


The College Athletic Department Toolkit
Series: Balancing Compliance and
Competitive Success in an Era of Change

September 19, 2023
12:00 p.m. – 1:30 p.m.

INCompliance | **Bricker Graydon**



Session 1: Title IX and Athletics | *What Every Athletic Administrator Needs to Know*

Disclaimer **Bricker Graydon**

This isn't legal advice!
(but please ask questions if you have them)

Your Presenters **Bricker Graydon**



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About this Series **Bricker Graydon**

- TODAY - Tuesday, September 19, 2023
 - Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know
- Tuesday, September 26, 2023
 - Session 2: Student-Athlete Conduct and Health, Safety, and Well-being
- Tuesday, October 3, 2023
 - Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate
- Tuesday, October 10, 2023
 - Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"



Agenda **Bricker Graydon**

- Overview of Case Scenario
- Nuts and Bolts: Title IX Athletics and Equal Opportunities
 - 1. Accommodation of Interests and Abilities
 - [BREAK]
 - 2. Scholarships
 - 3. Benefits and Treatment Areas (the "laundry list")
- Title IX and the Money

- Overview of Case Scenario
- Nuts and Bolts: Title IX Athletics and Equal Opportunities (Intro)
- Accommodation of Interests & Abilities
- Scholarships
- Benefits and Treatment Areas
- Title IX and the Money

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Overview of Case Scenario:

Champion University



Champion University **Bricker Graydon**

- NCAA Division II (with football)
- Varsity teams: 7 men's sports, 11 women's sports
 - Men's teams: baseball, basketball, cross country, football, golf, swimming, track
 - Women's teams: basketball, cross country, field hockey, golf, lacrosse, soccer, softball, swimming, track, triathlon, volleyball
- Club teams (that we know of):
 - Women's flag football
 - Men's lacrosse



Nuts and Bolts: Title IX Athletics and Equal Opportunities **Bricker Graydon**

- Overview of Case Scenario
- **Nuts and Bolts: Title IX Athletics and Equal Opportunities (Intro)**
- Accommodation of Interests & Abilities
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**Nuts and Bolts:
Title IX Athletics
and Equal
Opportunities**

Learning Outcomes **Bricker Graydon**

1. How to analyze your institution's compliance in providing equal **participation opportunities** and strategies to achieve and maintain compliance
2. How to analyze your institution's compliance in providing equal **scholarships** and strategies to achieve and maintain compliance
3. How to analyze your institution's compliance in providing equitable **benefits and treatment** and strategies to achieve and maintain compliance

Resources **Bricker Graydon**



- **Title IX Regulations**
 - It prohibits schools that receive Federal funding from discriminating based on sex in their programs or activities, including its athletic program.
- **Case law**
- **"Dear Colleague" letters (guidance from OCR)**
- **OCR Case Resolutions**

Why the emphasis now? **Bricker Graydon**

- It's the law!
- Anticipating renewed scrutiny with this administration (OCR released resources in February)
- Institutional restructuring due to financial challenges (may impact athletics programs)
- NCAA Division I institutions and DEI requirement
- Anyone (yes, anyone) can make a complaint to OCR, which may trigger an investigation
- Lawsuits
- A pillar of institution's values

It can be tricky... **Bricker Graydon**

- Title IX Coordinators have the ultimate responsibility
 - *But Athletics often has the data...*
- Compliance is a "snapshot in time"
- Rules, regulations, and requirements are dense and complicated
- Decisions – good and bad – flow downward to coaches
 - Oversight is KEY!

How to tackle these issues? **Bricker Graydon**

Control your own destiny...
be proactive in complying with Title IX.

Document your compliance...
have a written Gender Equity Plan.

Overview of your Legal Duties **Bricker Graydon**

- Must meet compliance with all three "buckets":

Accommodation of Interests and Abilities

Athletic Scholarships

Benefit & Treatment Areas

Overall program analysis **Bricker Graydon**

- Title IX regulations require that a school offer equivalent benefits, opportunities, and treatment to its men's and women's teams overall.
- Not sport-to-sport comparison (e.g., men's basketball to women's basketball, baseball to softball)

Men's OVERALL PROGRAM = Women's OVERALL PROGRAM

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A note on EADA...

- Can be used to evaluate (1) athletic participation opportunities and (2) financial aid
- **EADA & Title IX**
 - Although it may not *fully* reflect, it is *pretty* close
 - Example: Title IX participants
 - In lawsuits, Plaintiffs often rely on EADA data and courts have used these numbers to issue preliminary injunctions

You can use the questions below to help assess your school's provision of scholarships and athletic financial assistance. Your school's athletic director or other school leaders may be able to provide you with the information needed to answer these questions. Also, the Department's Office of Postsecondary Education maintains the [Equity in Athletics Data Analysis \(EADA\) website](#), which publishes information provided by all participating schools that have an intercollegiate athletics program and participate in Federal Student Aid programs. Data on the EADA website may be helpful in answering the questions below. But please note that DOE does not rely solely on this data or any one data point to determine compliance with Title IX.

EADA U.S. DEPARTMENT OF EDUCATION Equity in Athletics Disclosure Act

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- Scholarships
- Benefits and Treatment Areas
- Title IX and the Money


Compliance Requirement #1: Accommodation of Interests and Abilities

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Two compliance obligations

Accommodation of Interests and Abilities

- 1. Participation Opportunities**
 - *Three prong test*
- 2. Levels of Competition**
 - Your school has flexibility in choosing one of these options:
 1. Provide equivalently advanced competitive opportunities to female and male student-athletes
 2. Demonstrate continuing upgrades of competitive opportunities for the historical disadvantaged sex

Participation Opportunities 

- Your school has flexibility in choosing one of these options:
 - Substantial Proportionality:** whether the percentage of athletic participation compared to full-time undergraduate enrollment is "substantially" proportional
 - History and Continuing Practice:** whether you are adding opportunities for the underrepresented sex
 - Interests and Abilities of Students:** whether you are fully accommodating the interests and abilities of the underrepresented sex


PRONG 1 

How to: Substantial Proportionality


- Ask:** Are the percentage of women and men participants on athletic teams equal to – or "substantially proportionate" to—the percentage of women and men enrolled full-time as undergraduates at your school?

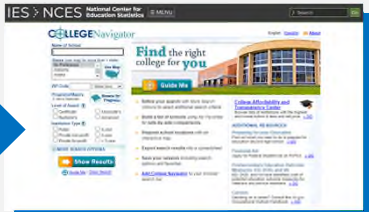
$$\% \text{ full-time undergraduate male} = \% \text{ male participants}$$

$$\% \text{ full-time undergraduate females} = \% \text{ female participants}$$

PRONG 1 


Full-time undergraduate enrollment

- Team effort: contact your institutional research office or compliance office for enrollment data
- IPEDS data is helpful 



PRONG 1

Athletic participants



1. Can you count the *sport*?

→

2. Can you count the *participants*?

PRONG 1

Athletic participants – Sport?



