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Mark A. Emmert
President

P.O. Box 6222
Indianapolis, IN 46206
Telephone: 317-917-6222

Shipping/Overnight Address:
1802 Alonzo Watford Sr. Drive
Indianapolis, IN 46202

www.ncaa.org

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Graham:

On behalf of the National Collegiate Athletic Association (NCAA), I would like to thank the Senate Committee on the Judiciary for holding a hearing to examine the issue of student-athletes name, image and likeness (NIL).

For over a century, the NCAA and its member schools have provided a pathway to opportunity for millions of young men and women. While intercollegiate athletics has continued to evolve to meet the needs of student-athletes, we understand that providing a world class experience in the classroom, on the field of competition and in life is not a destination but an ongoing process. Like previous efforts to improve the student-athlete experience, the modernization of rules to allow student-athletes to be compensated for use of their NIL is complex and we must get it right. We look forward to partnering with Congress to ensure a uniform approach to NIL, while protecting the integrity of college sports.

As requested, I am providing answers to additional questions for the record.

Respectfully,

A handwritten signature in black ink that reads "Mark A. Emmert".

Mark A. Emmert
President

National Collegiate Athletic Association

Creating a pathway to opportunity for college athletes

The NCAA is an equal opportunity employer that values inclusive excellence in the workplace.

QUESTIONS FROM SENATOR BOOKER

- 1. By threatening severe penalties on entire teams and institutions, the NCAA's Restitution Rule discourages judges from granting injunctive relief to athletes who believe they have been wrongfully punished. Many have argued that the Restitution Rule allows the NCAA to operate as both judge and jury, and that it effectively denies college athletes their due process rights.**

- a. Do you think the Restitution Rule discourages institutions and federal judges from granting college athletes injunctive relief?**

The Restitution bylaw has no impact on the decisions that come through federal or state judicial processes. Indeed, the NCAA respects final decisions that come through the judicial system, as the rule does not have any consequence if the student prevails in court. The NCAA rule does nothing to influence judges in their administration of the law. Bringing a legal action is the last of many reviews afforded the student-athlete who contests an ineligibility determination. Those reviews include review by experienced athletics administrators from multiple institutions.

- b. Are you concerned that the Restitution Rule may deny college athletes their due process rights?**

As noted above, the student-athlete who wishes to challenge an ineligibility determination has many levels of fair review, and there is no impediment to the student's access to the judicial system.

- 2. Implicit in the argument the NCAA is making for a national uniform name, image, and likeness (NIL) approach is that if certain states - Florida and California, for example - implement NIL laws before others, schools in those states will have a recruiting advantage over schools in states that deny athletes NIL opportunities.**

Florida is on track to allow college athletes to begin profiting off their NIL next year. Yet, looking at recruiting class rankings for football and basketball—the two largest revenue-generating sports—there has been no discernable recruiting advantage for schools in Florida. A review of the schools with recruiting classes ranked in the top 20 in football shows only two schools from Florida (University of Florida, ranked number 8, and the University of Miami, ranked number 11), while a review of the schools with recruiting classes ranked in the top 20 in basketball shows only one Florida school (Florida State, ranked number 20), according to ESPN. In fact, looking at the same data set—for schools with recruiting classes ranked in the top 20 for football and basketball—schools in Florida performed better with last year's recruiting class than they did with this year's recruiting class.

Athletes weigh several factors before committing to a university—such as the school's academic success, the coaching staff, and the proximity to the athlete's hometown. Potential NIL opportunities may be a factor, but it will be far from the only factor prospective college athletes will weigh.

- a. Why are you so confident that having NIL opportunities differ by state will dramatically alter the recruiting landscape?**

Recruitment of prospective student-athletes is a defining characteristic that separates intercollegiate

athletics from professional sports. This unique recruiting environment provides for and promotes student choice regarding where to attend college. NCAA rules have been developed with the goal of preserving this choice as well as fairness in recruiting. Each NCAA member school offers its own unique geographic, academic and competitive opportunities for prospective students; however, national rules provide student-athletes with a clear, uniform recruitment experience and institutions with a fair opportunity to participate in the recruitment process.

Many would argue that the recruiting environment is equally as competitive as an athletic contest, with participants constantly looking for an edge. This point has not been lost on state policymakers when crafting NIL proposals. In fact, Florida Governor Ron DeSantis made the following statement after signing a bill into law allowing student-athletes to be compensated for use of their NIL.

