmett Gill, Karl Idsvoog, Katie Lever, Brian Porto, David Ridpath, Allen Sack, Sandy Thatcher and Andrew Zimbalist (2020) The Drake Group Position Statement - College Athletes Should Give U.S. House NIL Bill A “C+” Grade: Criticism of *The Student Athlete Level Playing Field Act* (Oct, 2020). Retrieve from <http://thedrakegroup.org>.

² The Drake Group is a national organization of faculty and others whose mission is to defend and achieve educational integrity and freedom in higher education by eliminating the corrosive aspects of commercialized college sports.

- Allows college athletes to enter into endorsement agreements with third parties outside the institution without being declared professional athletes who would otherwise be declared ineligible for college sports participation by their institutions or national or conference governing organizations.
- Permits higher education institutions to prohibit their college athletes from entering into endorsement agreements with objectionable categories of products (e.g., tobacco, alcohol, controlled substances, adult entertainment, etc.).
- Designates the Federal Trade Commission as an enforcement agency to investigate allegations of unfair or deceptive acts or practices by college athlete agents, institutions or their boosters, make determinations of wrong-doing and impose penalties. Thereby, bypasses the NCAA enforcement system considered by most to have significant flaws, having been characterized as arbitrary, capricious and inconsistent with regard to provision of due process to individuals and institutions.³
- Preempts existing or future state laws that might limit or expand the right of college athletes to enter into endorsement agreements with agencies outside athletes' colleges or universities, thereby preventing the chaos of different rules applicable to colleges and universities depending on their geographical location and materially affecting the ability of those institutions to attract students with athletic talent.
- Permits higher education institutions to prohibit their athletes during an athletic competition or official university event from wearing any items of clothing or gear with an insignia unacceptable to the institution, thereby giving athletes full freedom to enter into endorsement agreements, even with competitors of institutional sponsors, as long as they are subject to this narrow condition.
- Prohibits boosters from directly or indirectly providing cash or items of value as an inducement to enroll or remain at an institution.
- Prohibits antitrust causes of action based on any of the restrictions in the Act.

Concerns. The Drake Group has the following concerns relating to the Act:

- 1. It appears that college athletes' freedom to be employed outside the institution is limited to "endorsement" contracts only.** The Act relies on the Sport Agent Responsibility and Trust

³ Porto, B., Gurney, G., Lopiano, D., Ridpath, D.B., Sack, A., Willingham, M., Zimbalist, A. (2015) The Drake Group Position Statement: Fixing the Dysfunctional NCAA Enforcement System. (April 7, 2015). Retrieve at: <https://www.thedrakegroup.org/2016/06/03/fixing-the-dysfunctional-ncaa-enforcement-system/>

Act (SPARTA) definition of “endorsement contract.” Athletes who are self-employed do not execute endorsement agreements. This Act should be clarified to make clear that college athletes have the right to engage in all forms of outside employment without losing athletics eligibility or athletic scholarship support, with the exceptions of employment as a professional athlete (playing a sport for pay) or endorsements related to prohibited product categories.

2. **The Act creates a powerless stakeholders’ Commission that will only exist for three years for the purpose of making “recommendations” to Congress and athletic governance organizations regarding NIL rules, a process that will further delay the realization of college athlete employment rights.** Instead, a permanent NIL Commission should be immediately established and begin operations. Such a permanent commission consisting of experts with independence from any stakeholders and possessing the authority to establish college athlete NIL rules and standards, monitor implementation, and resolve disputes is essential. Such a NIL Commission can easily operate without government funding as a not-for-profit entity that charges application fees for review of NIL agreement compliance with NIL Commission standards.

The issue of college athletes being permitted to monetize their NILs has been debated and litigated for years. A variety of proposed bills in Congress and many state legislatures has been critical of the NCAA dragging its feet on removal of its college athlete on these issues involving both outside endorsement and employment restrictions. All stakeholders have had the opportunity to express their recommendations. It’s time for Congress to act decisively and choose from among all of the following functions that have been proffered as necessary:

- a. Timely review of college athlete NIL agreements to determine if they meet the requirements of this Act and standards established by the NIL Commission;
- b. Require a fair market value (FMV) standard, establish that the justification of any FMV rests with the third-party licensor and resolve challenges to any NIL agreement that fails to meet the FMV standard;
- c. Set standards related to athlete engagement in inappropriate activity or contracts with third parties that do not meet certain character and integrity standards;
- d. Resolve disagreements between the athlete and the athlete’s member institution with regard to their respective rights and resolve compliance challenges;
- e. Determine on the basis of two years of data initially and as needed following that period, whether any additional marketplace compensation standards, time restrictions or other restrictions are advisable;
- f. Set standards for the registration and certification of agents and resolve complaints related to the conduct of agents, attorneys or third-party employers, and, if