Can you count...

- Traditional sports? **Yes.**
 - Sport on EADA!
 - Sponsored by NCAA, NAIA, etc.?
- Emerging sports? **Likely yes.**
 - Acrobatics and tumbling (33 schools)
 - Equestrian (22 schools)
 - Rugby (23 schools)
 - Triathlon (35 schools)
 - Women's wrestling (39 schools)
- Other sports? **It depends...**

* To be considered a varsity sport under the EADA, an activity must also be considered a sport for purposes of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1081 et seq. The Department's Office for Civil Rights, which administers Title IX, published guidance on determining which activities qualify. See the [College Board's Guidance of Title IX Compliance \(2016\)](#). The Guidance provides clarifying information to help secondary institutions which oversee sports activities to be assessed as a sport for the purposes of compliance with Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1081 et seq. This Guidance is useful for institutions as they evaluate their athletic programs for compliance with both the EADA and Title IX.



PRONG 1

Athletic participants – Other Sports



• 2008 Dear Colleague Letter offers guidance and has stood up in court

OCR will consider a variety of factors, mainly whether the sport's

1. Program Structure and Administration
2. Team Preparation and Competition

is consistent with established varsity sports in the institution's athletic program

- Operating budget, support services and coaching staff administered by athletic department?
- Eligible to receive athletic scholarship and are recruited?
- Practice opportunities (number, length, quality)?
- Regular season competition?
- Pre-season and/or post-season?
- Purpose is to provide athletic competition rather than support or promote other athletic activities?



PRONG 1

Cheer & Rugby

- Cheerleading and rugby could **not** count as a sport under Prong 1, according to the 2nd Circuit (CT, NY, VT)
 - *Biediger v. Quinnipiac Univ. (2013)*
- ✗ **Cheerleading**: had limited # of contests against other intercollegiate teams; differing rules for those contests; lack of off-campus recruitment; loosely organized post-season opportunity
- ✗ **Rugby**: at the time, only 5 programs nationwide; 6/10 contests against club teams; close to being removed from NCAA emerging sport list
 - Likely a different result today.

PRONG 1

esports

- ✗ Esports cannot count as a sport under Prong 1, according to the Middle District of Florida
 - *Navarro et al v. Florida Institute of Technology (2023)*
 - esports was not a "close-call" (compared to cheerleading in *Biediger*) regarding the application of OCR's factors:
 - "Esports does not require athletic ability"
 - "Sport governance associations have no control over the rules of the game itself."



PRONG 1

Key Takeaways on "Sport"

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- Sport on EADA/Traditional Sport? **Yes.**
- Emerging sports? **Likely yes.**
 - Keep records of how it meets the requirements
- Other sports? **It depends...**
 - Are you in a jurisdiction that recognizes it?
 - **Evaluate under 2008 DCL guidance**
 - Keep records of how it meets the requirements




PRONG 1

Hypo – Champion University

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- Triathlon?
- If **flag football** is added as a varsity sport next year, can Champion count the female participants for Title IX purposes?





PRONG 1

Athletic participants – What is a Title IX participant?

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- What metric do you use?
 - Website rosters?
 - EADA data?
 - Internal eligibility/squad lists?
- **OCR rule of thumb:** "number of females and males listed on the NCAA squad or eligibility list for each intercollegiate sport on the date of the first competition for each sport."



 Be careful of "inflation" – adding names to a squad list the day before the first game and eliminating the day after.

PRONG 1

Athletic participants – Other oddities





- How do you count...
 - Athlete who participates in more than one sport?
 - Walk-ons?
 - Quit or cut from the team?
 - Redshirt?
 - Student managers?

“Counting participants has become increasingly complicated as eligibility rules regarding transfers, redshirt players, exhausted eligibility, permanent medical determination, non-championship season play, and the growing practice of including male practice players on women’s teams have evolved”

PRONG 1

Hypo – Champion University



EADA		
Athletic Participants 2022-23 (As of May 15, 2023)		
Men's Teams	Teams	Women's
Basketball	55 Basketball	20
Basketball	18 Cross Country	10
Cross Country	10 Field Hockey	29
Football	120 Golf	8
Golf	13 Lacrosse	22
Swimming	33 Soccer	28
Track	30 Softball	22
	Swimming	23
	Track	17
	Triathlon	6
	Volleyball	15
Total	279	196
Total S.A.	473	473


→

- Subtract the 5 men's practice players from women's basketball
- Add 5 women's track athletes

Title IX participants		
Athletic Participants 2022-23 (As of May 15, 2023)		
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Basketball	55 Basketball	15
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Football	120 Golf	8
Golf	13 Lacrosse	22
Swimming	33 Soccer	28
Track	30 Softball	22
	Swimming	23
	Track	22
	Triathlon	6
	Volleyball	15
Total	279	196
Total S.A.	473	473

PRONG 1

How close is close enough?




- Now you know how to count, what is “substantially proportionate”?
- What is the “safe harbor”?
- Two data points to consider:
 - 1. Participation gap**
 - How many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality?
 - 2. Percentage differential**
 - What is the difference between the full-time undergrad population vs. athletic participants?

PRONG 1

Percentage Differential

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- Courts in the past have looked at this number
- Calculation
 - % full-time undergraduate male - % male participants = [percentage differential]
 - % full-time undergraduate females = % female participants = [percentage differential]
- Based on case law, if percentage differential is:
 - Over 10% = **unlikely compliant**
 - Between 3.5% and 10% = **less clear, but unlikely compliant**
 - Below 3.5% = **likely compliant**



PRONG 1


Percentage Differential – Hypo

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Title IX participants			
Athletic Participants 2022-23 (as of May 15, 2023)			
Men's Teams		Women's Teams	
Baseball	55	Basketball	15
Baseball	18	Cross Country	10
Cross Country	10	Field Hockey	23
Football	120	Golf	8
Golf	33	Lacrosse	22
Swimming	33	Soccer	28
Track	30	Softball	22
		Swimming	23
		Track	22
		Triathlon	4
		Volleyball	15
Total	279		394
Total SA	473		473
Percentage	59.0%		41.0%

Male 47% - 59% = **-12%** ❌

Female 53% - 41% = **12%** ❌



PRONG 1

Participation Gap

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- The most the important data point for courts
- How many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality?
 - ❌ If sufficient to field a "viable team" = **non-compliant**
 - ✅ If not sufficient to field a "viable team" = **compliant**
- Million dollar question: what is a "viable team"?
 - OCR examples:
 - 62 part. gap → can fit a viable team → **not compliant**
 - 6 part. gap → cannot fit a viable team → **compliant**
 - So what about 6-62 part. gap?

PRONG 1

Participation Gap – Magic Number?

