The Drake Group
Est. 1999
ACADEMIC INTEGRITY IN COLLEGIATE SPORT

## POSITION STATEMENT

# The U.S. House NIL Bill, *Student Athlete Level Playing Field Act,*[1] Is Improved but Still Needs Further Specification

## May 7, 2021

The Drake Group[2] commends lead sponsors Representatives Anthony Gonzalez (R-OH) and Emanuel Cleaver (D-MO), for the reintroduction of their bipartisan bill in the 117th Congress that prohibits 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) reintroduced the ***Student Athlete Level Playing Field Act*** on April 24, 2021, along with the support of Rodney Davis (R-IL), Josh Gottheimer (D-NJ), Steve Stivers (R-OH), Colin Allred (D-TX), Richard Hudson (R-NC), and Sharice Davids (D-KS). The bill, virtually the same as the version introduced in the 116th Congress, has a few substantive changes. First, the bill has a parity clause such that if college athletes are prohibited from entering into endorsements deals due to five objectionable categories of third parties, then the NCAA, covered athletic organizations, and institutions too will be prohibited from having sponsorships or endorsement contracts with such entities. Second, the bill now specifies that Congress should prioritize the selection of "independent" members to the Commission that will be charged with making recommendations to Congress on NIL rules. Third, the new version permits institutions to prohibit athletes from wearing any gear with the insignia of any entity during any athletic competition or "athletic-related university-sponsored event." The prior version had a broader prohibition that included any athletic competition and "university-sponsored event."

---

1 Preferred citation: Sommer, J., Zimbalist, A., Lopiano, D., Gurney, G., Gill, E., Idsvoog, K., Lever, K., Porto, B., Ridpath, D., Sack, A., Smith, B., and Thatcher, S. (2021) The Drake Group Position Statement - The U.S. House NIL Bill, *Student Athlete Level Playing Field Act,* Is Improved but Still Needs Further Specification. Retrieve from https://www.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.

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

- Permits athletes to enter into endorsement agreements and hire agents.

- Specifies that college athletes will not be considered employees of the covered athletic organization or institution by virtue of entering into endorsement contracts with third parties.

- Permits the NCAA, other covered athletic organization, or institutions to prohibit their college athletes from entering into endorsement agreements with the following categories of brands or companies: tobacco, alcohol, controlled substances, adult entertainment, and casino or gambling entities.

- Requires that if the NCAA, other covered athletic organizations, or institutions prohibit college athletes from entering into sponsorships or endorsement contracts with the objectionable categories above, then the NCAA, other covered athletic organizations, or institutions may not enter into any such sponsorships or endorsement contracts. Also, if an institution is a member of any covered organization that prohibits such contracts, then such institution too cannot enter into sponsorships or endorsement contracts with the objectionable companies. (These prohibitions were not in the earlier bill.)

- Preempts state laws that might limit or expand the right of college athletes to enter into endorsement or agency agreements.

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 bill relies on the Sport Agent Responsibility and Trust Act (SPARTA) definition of "endorsement contract." Athletes who are self-employed do not execute endorsement agreements. This bill 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. For example, the bill should make it clear that athletes should be permitted to enter into contracts with video developers and clothing companies for the use of college athletes' NILs.

2. **The bill 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.** Also, while the specified members include two athletes, there is still no designated number of members from other suggested categories--individuals with expertise in sports marketing, contracting, public relations, or corporate governance.

Conceivably, all other members could come from institutions or covered athletic organizations. An attempt was made to rectify that with an addition to this version of the bill that states that the appointment of members unaffiliated with divisions or conferences of covered athletics organizations shall be prioritized. The Drake Group believes this is still insufficient. Additionally, The Drake Group recommends that a permanent NIL Commission should be immediately established and begin operations. It is essential that such a permanent commission consist of experts with independence from any stakeholders and possess the authority to establish college athlete NIL rules and standards, monitor implementation, and resolve disputes.

3. **The bill permits institutions too much freedom to broadly control what and where college athletes may wear clothing with insignia.** The bill permits higher education institutions to prohibit their athletes from wearing any items of clothing or gear with an insignia unacceptable to the institution during any athletic competition or athletic-related university-sponsored event. While this gives athletes certain freedom to enter into endorsement agreements, even with competitors of institutional sponsors, The Drake Group believes that the prohibition is still too broad. Instead of "any athletic-related university-sponsored event," we believe the condition should be "official mandatory athletic-related events." Otherwise, e.g., athletes will not be able to wear their own gear when attending any athletics event on campus, even for sports in which the athlete is not a participant.

4. **The bill states that neither it nor its amendments shall create a cause of action under the Sherman Act**. This provision is ambiguous to the extent it might be attempting to create an antitrust exemption for NIL monetization rules. Plus, it is giving protection to claims in potential amendments without any clear information about what might be in those amendments. The intent of this provision should be clarified to avoid future litigation over its scope. The Drake Group is in favor of a clearly stated antitrust exemption with respect to appropriate rules regarding NILs endorsement contracts of college athletes.

5. **While the bill prohibits boosters from directly or indirectly providing cash or items of value as an inducement to enroll or remain at an** institution, The Drake Group is concerned that certain "boosters" will continue to find ways around any such restriction. We suggest that the NIL Commission study this concern to determine how this restriction can be restricted to appropriately defined "boosters" and be refined to have full force prohibiting inducements to enroll or remain at an institution.

6. **While the bill includes a provision that nothing in it restricts athletes' rights pursuant to Title IX,** The Drake Group considers this to be inconsequential as, of course, Title IX will continue to apply and is not negatively impacted by the bill. Instead, the bill should explicitly state that institutions must be particularly mindful not to violate Title IX as they market, directly or indirectly, their athletes or otherwise engage in activities related to athletes' NIL contracts, and that any violations of Title IX will be strictly enforced. The bill should also state that the NCAA and other covered athletic organizations, whether or not technically covered by Title IX, should adhere to its gender equity requirements. In a commitment to gender equity, a bill should provide for a Commission member with expertise in Title IX matters as

well as a Commission duty to monitor and provide publicly available information about compliance with Title IX of athletic programs.

7. **The bill contains no mechanism for resolving inevitable disputes between athletes' and their institutions' contracts other than directing the NIL Commission to make future recommendations (except for the narrow issue regarding objectionable categories noted above, which the bill states disputes would be addressed by the FTC).** Either a permanent independent Commission or the FTC should fill a broad enforcement role.

8. **Given the priority purpose of earning a degree, the bill should provide that 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.** Plus, the Drake Group suggests that the bill require institutions to provide a financial literacy course for all athletes engaged in NIL contracts.

9. **The bill 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 bill should require disclosure obligations and the implementation of a publicly accessible database with confidential information protected.

**An Improved Federal Legislative Solution.** The Drake Group further believes that federal NIL legislation should be embedded 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 *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.