- necessary, withhold approval of an agent, attorney or third-party employers for future college athlete NIL agreements;
- g. Set standards for agent, attorney and other third-party advisor compensation with regard to hourly rates or percentage commissions;
 - h. Set standards prohibiting institutions from assisting, directly or indirectly, athletes in their efforts to monetize their individual NILs (e.g., production of videos, creative development of brands, etc.) other than educating college athletes about NIL Commission standards and, generally, brand promotion;
 - i. Specify that only the NIL Commission in the first instance and then the Federal Trade Commission have the jurisdiction to resolve whether to void or require a revision to an athlete NIL contract and require any disputes concerning the NIL Commission's decisions be resolved by the Federal Trade Commission;
 - j. Develop educational and instructional materials, forms and applications for processing of NIL agreements;
 - k. Refer complaints about the inappropriate conduct of agents or other third-party advisors or involvement by institutions or its boosters to the Federal Trade Commission to determine unfair and deceptive acts or practices in violation of the Act;
 - l. Maintain a publicly accessible and searchable database of all athletes' NIL agreements;
 - m. Establish a de minimis amount or other standards for athletes' NIL agreements that do not have to be submitted to the NIL Commission or formalized in a contract;
 - n. Approve any Association eligibility rules related to college athlete outside employment and NIL monetization prior to their consideration for adoption; and
 - o. Develop policies and procedures for all NIL agreements, including an Association, conference, institution, and college athlete agreement fee system that will permit the Commission to be self-supporting.

The independent and permanent NIL Commission is necessary to handle all of the oversight logistics detailed above; while the Federal Trade Commission should be limited to enforcing the Act, investigating allegations of unfair or deceptive acts or practices by agents, institutions and boosters, and imposing penalties. As a government agency with the powers of discovery and subpoena, the FTC is perfectly positioned to perform this function of prosecuting those who violate the rules.

- 3. The Act contains no mechanism for resolving inevitable disputes between athletes' and their institutions' contracts other than directing the temporary Commission to make future recommendations.** The NCAA has no capacity to administer rules or police the college athlete outside employment space. Indeed, it cannot even do that for the area that it

professes is of the upmost importance: education of athletes. Either a permanent independent Commission or the FTC should fill this role.

4. **Given the priority purpose of earning a degree, institutions and athletic governance organizations should be permitted to promulgate rules that prohibit college athletes from missing classes, exams or other academic responsibilities for employment/endorsement related activities.** This should be added to the Act.
5. **The Act does not include any provision requiring transparency of institutional or athlete endorsement agreements that would enable any stakeholder to discover or expose the misuse of NILs or non-compliance with the Act.** The Act should require disclosure obligations and the implementation of a publicly accessible database (see above at 2 (l)) by a permanent NIL Commission. The Commission must also be charged with imposing a process of review to certify compliance with endorsement agreement standards. Such a system would also greatly reduce the probability of athlete/institution conflict.

An Improved Federal Legislative Solution. The Drake Group further believes that such federal NIL legislation should be imbedded in a more comprehensive bill that conditions receipt of Higher Education Act funding on higher education institutions providing students participating in intercollegiate athletic programs with sufficient health and medical protection, improved educational benefits that lead to better graduation rates, greater freedom of college athletes to attend institutions of their choice, and a stronger athlete voice in the governance organizations that control their athletics experience. Existing restrictions of time spent on athletics-related activities are woefully inadequate and must be reexamined. Greater transparency and annual public reporting of compensation of athletics personnel, and detailed information on sources of revenues and expenditures should be required. The Drake Group urges the House leaders of *The Student Athlete Level Playing Field Act* to join forces with Senate proponents of the [College Athlete Bill of Rights](#) to accomplish such broader purposes.

Need for Congress to Engage in a Deeper Examination of the Need for Collegiate Athletics Reform. Last, The Drake Group believes that while a more comprehensive athlete protection bill can be accomplished in the near future, there will remain a need for Congress to review broader issues in intercollegiate athletics via the establishment of a Congressional Commission to examine policies related to academic success, restrictions to combat commercial excesses and to maintain a clear line of separation between collegiate and professional sports, due process for persons and institutions accused of violating the rules of the athletic governance organizations, the impact of athletics on the academic mission and integrity of the higher education institution, sexual misconduct by athletes, and other issues that require deeper examination. The Drake Group therefore strongly supports H.R. 5528, the [Congressional Advisory Commission on Intercollegiate Athletics Act](#).