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- So what about 6-62 part. gap?
 - Likely depends on a variety of factors (*Lazor v. UConn*)
 - Average size of a team the underrepresented sex is not dispositive (“may” be considered as a “frame of reference”)
 - **20 part. gap is enough to sustain a viable team**
 - Mentioned that average Division I women’s golf team is 8, bowling is 10, rifle is 8, gymnastics is 18, and sand volleyball is 18
 - **Using this theory, a part. gap has to be under has to be under the women’s sport with the lowest roster size not offered at your institution?**
 - Used viable team at issue – women’s swimming and diving (*Balow v. Michigan State*)
 - **31 part. gap is enough to sustain a viable team** because the smallest swimming & diving team in the Big Ten Conference was 21 females


PRONG 1

Participation Gap - Hypo

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- For women:

$\left(\frac{\text{Number of male athletes}}{\text{Percentage of males in student body}} \right) - \text{Total athletic participants} = \text{Participation Gap}$	=	
$\left(\frac{279}{47\%} \right) - 473 = 120$	=	120



PRONG 1

Strategies to Meet Prong 1

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- Roster management policies
- Adding, eliminating (“disfavored” practice), and transitioning programs
 - Leverage emerging sports

PRONG 1

Hypo – Champion University

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- If used roster management and had the average NCAA DII participants...
 - Percentage differential = 7.5%; Participation gap = 77
 - Closer, but likely not substantially proportionate
- If eliminated football...
 - Percentage differential = -2% (now men are the underrepresented sex!); Participation gap = -15
 - Likely substantially proportionate
- If added women's flag football and if you can count...
 - Percentage differential = 8.4%; Participation gap = 90
 - Closer, but likely not substantially proportionate – wait for prong 2!




PRONG 1

Key Takeaways – Prong 1

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- Challenging because of the changing demographics
 - Rise of female students since 1970
- If relying on this prong:
 - Do an internal count – don't just rely on EADA data
 - Have rigorous and well-document procedures in place that support the roster numbers being used
 - Calculate the participation gap
 - Consider having a roster management policy
 - Consult with legal counsel and/or experts

PRONG 2

How to: History & Continuing Practice

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- It is okay for the underrepresented sex to be substantially lower than their student body population, so long as the institution has, for the underrepresented sex (often women):
 - (1) consistently added new teams and → "HISTORY"
 - (2) intends to do so in the future → "CONTINUING PRACTICE"

PRONG 2

History & Continuing Practice

- In evaluating “**history**,” OCR looks at the institution’s record for:
 - adding teams, (within the last 3-4 years)
 - increasing participants on existing teams, and
 - the institution’s response to requests to add teams.

+

- In assessing “**continuing practice**,” OCR examines:
 - the institution’s current policy for adding teams and
 - an institution’s current implementation of a plan of program expansion that is responsive to developing interests and abilities.

PRONG 2

Hypo – Champion University

- Are they compliant with prong 2?
 - Likely **not** because they added triathlon 5 years ago, which is not within the past 3-4 years and they are missing other obligations
- How can they comply with prong 2?
 1. If they add women’s flag football as a varsity sport immediately
 2. If they prepare a policy on requesting the addition of varsity teams
 3. If they have a written plan to add another women’s sport in the future (3-4 years)





PRONG 2

Key Takeaways - Prong 2

- Look at the last time you added a [women’s] team.
 - → If more than 4 years have passed, be cautious.
- Look at if you have a policy regarding requesting the addition of varsity sports.
 - → If you don’t have one, prepare a policy and procedure.
 - → If you have one, effectively communicate it (website, handbook, etc.).
 - → If you have one, make sure you document responses to sport requests.
- Look to see if you have a long-plan program expansion plan, including a rough timetable for adding sports.
 - → If you don’t have a plan, prepare one.

PRONG 3

How to: Interests & Abilities of Students

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- This is the most complicated because the metrics are nuanced
- Usually referred to as the "survey" prong
- **Question – is there enough (1) demand/interest, (2) skill/talent, and (3) competition at your school among [women/men] to sustain a viable team or sport?**
 - → If the answer is "no" to any of these questions, your school can likely use Prong 3
 - → If the answer is "yes" to all three questions, your school likely cannot use this option.
- **OCR: Your school's athletic director or other school leaders should have information to help you answer these questions. If they do not have this information, your school likely cannot use this option.**

PRONG 3

Competition + Interest + Ability

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Competition

Are there other schools in your area or region currently competing in the sport?

Look at normal competitive region, the average mileage to away events and conference opportunities

Interest

Is there an current interest in a particular sport that is not offered at your school?

Look at participation in club sports, intramural and recreation programs, requests from students/parents, surveys, high school and university participation in the College's normal recruitment area

Ability

Is there enough talent and skill among women in the student body to sustain a team in the sport?


Look at whether students have experience or accomplishments playing the sport, administrators/coaches believe that there is enough talent to support a team, high participation in other sports that require similar skills

PRONG 3

Surveys

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- How to assess student's interests and abilities
- Note that you not have to administer a survey to rely upon prong 3
- OCR has released guidance on this prong because it has been controversial
 - Does not consider nonresponses to surveys as evidence of lack of interest or ability in athletics.



PRONG 3

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Survey Factors

- OCR evaluates the overall weight it will accord the results of a survey by examining the following factors, among others:
 - content of the survey;
 - target population surveyed;
 - response rates and treatment of nonresponses; (*higher response rate – more weight by OCR*)
 - confidentiality protections; and
 - frequency of conducting the survey.

PRONG 3

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Key Takeaways – Prong 3

- Collect good information
 - Surveys can be complicated. Using an expert might be beneficial.
- Document the analysis
 - If you decide not to add a sport that has been requested, you should **document** the reasons you made that decision, which should include the results of assessing the abilities of interested students and viability of the sport.

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- Overview of Case Scenario
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- Accommodation of Interests & Abilities
- **Scholarships**
- Benefits and Treatment Areas
- Title IX and the Money

Compliance Requirement #2

Scholarships

Scholarships **Bricker Graydon**

- OCR considers whether the total amount of athletic scholarship aid a school makes available to men and women is "substantially proportionate" to their participation rates
- "substantially proportionate" = **within 1%**
 - However, this is subject to adjustment of disparities that are legitimate and non-discriminatory
 - What does this mean? Outside 1% might be okay if:
 - Actions are taken to promote athletic program development
 - Differences between in-state and out-of-state tuition
 - Unexpected fluctuations in participation (someone quits)



Scholarships **Bricker Graydon**

- Often not an issue for NCAA Division III institutions because you are not allowed under the bylaws to offer athletic aid
- However, if you offer aid only to athletes, could be subject to Title IX scrutiny
 - Ex. "presidential awards" or "leadership awards"



Hypo – Champion University **Bricker Graydon**

- Calculation
 - Male
 - Male participation = 59%
 - Male scholarship dollars = 57.8%
 - **Difference = 1.2%**
 - Female
 - Female participation = 41%
 - Female scholarship dollars = 42.2%
 - **Difference = 1.2%**

