THE DRAKE GROUP

Advancing Positive Legislative Change In College Athletics

November 8, 2024

Issue Report #10
Post-Election, Looking Forward to 2025 Issues

The Drake Group (TDG) works with Congress on critical issues related to the conduct of collegiate athletics programs. Starting at the beginning of each academic year, we report on the top concerns we are addressing with Congressional members and executive agencies. This is the tenth and last of our beginning of the academic year reports. Given the fact that the results of the 2024 presidential election are close to being finalized, this is an opportune time to reflect on our work in progress and 2025 agenda priorities.

Issue #10. Looking Forward to 2025 Anticipated Congressional Action on Intercollegiate Athletics. As of November 7, Republicans took over the Executive branch of government and flipped the Senate to a Republican majority. While the majority of the House of Representatives has not yet been decided, Republicans are leading. Thus, there is a high likelihood of our three branches of government having Republican leadership/

majorities. If this is the case, what were once Republican minority legislative positions focused on protecting higher education institutional financial interests and athletics program cost controls would now become majority positions. Significantly, athletes' rights, medical protections, and financial interests would become a Democratic minority position.

Given the demonstrated ability of both parties over the past eight years to exercise maximum control of their respective representatives, any party controlling all three branches of government in such a lockstep environment effectively removes the need to engage in bipartisan compromise. Therefore, the legislative agenda of the Republicans is likely to be accomplished.

If Republicans have a majority in the Senate and Democrats have a majority in the House, we can anticipate a likely repeat of the past four years—a dysfunctional Congress with few bills making it to the president's desk.

If Republicans have control of the three branches, the most critical pending college sport issue will be "pay for play." The *House-Hubbard-Carter vs. NCAA* proposed settlement (Division I schools pay $2.8 billion in past damages to Division I athletes, 90 percent of whom are male basketball and football players and, over the next 10 years, Power 5 schools pay $20-25 billion to their athletes with sex and sport unspecified) is scheduled for approval in April of 2025 with colleges preparing to pay athletes as early as the fall of 2025. Given the Republican position against college athletes becoming employees and labor unions and in favor of an exemption to protect schools from antitrust lawsuits and allowing the NCAA to control athletic program costs, such legislation may negate the proposed settlement.

What The Drake Group Will be Doing?

When the court gave preliminary approval of the *House-Hubbard-Carter vs. NCAA* proposed settlement in early October, TDG assembled legal, economic, and other academic experts to analyze whether the settlement meets the court standard of "fair, adequate, and reasonable." Athletes in the plaintiffs' classes have until January 31, 2025 to "opt out" of participating and they need good information to make that decision. Congress also needs this information. If the settlement is unfair, Congress may wish to address the college athletes pay-for-play issue before the April 2025 deadline for court approval. The Department of Education Office for Civil Rights (DOE-OCR) also needs to be aware of the Title IX implications of the settlement. So, our first priority is to identify and investigate the following possible reasons why stakeholders might choose to file an objection or take other actions:

1. The settlement agreement provides that athletes failing to opt out of the settlement cannot bring Title IX lawsuits in the future related to the past damages portion of the settlement (contrary to representations to the court at a Sept. 5 hearing and the parties' joint brief accompanying the amended proposed settlement that was approved by Judge Wilken.) Further, the notices to the potential class members informing them that they have a right to opt out are confusing, leaving female athletes without a clear understanding of their rights.
2. The Title IX standard is that institutions must distribute financial assistance to male and female athletes proportional to each school's male/female participation in athletics Also, Title IX requires that the treatment and benefits to males and females must be equitable. The damage payments qualify under Title IX as both financial aid and treatment and benefits that are subject to Title IX standards. Here over 90 percent of the money will go to male athletes—on its face, a violation of Title IX's requirements. No females should be precluded from bringing Title IX claims regarding this.
3. Plaintiffs' economic expert failed to create an economic model fairly estimating the undervaluation of women's sports/athletes by the defendants, particularly the undervaluing in NIL values and broadcast media deals (documented by the Kaplan report prepared for the NCAA).
4. There is a possible antitrust claim under the Sherman Act that the NCAA and conferences have colluded/agreed not to permit women participating in the settlement from bringing Title IX claims based on the distribution of past damages.
5. Disparate impact on women of the past damages settlement should be considered by the court in determining whether the settlement meets the standard of "fair, adequate, and reasonable." This standard also requires the court to consider whether final approval of the settlement agreement would inappropriately change the college sports industry. Settlements in other industries have been denied final approval on this basis, e.g., if it goes too far (Google Book Settlement).
6. Roster limits, like scholarship limits in the past, also may be challenged as a restraint of trade prohibited by the Sherman Act (absent Congressional antitrust exemption or NLRA CBA agreement protections).
7. The escalating $21 million plus annual cap on institutional pay-for-play and/or NIL payments likely is a restraint of trade prohibited by the Sherman Act (absent Congressional antitrust exemption or NLRA CBA-agreement protections).

Once this analysis is completed, TDG will disseminate this information to organizations willing to distribute to athletes, members of Congress, DOE-OCR, and to the media for public education purposes. We will also engage Congressional staff members responsible for educating their senators and representatives or supporting House and Senate committees responsible for considering college athlete legislation.

While this is easily the most pressing issue, we must also continue identifying and evaluating other legislation affecting college sports, always educating policymakers about how college sports really operates.

Asking for Your Support. We'd really appreciate your help in advancing these efforts. Please consider a gift to TDG to support this important work with Congress. We use membership fees and gifts to pay for student research, operate our communications platforms, and fund limited volunteer academic expert trips to meet with members of Congress—please note that 90 percent of our work educating Congressional staff members is via Zoom communication.

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.

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 believe in Title IX and the equitable treatment of male and female athletes. We also believe athletics programs contribute to a vibrant campus community and are part of the 'glue' that keeps alumni involved in higher education. We must keep these values and 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,

Donna

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P.S. If you missed our first nine reports, you may access them here:

Issue Report #1 — Proposed Antitrust Settlement – 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