“If you’re a blue-chip recruit out there thinking about where you want to go, one of our Florida schools, I think, is a great landing spot for anywhere in the country,” he said. “But particularly for all our great Florida high school players, stay in state. I don’t want to see people going to Alabama and Clemson. I know they’ve got great programs, but I think there’s nothing better than winning a national championship in your home state. So maybe this will be added enticement.”

The NCAA and its member schools strongly believe that conducting collegiate athletics with a patchwork of 50 state laws governing NIL activities is untenable. A state by state model would create a distinctly uneven playing field in which a school in one state could offer opportunities to prospective students which would be impermissible for schools in another state, or even for other schools within its own conference. As NCAA member schools move forward with modernization efforts to allow student-athletes to be compensated for use of their NIL, it is imperative that efforts be undertaken to establish uniform rules which protect the recruiting environment and allow the NCAA to continue to conduct fair national competition.

b. What data can you provide that you believe support the NCAA’s assertion that a patchwork of NIL laws will adversely affect the competitive balance?

To date, four states (CA, CO, FL, NE) have enacted NIL legislation, with Florida’s law being the first to take effect in July 2021. The delayed effective dates, coupled with the NCAA’s own commitment to pass NIL legislation last fall, makes it extremely difficult to look at current recruiting class rankings or any other data to measure the immediate impact on competitive balance. Because the recruitment of prospective student-athletes begins years before recruiting class rankings are posted and as early signing periods occurred in the fall and winter, this further complicates any analysis based on the suggested data.

The NCAA and its member schools believe that the varying provisions and effective dates found in state proposals, will make unattainable the goal of providing a fair and level playing field—let alone the essential requirement of a common playing field—for our schools and nearly half a million student-athletes nationwide.

3. At the hearing, you acknowledged there are no penalties levied against institutions or coaches that fail to follow the NCAA's health and safety guidelines, and specifically the suggested concussion protocol.

a. Is the NCAA working to develop enforceable guidelines?

Within the NCAA structure, athletics compliance officers working at individual member schools—in partnership with designated athletics health care administrators and primary athletics health care providers – are responsible for ensuring athletics health care is being delivered in a manner consistent with existing legislation and interassociation recommendations. The membership is in the process of discussing an appropriate role the NCAA can play in ensuring the implementation of NCAA health and safety policies and guidance.

b. Do you personally believe that there should be penalties attached to the NCAA's suggested health and safety guidelines?

There must be consequences for failure to protect the health and safety of NCAA student. As an obligation of Association membership, NCAA member schools in all three divisions are responsible for ensuring compliance with the NCAA constitution and bylaws, including protecting the health and safety of its participating student-athletes. The NCAA's goal is that its health and safety best practices and recommendations are implemented in conjunction with decisions made by each school's primary athletics health care providers. The membership is discussing authority that the NCAA can be given, which could include education, corrective measures and penalties when appropriate.

QUESTIONS FROM SENATOR SASSE

1. In the biggest three sports by revenue for men and the biggest three sports by revenue for women, what percentage of college athletes that suffer a career-ending injury graduate? Please break down the response by sport. [NOTE: Answers to questions 1 and 2 are below.]

2. In the biggest three sports by revenue for men and the biggest three sports by revenue for women, what percentage of the athletes that do not graduate after a career-ending injury had the financial opportunity to graduate? Please break down the response by sport.

Since the 2015-16 academic year the Association has had the limited ability to monitor trends in the occurrence of injuries that lead to medical disqualification as well as those injuries that are career-ending due to an athlete's decision to stop participation. These data are voluntarily reported by schools in all three divisions. Unfortunately, and for the purpose of student-athlete privacy and confidentiality, these data are reported in a de-identified and aggregate manner, making it impossible to correlate with the academic performance data available to the Association. Importantly, current Division I bylaws do not allow any institution to reduce or cancel athletics aid for an injury or other athletically related reason during the period of the award. The period of an athletics aid agreement must be at least one academic year and may be up to a student's full five-year period of eligibility. Further, autonomy conferences adopted legislation prohibiting the non-renewal of athletics aid for any athletics reason or injury and allowing financial aid to be awarded to a former student-athlete for any term in which the student is enrolled. This effectively ensures that student-athletes at autonomy institutions are provided a financial

aid agreement for the student's full period of eligibility unless the student fails to meet academic or other institutional standards and can continue to receive financial aid beyond their period of eligibility to complete their degree.

