



THE DRAKE GROUP

Advancing Positive Legislative
Change In College Athletics



October 10, 2024

Issue Report #6
Confronting Misinformation About Title IX

Myths About Title IX Being Advanced to Shortchange Female Athletes



\$Billions at Stake – *House-Hubbard-Carter v. NCAA* Proposed College Athlete Settlement Agreement

The Drake Group (TDG) works with Congress on critical issues related to the conduct of collegiate athletics programs. At the beginning of each academic year, we report on the top concerns we are addressing with members of Congress and executive agencies. This is report six of ten.

Issue #6. On October 4, 2024, Judge Claudia Wilken gave “preliminary” approval for the proposed settlement of *House, Hubbard, and Carter v. NCAA*. College male and female athlete plaintiffs have charged the NCAA and the Power Five conferences (SEC, Big Ten, Pac Ten, Big 12 and ACC) with violating antitrust laws because of NCAA rules which prevented athletes from receiving money from a variety of sources (e.g., television revenues, monetization of their names, images, and likenesses, etc.). “Final” approval is scheduled for April of 2025.

If final approval is received from the court at that time and there are no amendments to the current settlement documents,

- 90 percent of the \$2.8 billion for the past damages portion of that settlement would go to male athletes participating in basketball and football in Power Five conferences;
- approximately 5 percent to female basketball players at those same schools; and
- 5 percent to non-Power Five Division I athletes (sex of recipients undesignated).

The second part of the settlement (injunctive relief) would occur over the next ten years, during which an additional estimated \$20 billion will be distributed to Division I athletes (primarily to athletes attending Power Five institutions) with no sex or sport currently designated.

Two major concerns regard the past damages are (1) no effort has been made to calculate the significant financial damages to women created by institutions failing to equally publicize and promote and provide equal scholarship dollars (estimated by government reports to be in the range of \$1 billion annually), and (2) the NCAA and schools are saying they are not required to give female athletes their Title IX fair share (e.g., each year dollars awarded to males and females must match their respective percentages of all athletic participants with a one percent allowable variance). Many rationalizations are being advanced to allow schools to favor male athletes in the distribution of both past and future dollars. Several members of Congress and NCAA member institutions have requested that the Department of Education Office for Civil Rights (OCR) issue guidance regarding the application of Title IX.

What The Drake Group is Doing About This. TDG has been in direct communication with OCR staff to inform them of settlement details and the arguments being offered by the NCAA and athletic administrators to deny female athletes equal financial assistance proportional to their athletic participation – the Title IX gender equity standard. We have provided OCR with information on the legislative history of Title IX which precludes favored treatment of male athletes based on their participation in revenue-producing sports, how financial distributions to athletes are made by their institutions even when revenues are generated by conference and NCAA championships, and how new labels like “revenue-sharing” and “NIL payments” have been invented to suggest that new types of financial assistance are not covered by Title IX. Just to give you a quick idea of the myths being advanced:

- **Myth #1. Men in Revenue-Producing Sports Deserve More.** One of the proffered justifications for favored treatment of male athletes is that football and men’s basketball produce the revenues and therefore they are entitled to the cash. But this reason is explicitly prohibited by Title IX. When the Title IX athletics regulations were approved by Congress in 1975, there were repeated failed attempts to eliminate revenue-producing sports from Title IX coverage. Congress clearly rejected favored treatment of athletes because their sports generated revenues.
- **Myth #2. Cash Comes Directly from the NCAA, Not the Schools.** Another purported justification for treating football players and men’s basketball players differently than women and not applying Title IX’s requirements to such

discrimination is that the cash is coming from the NCAA and not directly from the schools. The argument is that Title IX only applies to the schools. This argument too has no merit. The current system works like this:

- The NCAA does not provide financial assistance directly to athletes and certainly should not start doing so now to evade Title IX.
- The schools make NCAA rules based on votes by the schools.
- School representatives on NCAA governance committees have controlling authority over the operation of championships and distribution of NCAA championship-generated revenues back to their member schools.
- Schools receiving the championship revenues determine the use of funds at their institutions and schools must follow Title IX gender equity mandates for equitable treatment of male and female athletes.

- **Myth #3. All Employment Compensation or Benefits Provided by Outside NIL Collectives are Exempt from Title IX Analysis.** External NIL collectives have been formed by boosters to assist schools in recruiting, compensating and treating athletes to induce them to attend or stay at the institution. If the collective operates independently without the support of or direction from the institution according to OCR's definition of "significant intertwinement," such outside employment and pay to athletes are not subject to Title IX. If the institution is significantly intertwined, such compensation and benefits should be subject to the school's aggregated-by-sex-proportional-to-participation Title IX distribution. To date, there is evidence that many of these organizations are employing athletes and offering NIL payments to recruits at the direction of the athletic department.
- **Myth #4. Newly Labeled Nomenclature Describes Forms of Financial Assistance Not Covered by Title IX.** Another purported argument is that settlement cash benefits do not fall within the nomenclature of financial assistance covered by Title IX. This too has no merit. Whether labeled scholarships, pay-for-play, revenue-sharing, or payment for publicity rights – calling financial assistance provided by the school by a different name does not make financial assistance exempt from Title IX.
- **Myth #5. Settlement Compensation is Employment Not Covered by Title IX.** Yet another proffered justification to attempt to avoid the application of Title IX is that the NIL payments and additional pay-for-play compensation are employment, not covered by Title IX. Title IX regulations include sections (in addition to those dealing with athletic scholarship) relating to employment. These sections apply to all students — including athletes — and prohibit sex discrimination.
- **Myth #6. Cash Awarded Based on Fair Market Value (FMV) is Sex Neutral.** And, finally, some have argued that the cash from the proposed NCAA settlement is based on the higher market value of the predominantly male teams and players. The argument is that FMV is a sex-neutral criteria. This standard is not sex neutral when

schools have failed for decades to publicize and promote women's athletics in the same way as men's basketball and football. Favored treatment and investment into men's sports produces this higher market value. Further, special treatment of men's revenue sports was expressly rejected by Congress in 1975. Indeed, schools have been ignoring specific Title IX gender equity obligations to promote, publicize, and develop women's sports in the same way they have treated men's sports.

Over the next six months, TDG will spend significant time continuing to educate OCR and members of Congress about these efforts that continue to shortchange female athletes.

Asking for Your Support. We'd really appreciate your help in advancing these efforts. If you aren't a member already, please consider becoming one. Membership is nominal (\$10/students, \$35/faculty, \$50/general) and gifts in any amount are appreciated. [We welcome you to do so here](#). If you are already a member, thank you for your support. These funds are used to pay for student research, operate our communications platforms and fund limited volunteer trips to meet with members of Congress (90 percent of our work educating Congressional staff members is via Zoom communication).

We do what we do because we believe in the extraordinary developmental impact of intercollegiate athletics on participants — confidence, discipline, work ethic, and more. We also believe in athletics because it contributes to a vibrant campus community and is part of the 'glue' that keeps alumni involved in higher education. We must keep these benefits while we solve the challenges created by the commercialization of college sport.

Thanks for your interest in our work and considering this request.

Gratefully,





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[Issue Report #1 — Proposed Antitrust Settlement – Huge Financial Implications for College Sport](#)

[Issue Report #2 — Failure of the U.S. Office for Civil Rights to Enforce Title IX](#)

[Issue Report #3 — Confronting the Failure of the NCAA Enforcement Process](#)

[Issue Report #4 — Gambling: The Biggest Danger to College Sport](#)

[Issue Report #5 — Athletics Injuries, Heat Related Illness, and Death](#)