If Champion can show they have legitimate non-discriminatory reasons for the 0.2% difference

→ **Complaint.**

Key Takeaways **Bricker Graydon**

- Analyze this each year
- Document legitimate, non-discriminatory disparities
- Keep copies of policies, procedures, and criteria for awarding scholarship including how determinations are made
- Exercise oversight of coaches

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Compliance Requirement #3
Benefit and Treatment Areas

- Overview of Case Scenario
- Nuts and Bolts: Title IX Athletics and Equal Opportunities (Intro)
- Accommodation of Interests & Abilities
- Scholarships
- **Benefits and Treatment Areas**
- Title IX and the Money

Benefit and Treatment Areas **Bricker Graydon**

The "Laundry List"

Equipment and Supplies	Scheduling Games and Practice Time	Travel and Daily Allowance	Coaching	Academic tutors
Locker Rooms and Fields, Courts, or Other Facilities for Practice and Competition	Medical and Training Facilities and Services	Housing and Dining Services	Publicity	Recruitment

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What is a disparity?

- There are going to be differences amongst the men's and women's program, but when is it a big enough difference to be a compliance concern?
 - Disadvantage *based on gender*
 - Depends on how many student-athletes it impacts
 - Depends on the benefit
- A disparity in of itself is likely not a Title IX violation, but a pattern or practice of multiple disparities may indicate discrimination and may rise to the level of a violation

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A few more notes...

- You can consider the nature of particular sports
- You (and your coaches) can make reasonable professional decisions, but it cannot be discriminatory
 - Example: less expensive equipment
 - If the reason is "tradition" or "that is the way it has always been done" you may want to reconsider



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Equipment and Supplies

- Does your school provide athletic gear of equivalent **quality, quantity, suitability, condition, and availability** for athletes on men's and women's teams?
- Strategies to help compliance:
 - Apparel and equipment rotation policies (ex. every 3 years, new warm up gear)
 - Be able to list all the equipment, supplies, and laundry services to teams (inventory software?)



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Scheduling Games and Practice Time





- Do men's and women's teams both have a **reasonable opportunity to compete before an audience**?
 - OCR has been investigating this one recently
- Are scheduled practice times equally **convenient** for both men's and women's teams?
- Are the **number and length** of practice sessions equivalent for women's and men's teams in the same or similar sports?

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Hypo - Champion

- Men's and women's basketball team play double-headers on Saturdays – tipoff for the women's game is at 5:30 p.m. while the men's game starts after the conclusion of the women's game, usually around 7:30 p.m. The conference schedules the games
 - Disparity?
 - Solution?
- Whether in- or out-of-season, the football team gets the best lift time in the morning. The field hockey team is scheduled for mid-day, which often runs into class schedules.
 - Disparity?
 - Solution?

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Travel and Daily Allowance

- Do athletes on women's and men's teams use equivalent modes of **transportation** when traveling to away games or competitions?
 
- Do athletes on women's and men's teams have equivalent **accommodations** when traveling overnight?
 
- When athletes travel to games, are they offered equivalent **meals** or meal allowances?
 

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Coaching

- Do men's and women's teams have coaches with equivalent **qualifications**?
- Are coaches **available** to women and men athletes for equivalent amounts of time?
- Do coaches of men's and women's teams receive equivalent **compensation**?
 - If not, can differences in pay be justified by factors that could be nondiscriminatory?
- Do coaches of women's and men's teams have equivalent **"other duties"**?



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Hypo - Champion

- The assistant athletic director also started to hear complaints that the field hockey team's strength and conditioning coach – though a well-liked individual – is "only" a graduate assistant and isn't exactly tailoring the team's workouts to the sport. The complaints also point out that the University's director of strength and conditioning, who has 20 years of experience, leads the football team and all the other men's sports lifts, and those lifts are typically highly customized.
- Disparity?
- Solution?

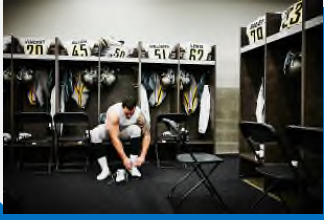
Bricker Graydon

Academic Tutors

- Do men's and women's teams have academic tutors with equivalent **qualifications**?
- Are academic tutors **available** to athletes on women's and men's teams for equivalent amounts of time?
- Do academic tutors for men's and women's teams receive equivalent **compensation**?
- Are the **rules for qualifying for and getting tutoring** equivalent for athletes on women's and men's teams?



Locker Rooms & Facilities for Practice and Competition



- Do athletes on men's and women's teams have locker rooms of equivalent **quality and size**?
- Are the **conditions** of playing fields, courts, pools, and other practice/game facilities for men's and women's team equivalent?

Hypo - Champion



- Baseball: turf field upgraded recently and it continues to be in outstanding shape. In fact, the University regularly hosts tournaments from nearby high school athletic associations because of the turf's high quality.
- Softball: grass field that, while maintained and serviceable, suffers from poor drainage and regularly floods. The softball team's issues are compounded by ad-hoc fencing and poor lighting, *the latter of which necessitates the need to schedule games and practices only when the daylight will accommodate it.*

Disparity?
Solution?



Medical and Training Facilities and Services



- Are the training and conditioning facilities for athletes on men's and women's teams of equivalent **quality**?
- Do members of men's and women's teams have equivalent **access** to training facilities?
- Do men's and women's teams have equivalent medical and training **personnel/services**?



Housing and Dining Services



- Are equivalent **special housing and services** available to athletes on women's and men's teams?
- Are equivalent **special dining and services** available to athletes on women's and men's teams?

Publicity



- Does your school provide equivalent **coverage** for men's and women's teams and athletes on its website, social media, or other publicity?
- Are cheerleaders, pep bands and drill teams provided equivalently for women's and men's teams?




Recruiting



- Are coaches and other personnel given substantially equal **opportunities** to recruit women and men for athletic teams?
- Is recruitment for men and women athletes **funded** in a way that is equivalently adequate to meet the needs of each men's and women's athletic program?



 **Key Takeaways** **Bricker Graydon**

- Keep your eyes and ears open
- Meet with your student-athletes and coaches
- Monitor where the money is spent
- Administrators travel with teams
- Identify and remedy immediate compliance concerns


 **Bricker Graydon**

- Overview of Case Scenario
- Nuts and Bolts: Title IX Athletics and Equal Opportunities (Intro)
- Accommodation of Interests & Abilities
- Scholarships
- Benefits and Treatment Areas
- **Title IX and the Money**

Title IX and the Money

Title IX and the Money **Bricker Graydon**

- Funding does not have to be the same for the men's and women's overall program
 - Not dollar-for-dollar matching
 - But there are two program components where funding does matter: athletic scholarships & recruitment

 **What matters is the tangible benefits provided to students**

- Evaluate what students *receive*, regardless of the source of the funds
- Budget is intent

Bricker Graydon

Donations and Booster Clubs

- Booster clubs or foundation may not be subject to Title IX, but any *benefits* provided by the entity is subject to Title IX
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Bricker Graydon

Hypo – Champion University

- What to do about the club men's lacrosse team potential donation?
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Fundraising

- Men's and women's programs have equitable opportunities to fundraise (allow teams to use facilities, etc.)
- Fundraising by student-athletes
 - Under Title IX, an institution has no obligation to offset benefits purchased individually by students
- Fundraising creates a disparity
 - Challenging because some coaches effort is not rewarded while other coaches lack of effort and lack of donors is not penalized.