Institutions outside the five autonomy conferences may be required to adopt this legislation by their conference governance board, may choose to adopt this legislation at their own initiative, or may continue to follow bylaws that allow institutional discretion on renewing awards on a yearly basis. However, if an institution outside the five autonomy conferences elects to not renew the athletics aid of a student-athlete, or renews at a reduced amount, the institution's financial aid authority is required to notify the student-athlete in writing by July 1 and provide the student-athlete with written policies and procedures to appeal the athletics department decision to an institutional authority outside of athletics. The athletics department decision to not renew athletics aid is not final until the outside appellate authority reviews and affirms the decision.

Additional Division I bylaws are also in place to minimize any competitive incentive to exercise nonrenewal or reduced renewal discretion relative to a student-athlete with an injury or medical condition. Athletics aid received by a student-athlete who suffered a career-ending injury or illness (including mental illness) will not count against team financial aid limitations during the academic years following the medical determination that he or she is unable to participate. Further, the Division I Academic Performance Program incentivizes institutions to renew the athletics aid of all student-athletes through penalties for institutions that fail to retain scholarship student-athletes. These penalties are assessed on a team-by-team basis and have included ineligibility for NCAA championships.

3. What is your best estimate of the number of college athletes who are covered by insurance policies in case of an injury that inhibits or prohibits their future earning potential as professional athletes?

For nearly three decades, the NCAA has procured and fully funded the NCAA Catastrophic Injury Insurance Program which provides coverage to student-athletes in all three NCAA divisions and is underwritten by Mutual of Omaha. This catastrophic insurance is activated when the limit of the NCAA's legislatively required medical insurance coverage is reached (\$90,000) within two-years from the date of injury. One of the many policy benefits afforded to catastrophically injured student-athletes under this program is monthly disability income payments to both "Totally Disabled" and Partially Disabled" claimants. This is a lifetime benefit, including annual inflationary increases, per the terms and conditions of the policy. A full summary of this comprehensive benefit can be found [here](#).

Since 1990, the NCAA has also sponsored the NCAA Exceptional Student-Athlete Disability Insurance (ESDI) Program which enables qualifying student-athletes, as approved by the program insurer/administrator, to purchase a lump sum permanent total disability (PTD) insurance contract with preapproved financing, if necessary, at commercial prime lending rates and with no cosigner required. The basis of the program is to provide a vetted option to procure PTD coverage directly from a domestic insurance company on a "admitted" policy form filed and approved by state departments of insurance, without outside influences that could potentially jeopardize a student-athlete's eligibility. The NCAA receives zero revenue from this program. The NCAA also pays an annual fee to the lending institution and ultimately bears the loan default risk in order to provide an option for favorable lending terms to eligible student-athletes. Additional information regarding the NCAA ESDI Program is publicly available [here](#).

In November 2018, the NCAA engaged an external consultant and expert on student-athlete disability insurance, and especially loss-of-value coverage, to perform the following:

- a. Provide a comprehensive independent analysis of the NCAA ESDI Program and recommendations on enhancements that could benefit student-athletes.
- b. Provide the NCAA with a comprehensive overview and current market analysis specifically related to loss-of-value insurance coverage.
- c. Provide a recommendation to the NCAA for consideration of potentially broadening the ESDI Program to include an option for loss-of-value coverage.

Based on the consultant’s findings and research, it was recommended that the NCAA not expand its ESDI Program to include loss-of-value as the coverage has not been shown to consistently benefit student-athletes who file a claim.

The NCAA has no data specific on any disability insurance procured by student-athletes and/or member institutions outside of the NCAA-sponsored programs, however, below is a chart providing data of historical participation within the NCAA ESDI Program from 1/1/2013 to 12/31/2019:

	<u>CY 2013</u>	<u>CY 2014</u>	<u>CY 2015</u>	<u>CY 2016</u>	<u>CY 2017</u>	<u>CY 2018</u>	<u>CY 2019</u>	<u>TOTAL</u>
PTD Policies Written	35	34	30	48	65	61	66	339
Loans	31	20	8	9	6	9	5	88
Loan Utilization %	89%	59%	27%	19%	9%	15%	8%	26%
PTD Premium Written	\$ 451,564	\$ 393,181	\$ 247,591	\$ 395,925	\$ 419,385	\$ 443,550	\$ 437,982	\$ 2,789,178

4. What is your best estimate of the breakdown by sport—and, if possible, position—of which college athletes are covered by such policies?

The NCAA has no record of data specific to any disability insurance procured by student-athletes and/or member institutions outside of the NCAA-sponsored programs, however, below is a chart highlighting participation in the NCAA ESDI Program by sport between 2013-2019. The NCAA does not maintain data specific to insurance procured by college athletes’ position.

<u>Sport</u>	<u>CY 2013</u>	<u>CY 2014</u>	<u>CY 2015</u>	<u>CY 2016</u>	<u>CY 2017</u>	<u>CY 2018</u>	<u>CY 2019</u>	<u>TOTAL</u>
Football	24	21	17	36	35	42	36	211
Men's Basketball	7	9	8	5	12	7	14	62
Women's Basketball	0	0	0	0	1	1	1	3
Baseball	2	1	1	4	7	5	8	28
Hockey	2	2	4	2	9	6	6	31
Swimming	0	1	0	1	1	0	0	3
Track & Field	0	0	0	0	0	0	1	1
TOTAL	35	34	30	48	65	61	66	339

5. To the best of your knowledge, how often have these policies paid out?

Except for occasional news reports that may be published by outside media, the NCAA obtains no data specific to any disability insurance claim payments outside of the NCAA-sponsored programs. For disability loss payment information specific to the NCAA-sponsored insurance programs:

- a. NCAA Catastrophic Injury Insurance Program: From 1998-2019, more than 9.3 million students were covered by the program and approximately .00046% percent (43) of the claims triggered “Partial Disability” or “Total Disability” benefits.
 - During this same time period, Mutual of Omaha has incurred a total \$33,679,480 in disability benefit claims (\$11,086,707 in previously paid benefits and \$22,592,773 reserved for future benefit payments to current claimants).
- b. NCAA Exceptional Student-Athlete Disability Insurance (ESDI) Program: Since the creation of the program in October 1990, 1,349 PTD policies were written for eligible student-athletes and 10 permanent total disabilities have occurred resulting in claim payment. Below is a chart consisting of all paid claims, by sport, under the NCAA ESDI Program:

	Year	Claim Payment	Sport
1	1991	\$446,465	Football
2	1992	\$500,300	Football
3	1998	\$528,791	Football
4	1999	\$2,000,000	Football
5	1999	\$10,000	Football
6	2010	\$2,000,000	Football
7	2012	\$202,000	Football
8	2013	\$1,000,000	Men's Basketball
9	2017	\$500,000	Football
10	2019	\$1,500,000	Baseball
TOTAL		\$8,687,556	

6. What are the obstacles to more widespread use of these policies?

As described above, the NCAA Catastrophic Injury Insurance Policy provides disability benefits for all student-athletes across all three NCAA divisions for both “Total Disability” and “Partial Disability” injuries per the terms of the insurance policy. Covered events include not just competitions scheduled by the institution and post-season conference and NCAA championships, but also official team activities, conditioning, and practice sessions that are authorized by, organized by, or directly supervised by an official representative of the institution.

With regards to loss-of-value insurance coverage specifically, widespread procurement of such policies may not further materialize for some of the following reasons:

- a. Loss-of-value forms can be characterized as complex coverage terms, claim triggers, and value threshold requirements.
- b. High frequency of coverage litigation due to this complexity in loss-of-value coverage terms and conditions.
- c. Loss-of-value coverage forms are not typically filed, “admitted” and approved by states’ departments of insurance, therefore written on a surplus lines basis resulting in materially different policy forms being offered by each insurer.
- d. The complexity and variances in loss-of-value coverage forms may place schools’ athletic department representatives in a precarious position related to the insurance transaction, posing potential professional liability exposures for the institution.
- e. Loss-of-value coverage terms and application process may be characterized as subjective in nature, which could lead to challenges formally collecting on a claim.
- f. Premium cost and rates are significantly higher than traditional Permanent Total Disability (PTD) rates.
- g. Significant insurance market volatility related to the loss-of-value coverage offerings, which most recently has consisted of significantly decreased market capacity and competition.
- h. Potential negative outside influences and conflicts of interest (i.e. agent/broker receiving commissions, coverage attorneys).

7. In your opinion, should the premiums on these policies be paid by universities or student athletes in an ideal world?

NCAA member institutions should be permitted to fund disability insurance premiums for student-athletes, and current NCAA legislation allows each member institution the flexibility to do so. This includes Division I institutions’ ability to utilize NCAA-distributed Student Assistance Funds to directly pay student-athletes’ insurance costs. The NCAA recommends that institutions and student-athletes consult with an experienced tax consultant to better understand the future income tax liability for student-athletes related to any future insurance claim payment if the institution funds the insurance premium directly on behalf of the student-athlete, versus the student-athlete funding the premium themselves.

Current NCAA legislation also permits student-athletes to secure loans against future earnings to fund such insurance. As detailed above, the NCAA sponsors the NCAA Exceptional Student-Athlete Disability Insurance (ESDI) Program which facilitates a pre-approved financing option for eligible student-athletes to procure Permanent Total Disability (PTD) insurance coverage at a very favorable interest rate.