 **Key Takeaways** **Bricker Graydon**

- Monitor how coaches are spending their budget
- Monitor fundraising efforts and successes
- Have conversations with donors
- Be prepared to provide offsetting benefits




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Today's Recap

Key Takeaway: Gender Equity Plan **Bricker Graydon**

- Document! Document! Document!
- One that is current, supported by top leadership at the institution, and reviewed by department leadership continuously
- Has an administrator as a "point of contact/responsibility"
- In-house plan or external plan?
- Importance of start and end date



Key Takeaways: Control your Destiny

- Be proactive!
- Federal judges and OCR investigators are not afraid to tell you how to run your athletic department



REPORTING REQUIREMENTS

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Questions?

[REGISTER HERE!](#)

- Tuesday, September 26, 2023
 - Session 2: Student-Athlete Conduct and Health, Safety, and Well-being
- Tuesday, October 3, 2023
 - Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate
- Tuesday, October 10, 2023
 - Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"

The College Athletic Department Toolkit Series:
Balancing Compliance and Competitive Success
in an Era of Change

September 26, 2023
12:00 p.m. – 1:30 p.m.

INCompliance | **Bricker Graydon**

Session 2: Student-Athlete Conduct, Health, Safety, and Wellness

Disclaimer

Bricker Graydon

This isn't legal advice!

(but please ask questions if you have them)

Chime in!!

Bricker Graydon

- Today's webinar addresses hot topics – many of you have experienced, or are experiencing them – please feel free to chime in as we go!
- If you prefer to stay anonymous – feel free to message us directly or pose an anonymous question in the Q&A.

Your Presenters **Bricker
Graydon**




Kasey Nielsen
Attorney



Kylie Stryffeler
Attorney



Joel Nielsen
Higher Education
Specialist

 About this Series **Bricker
Graydon**

- Tuesday, September 19, 2023
 - Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know
- **TODAY - Tuesday, September 26, 2023**
 - Session 2: Student-Athlete Conduct and Health, Safety, and Well-being
- Tuesday, October 3, 2023
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Agenda **Bricker
Graydon**

- Title IX and the Money
- Student-Athlete Conduct & Institutional Response
 - Best Practices and Tips from the Trenches: Hazing, Sports Wagering, Sexual Misconduct, and Other Conduct
- Student-Athlete Safety, Duties Owed, & Best Practices
- Promoting Student-Athlete Mental Health



Learning Outcomes **Bricker Graydon**

1. Learn how to identify risk issues in student-athlete misconduct.
2. Learn how to navigate the Title IX Sexual Misconduct Resolution Process.
3. Identify trends in student athlete health and safety and learn best practices for promoting safe environments for student athletes.

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Student-Athlete Conduct & Institutional Response:
Best Practices and Tips from the Trenches

- Title IX and the Money
- Student-Athlete Conduct & Institutional Response
- Student-Athlete Safety, Duties Owed, & Best Practices
- Promoting Student-Athlete Mental Health




Managing Student-Athlete Conduct

Conduct Issues

- Hazing?
- Sexual Misconduct?
- Wagering?
- Other On/Off campus conduct?

Impact to Athletics?


- Eligibility issues?
- Wait... Participation?
- Media attention?
- Safety concerns?



Poll

How much time per week do you spend addressing student-athlete conduct issues?

- A. 0-5 hours
- B. 5-10 hours
- C. 10-20 hours
- D. 20+





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HAZING

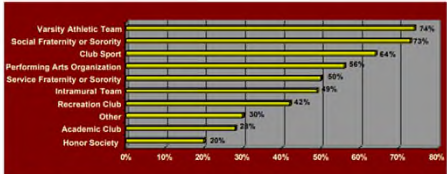
Hazing – NCAA Definition

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- "Any act committed against **someone joining or becoming a member or maintaining membership** in any organization that is humiliating, intimidating or demeaning, or endangers the health and safety of the person. Hazing includes **active or passive participation** in such acts and occurs **regardless of the willingness to participate in the activities**. Hazing **creates an environment/climate in which dignity and respect are absent**"
- NCAA (2007) [Building New Traditions: Hazing Prevention in College Athletics](#).

Hazing By Type of Organization

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Organization Type	Percentage
Varsity Athletic Team	74%
Social Fraternity or Sorority	73%
Club Sport	64%
Performing Arts Organization	56%
Service Fraternity or Sorority	50%
Intramural Team	49%
Recreation Club	42%
Other	30%
Academic Club	23%
Honor Society	20%

* Other includes religiously-affiliated organizations, culture clubs and organizations, and student government.

Hazing in View: College Students at Risk, Initial Findings from the National Study of Student Hazing, E. Allan & M. Madden (2008)

Hazing Study Findings **Bricker Graydon**

- 55% of respondents report they had experienced at least one behavior that meets the researcher's definition of hazing
- 61% of male respondents and 52% of female respondents experienced behaviors that met the definition

"Hazing is an activity expected of someone joining or participating in a group that humiliates, degrades, abuses, or endangers them regardless of the person's willingness to participate."

- Only 7% of students who experience hazing actually recognize the behavior as "hazing"

→ **This mischaracterization of hazing behavior could normalize a dangerous culture: someone could subject themselves to hazing and not think it is really as bad as it is.**

Hazing in View: College Students at Risk, Initial Findings from the National Study of Student Hazing, E. Allan & M. Modden (2008)


Intersection Across Campus **Bricker Graydon**

How does hazing intersect with policies on your campus?
Concerns your institution has?


Beyond Hazing **Bricker Graydon**

- 25% of students believed *coaches and/or advisors were aware of the activities;*
- 25% of hazing experiences, students reported that *alumni were present;*
- 53% of respondents say a member of their team or organization *posted photos of the hazing activity to a public website* (Facebook) and
- 42% report *posting the hazing photos**

Knowledge of Hazing **Bricker Graydon**



Agents/Employees Knowledge
=
Institutional Knowledge

 **Key Takeaways: Hazing** **Bricker Graydon**

- Review (or implement) hazing policies and consult with counsel.
- Revisit or develop and implement hazing training protocol for your athletic department.
- Tap into your student-athletes.
 - Do you have a student-athlete advisory committee (SAAC)?
 - Are you fostering an environment that empowers student-athletes to identify and report hazing?
 - Will you use third party anonymous reporting platforms?
- Be alert – tap into your trainers (or other staff)
 - What are they seeing?



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SPORTS WAGERING

Sports Wagering & NCAA Bylaws **Bricker Graydon**

Placing, accepting or soliciting a wager

On a staff member's or student-athlete's own behalf or on the behalf of others

On any intercollegiate, amateur or professional team or contest

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Common Misconceptions **Bricker Graydon**

- Not only an NCAA Rule
 - According to the American gaming association, 35 states and D.C. have legalized sports betting activity
- NCAA revised penalties for sports wagering
 - If a student-athlete wagers on their own sport at another school, education on sports wagering rules and prevention will be required as a condition of reinstatement, **and the loss of 50% of one season of eligibility will be considered.**
 - For all other wagering-related violations is a tiered system

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 Key Takeaways: Sports Wagering **Bricker Graydon**

- Train your staff, administrators who work with athletics, coaches, and student-athletes.
- Make sure the training addresses state law.
- Rules education throughout the year.



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Graydon**

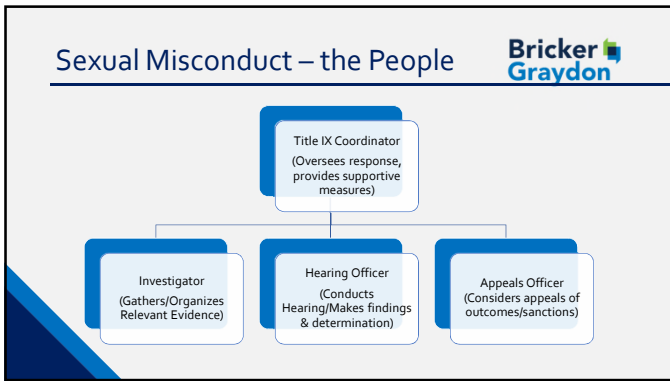
SEXUAL MISCONDUCT

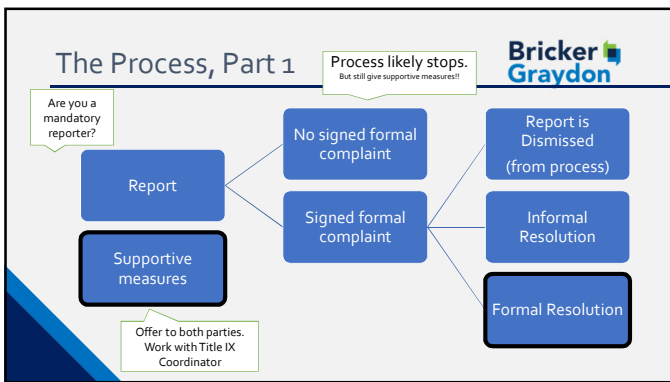
Sexual Misconduct (Disclaimer) **Bricker
Graydon**

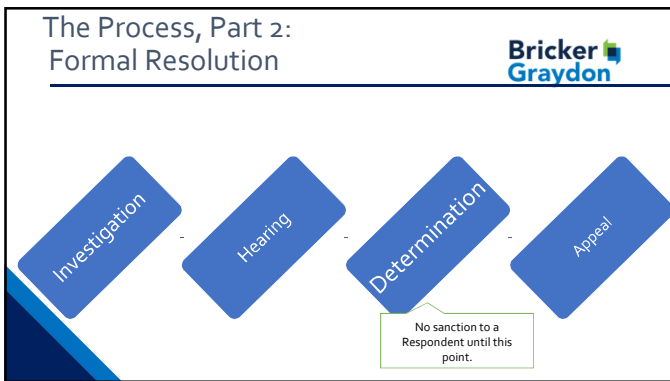
- We provide entire training series on the subject of Title IX Sexual Misconduct.
- *This brief overview is not intended to be a comprehensive Title IX Sexual Misconduct training, nor does it satisfy the training requirements under the regulations.*
- The purpose of this portion of the is to provide athletics staff with practical information they need to know to be effective in their roles.

Sexual Misconduct **Bricker
Graydon**

- Your institution has a policy prohibiting discrimination based on sex.
- Prohibited conduct includes:
 - Sexual harassment
 - Sexual assault
 - Stalking
 - Dating Violence
 - Domestic Violence
 - Retaliation
- Title IX has limited scope/jurisdiction defined by regulations (34 C.F.R § 106)







Two Essential Tips **Bricker
Graydon**

1. REPORT. REPORT. REPORT

2. Unless you are the Title IX Investigator assigned to the case, DO NOT INVESTIGATE.

Who are mandatory reporters? **Bricker
Graydon**

- "Actual Knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient. . ." 34 C.F.R § 106.30.
- Might depend on your institution, but generally, most schools say all employees are mandatory reporters.
- Examples: Any staff members, AD Staff, Coaches, Athletic trainers, Academic support

Sexual Misconduct - Discipline **Bricker
Graydon**

- A Respondent is **presumed not responsible** until a determination is made that they engaged in Title IX Misconduct.
- You **can not** penalize a respondent **until a finding** is made that they engaged in Title IX Sexual Misconduct.
- What does that mean for:
 - Practices?
 - Games?
 - Travel?
 - Team events?
- BUT: Emergency Removals?
- What about when the conduct involves two student-athletes?


Potential Limitations on Institutional Response **Bricker Graydon**

- Cannot penalize until Title IX Process has concluded with a finding that Respondent has engaged in misconduct
 - But, always offer supportive measures.
 - May need to consider offering that the student miss practice/games for supportive measures
- What about violations of team rules from same conduct?
 - May be limited in your response still.
- FERPA
- Police Investigations? May need to defer institutional investigations pending police investigation.

Poll 2 **Bricker Graydon**

Do you have a response team identified when you have a sexual (or other) misconduct issue arise?

A. Yes
B. No
C. . . . Should we?



Who "Needs" to Know? **Bricker Graydon**

Title IX

Public Safety?

Athletics Admins?



Coaches?

PR Team?

President? Board?

Conference?

Advancement offices?

 **Sexual Misconduct - What you NEED to Know** 

- Mandatory reporting obligations.
- Connect with Title IX Coordinator early and keep lines of communication open.
 - Due to privacy concerns, Title IX Coordinator might not be able to share some information.
- Remember, members of your team/staff may be witnesses (be careful to not impact integrity of the investigation).
- Parties are allowed to talk about the case and you cannot tell them not to.
 - Caution: Talking could be considered retaliatory, in violation of a no contact directive, or could constitute other misconduct
- Cannot impose a penalty *until found responsible for TIX sexual misconduct*
 - BUT: Emergency removal?
- Offer supportive measures to the student-athlete
 - Absence from practices? Games? Connection to mental health resources, academic support?
- **MONITOR MENTAL HEALTH.**

 **Sexual Misconduct – Final Thoughts** 

- Make sure you are compliant with the **NCAA Policy on Campus Sexual Violence and up to date on annual attestations** (see materials)
- Develop/bring to campus engaging annual (or more frequent) prevention education programs for Athletic Department
- Work with your campus team to determine the best way to approach sexual misconduct response/prevention on your campus

OTHER CONDUCT

Develop Team Rules



- Consider Athletic Department Standard Rules
 - Pros: Consistency across teams
 - Cons: Less flexibility for coaches
- Use Team Rules to Set Expectations!
 - Be direct.
 - Don't Write a rule if you don't plan on enforcing it.
- Stay up to date on conference/governing body/state laws & adjust your rules if needed.
- Periodic Reviews of Athletic Handbook!
- Social Media Use Policy?
 - Free speech implications.