8. If you had to choose between universities paying for these policies or allowing student athletes to monetize their NIL, which would you choose and why?

The NCAA procures and fully funds the Catastrophic Injury Insurance Program and the Exceptional Student-Athlete Disability Insurance (ESDI) Program and rules allow institutions to pay for Loss of Value insurance coverage. NCAA member institutions are also in the process of developing legislative proposals to allow student-athletes to benefit from use of their NIL, which will be voted on in January 2021. We do not view these opportunities to support student-athletes to be mutually exclusive and intend to follow through on our commitment in both areas.

QUESTIONS FOR SENATOR LEE

- 1. Last week, you testified that the issue of transgender athletics is a “very challenging issue to find the right balance” but stood by the NCAA statement against the Fairness in Women’s Sports Act. How can the NCAA reconcile attempting to find the right balance with a definitive statement that is one-sided and lacks consideration of physiological advantages that biological male athletes have over biological female athletes? In preparing NCAA transgender policies, what consideration was given to fair competition for biological females in sports and how the policies may negatively affect collegiate records, victories, standings, rankings, public recognition, and scholarships for biological females?**

The NCAA’s transgender [policy](#) was thoughtfully developed with fairness and inclusion for all students as the top priority and with the latest available scientific data. As outlined in the policy, an institution must submit written documentation to the NCAA of the year of testosterone suppression treatment and ongoing monitoring of testosterone suppression. If hormone treatment is involved in the student-athlete’s transition, the institution is expected to notify the NCAA of the student-athlete’s request to participate with a medical exception request. In those instances, a student-athlete transitioning with the assistance of testosterone, which is a banned substance, would need a waiver to compete.

Importantly, the U.S. Olympic & Paralympic Committee (USOPC) allows for trans females to compete in sport, which is a message of both inclusion and fairness. The NCAA will be hosting a summit this fall - with the USOPC and other national experts, including public policy experts who have differing views of fairness – to update its current policy on trans athletes.

- 2. The Title IX regulations--specifically 34 C.F.R. 106.41--permit schools to “operate or sponsor separate teams for members of each sex.” Does the NCAA believe that the Idaho Fairness in Women’s Sports Act is permissible under Section 106.41? If not, please explain the legal reasoning for why Idaho’s law is not permitted under Section 106.41 or Title IX in general.**

As this matter is now in the hands of the court, we respect the final ruling that will judge the legality of the Idaho law. The NCAA believes its current policy is consistent with Title IX and understand that any policy revision also must be consistent with the law.

- 3. The NCAA will be considering at its August meeting whether to take punitive action against Idaho for enacting the Fairness in Women’s Sports Act. Other states are pursuing similar legislation. If enacted in other states, would the NCAA likewise consider a boycott or other punitive action against those states? Do you believe such a course would be consistent with the antitrust laws? If this is as challenging of an issue as you alluded to in your testimony, why consider boycotting a state for pursuing legislation?**

The NCAA does not make decisions about championships site selection to be punitive, and the decision to relocate a championship competition site does not constitute a boycott. The NCAA's site selection Anti-Discrimination Policy may be found [here](#).

- 4. Can a public or private university that is a member of the NCAA maintain an athletic eligibility policy similar to the Idaho Fairness in Women Sports Act that allows only biological females to be eligible to participate in women's sports? Many private religious colleges that are NCAA members currently have such policies or practices in effect. Does the NCAA intend to take action against those institutions for having policies or practices intended to maintain consistency with their religious beliefs?**

The NCAA's site selection Anti-Discrimination Policy only governs what sites are selected for NCAA championships. It does not govern institutional policy.

- 5. On July 19th, World Rugby issued draft guidelines reportedly acknowledging that transgender women have "significant" physical advantages over biological women even after testosterone therapy and "at least a 20-30% greater risk" of injury to female players who are tackled by transgender players.¹ Do you agree with these guidelines? Why or why not?**

The NCAA understands that World Rugby's guidelines have not been ratified and that the rugby community, like other sports organizations, are trying to equitably address numerous competing objectives and complex issues to achieve fairness and inclusion for all. The NCAA is working with the USOPC and other organizations to examine research data that is available and to solicit feedback from a spectrum of athletes.

¹ "Trans women face potential women's rugby ban over safety concerns", Sean Ingle, The Guardian, July 19, 2020, at https://www.theguardian.com/sport/2020/jul/19/transwomen-face-potential-womens-rugby-ban-over-safety-concerns?CMP=share_btn_tw