Tips:


- ✓ **Physical activity should not be used as a consequence** (ex. conditioning session, sprints, etc.)
- ✓ **Don't include "gag" rules** such as "what happens here stays here" – implies covering up inappropriate things
- ✓ **Don't discriminate based on sex** – be aware of sex based expectations (ex. relationship limitations)

On Free Speech





- Public v. Private?
 - Public – First Amendment applies! Your institution (an arm of the state) cannot impede rights to speech and expression.
 - Private – a little murkier, many have adopted free speech principles into the student code of conduct
- On campus v. Off campus?
- Some broader rights for athletic departments to act (participation is a privilege, not a right). See, *Radwan v. Manuel* (2d. Cir. 2022).
- If you are not sure what to do, consult your general counsel!
- **Best defense is a good offense – train!**
 - Media relations training, implicit bias training, alcohol education, etc.

Hypo – Rose (WBB)




Champion University's star women's basketball player, Rose, recently tweeted about in-state rival Challengers College, who they play next week. Challengers' starting freshman is a transwoman. Rose tweeted, "thinking about sitting out of next week's game. I play women's basketball, not men's."





Drug Testing **Bricker Graydon**

- Contents of athletics drug testing policies
 - Purpose
 - Notification
 - Consequences
 - Requiring student-athletes to call their parents
 - Education
 - Safe harbor policy
 - Teams want to set more stringent standards?
- How often do you review your athletics drug testing policy?
- The NCAA CCMAS recommended that each of the divisions introduce and adopt legislation that would remove cannabinoids from the list of NCAA banned drug classes
 - Remember – still not allowed on campus under federal law



Athletic Department Education **Bricker Graydon**


Develop a Training Rubric to Deliver Across the Department

Timing?
 When are you going to deliver training such that it does *not* cause training fatigue?
 Make sure it covers Hazing? Sports Betting? Sexual Misconduct? Other Conduct?
 Is the training accessible? Will student-athletes understand it? Is it engaging?
 Who is going to conduct the training?
 How will you track who participates/does not participate?
 Will you penalize non-participation? How?
 Build awareness (think of speakers/conferences) & engagement?
 How can you deliver it quickly and readily (online options?)

Student-Athlete Safety
 Duties Owed & Best Practices

Bricker Graydon

- Title IX and the Money
- Student-Athlete Conduct & Institutional Response
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NCAA Constitution **Bricker Graydon**

- “Each member institution shall facilitate an environment that reinforces **physical and mental health** within athletics by ensuring access to **appropriate resources and open engagement** with respect to physical and mental health. Each institution is responsible for ensuring that coaches and administrators exhibit **fairness, openness and honesty in their relationship with student-athletes**. Student-athletes **shall not be discriminated against** or disparaged because of their physical or mental health”
- Division I, Bylaws, Constitution Article I(D)

Why do we focus on safety? **Bricker Graydon**

- Obviously, we want our athletes to be safe and healthy.
- This area is **ripe** for litigation.
- Litigation arises over:
 - Lack of proper athletic training presence
 - Concussions/CTE
 - Cardiac issues
 - Heat caused catastrophic injury
 - Strength & conditioning injuries

Collegiate Catastrophic Sport Injuries
1982-2021

Category	Percentage
Exertional/Medical	~65%
Traumatic	~35%

■ Traumatic ■ Exertional/Medical

Data from: 2021 Annual Report, <https://ncssi.unc.edu/wp-content/uploads/sites/5614/2022/10/2021-Catastrophic-Report-AS-39th-AV2020-2021-FINAL1w.pdf>

Duty Owed to Student-Athletes? **Bricker Graydon**

- General negligence claims require 1) a **duty of care** owed, 2) a breach of that duty, 3) causation between the conduct and the injury, and 4) damages.
- What duty is owed?
 - **State and jurisdiction dependent!** Check with your counsel.
 - Some courts have held that due to the “**special relationship**” between the student athlete and the school, that there is a duty to provide “**reasonable care**.” See, e.g. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993); *Davidson v. Univ. of N. Carolina at Chapel Hill*, 142 N.C. App. 544, 543 S.E. 2d 920 (2001)
 - Meaning, the college had to take **reasonable precautions** against the risk of **foreseeable** life threatening injuries



Duty Owed to Student-Athletes cont'd.



- What is reasonable? Typically a question for juries.
 - Presence of athletic trainers
 - Monitoring heat/exertion
 - Responding quickly
 - Making sure physicals were completed
 - Having proper medical equipment (like an AED and knowing how to use it)

NCAA Independent Medical Care



The Constitutions for Divisions I-III each state:

*"An active member institution shall establish an **administrative structure that provides independent medical care** and affirms the unchallengeable autonomous authority of primary athletics health care providers (team physicians and athletic trainers) to **determine medical management and return-to-play decisions related to student-athletes**. An active institution shall **designate an athletics health care administrator** to oversee the institution's athletics health care administration and delivery."*

Division I Constitution 3.2.4.16, Division II Constitution 3.3.4.17, Division III Constitution 3.2.4.18



Concussion Protocol



- Is your concussion safety protocol compliant with the Concussion Safety Protocol Legislation?
- On 9/22/2023 NCAA released clarifications and updated the checklist

Resources


- Concussion Safety Protocol Checklist
- Concussion Safety Protocol Template
- Concussion Safety Protocol Committee Roster
- Concussion Management Guidelines: Frequently Asked Questions
- Preventing Catastrophic Injury and Death in Collegiate Athletics
- Division I Certificate of Compliance (docs)
- Medical Care and Coverage for Student-Athletes at Away Events
- Medical Care and Coverage for Student-Athletes at Away Events: FAQ

NCAA Transformation Committee **Bricker Graydon**

- Review of physical and mental health, safety and performance support services.
- Coverage of athletics activity.
 - Contact/collision sports: Require medical personnel to be **on site** at all practices and competitions
 - Other sports: Require medical personnel to be **"available"** at all practices and competitions
- Empowerment of the athletics health care administrator
 - Require all Division I schools to provide medical coverage for athletically related injuries for a minimum of two years following graduation or completion of athletics experience. This would also include assistance for out-of-pocket medical expenses during a student-athlete's playing career (of note, a national coverage model may need to be created to assist schools with costs).

• Require schools to attest that they follow concussion management protocols consistent with the [NCAA Concussion Safety Protocol Checklist](#)

• Require schools to complete a post-incident review of circumstances surrounding any athletically related catastrophic injury or death.


 Best Practices in Student-Athlete Safety **Bricker Graydon**

- Have trained and properly certified coaches, strength coaches, athletic trainers, and team doctors
 - Are they trained in First Aid, CPR?
 - Is someone trained in using the AED?
- Have a way to **verify certifications and keep records!**
 - Annual? When hired?
- Develop a collaborative approach to student-athlete health and safety: who is going to be on that team?
 - Coaches, Strength & Conditioning staff, Trainers, Nutritionists, mental health advocates/counselors, Sports medicine
 - Identify your Health Care Administrator
 - What are you doing to ensure that sports med staff are **empowered to intervene** (modify/cancel) workouts that may compromise health/safety?
- Conduct pre-participation physicals and screenings of athletes.



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PREGNANT STUDENT-ATHLETES


Pregnancy, Title IX, and the NCAA 

- Discrimination based on pregnancy is a form of sex discrimination.
- Under the Title IX regulations, applicants, students, and employees may not be deprived of access to a Recipient's program/activities based on pregnancy/parenting.
 - 34 C.F.R. § 106.21, 34 C.F.R. § 106.40, 34 C.F.R. § 106.57
- Reasonable modifications and academic adjustments!
- Consult with your Title IX Coordinator!
- [NCAA Resources](#)
- [Bricker Graydon Resources](#)

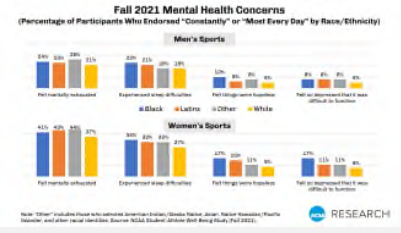
Promoting Student-Athlete Mental Health

- Title IX and the Money
- Student-Athlete Conduct & Institutional Response
- Student-Athlete Safety, Duties Owed & Best Practices
- Promoting Student-Athlete Mental Health

Student-Athlete Mental Health 

Fall 2021 survey of 9,808 student-athletes across DI, II, and III.

Fall 2021 Mental Health Concerns
(Percentage of Participants Who Endorsed "Constantly" or "Most Every Day" by Race/Ethnicity)




Men's Sports

Concern	Black	Latino	Other	White
Fell mentally exhausted	59%	53%	58%	51%
Experienced sleep difficulties	42%	41%	46%	38%
Fell things were hopeless	32%	34%	36%	28%
Fell so depressed that it was difficult to function	21%	21%	25%	18%

Women's Sports

Concern	Black	Latino	Other	White
Fell mentally exhausted	45%	43%	48%	40%
Experienced sleep difficulties	30%	29%	34%	25%
Fell things were hopeless	22%	23%	25%	18%
Fell so depressed that it was difficult to function	13%	13%	16%	10%

Note: "Other" includes those who selected American Indian, Alaska Native, Asian, Native Hawaiian, Pacific Islander, and other race/ethnicities. Source: NCAA Student-Athlete Fall 2021 Survey (Fall 2021).



Contributing factors?

Factors Negatively Impacting Student-Athlete Mental Health in the Month Before the Survey
 (Percentage of Women's Sports Participants Who Responded "Agree" or "Strongly Agree" by Race/Ethnicity)

	Black	Latina	Other	White
Academic worries	49%	49%	50%	49%
Planning for the future	45%	46%	48%	39%
Financial worries	38%	38%	30%	24%
Coach relationship	25%	22%	20%	22%
Playing time	23%	23%	23%	21%
Team environment	28%	24%	19%	20%
Family worries	29%	29%	26%	18%
COVID-19 health concerns	17%	18%	12%	14%
Personal experiences of racism or racial trauma	11%	5%	6%	1%
Political disagreements with family/friends	5%	5%	6%	3%

Note: Top 2 points on a 6-point scale. The survey asked, "How much do you agree or disagree that the following have negatively impacted your mental health within the last month?" (1=Not at all, 6=Very much). 1/10/23, 11/2022. "Other" includes those who selected American Indian/Alaska Native, Asian, Native Hawaiian/Other Pacific Islander, and other racial identities. Source: NCAA Student-Athlete Well-Being Study (Fall 2022)

NCAA Bylaw 16.4.1

- **Best Practices**
 1. Clinical Licensure of Practitioners Providing Mental Health Care
 2. Procedures for Identification and Referral of Student-Athletes to Qualified Practitioners (written emergency and non-emergency action plans)
 3. Pre-Participation Mental Health Screening
 4. Health-Promoting Environments That Support Mental Well-Being and Resilience


16.4.1 Mental Health Services and Resources. An institution *shall* make mental health services and resources available to its student-athletes. Such services and resources may be provided by the department of athletics and/or the institution's health services or counseling services department. *Provision of services and resources should be consistent with the Interassociation Consensus: Mental Health Best Practices.* In addition, an institution must distribute mental health educational materials and resources to student-athletes, including those transitioning out of their sport, coaches, athletics administrators and other athletics personnel throughout the year. Such educational materials and resources must include a guide to the mental health services and resources available at the institution and information regarding how to access them. *(Adapted: 7/25/19 effective 8/1/19)*

Looking Forward

- **NCAA Division I Transformation Committee**
 - Still stuck in legislative cycle – expected to be implemented in August 2024

- **Enhanced mental health support** – The Transformation Committee recommends the establishment of a requirement that Division I schools must provide a direct pathway for full-time clinical services of a licensed mental health professional exclusively dedicated to serving student-athletes.
- **Ongoing education and programming** – In addition to providing student-athletes with access to educational programming that will be outlined later in the report, the Transformation Committee recommends that each Division I member school be required to annually attest that its coaches have completed required education in the following areas:
 - Mental health.
- **Require schools to attest that they provide career counseling and life skills programming to student-athletes** that include, at minimum, the following:
 - Mental health.

- **Additional student-athletes health and safety measures.**
 - **Review of physical and mental health, safety and performance support services.** The Transformation Committee recommends requiring schools to complete a regular review of physical and mental health, safety and performance support services, which may be overseen or facilitated by a conference office.
 - **Track and report on schools' commitments related to mental health services and resources directly provided to student-athletes** consistent with the [Inter-Association Consensus Document: Mental Health Best Practices](#).

 **Best Practices** **Bricker Graydon**

- Impacts everyone! (Even coaches!)
- Don't let your approach to mental health be an afterthought.
- Develop/maintain relationships with student-athletes.
 - Utilize your Student-Athlete Advisory Committee (SAAC).
 - This will help you identify issues facing individual athletes & give you a chance to brainstorm how you can help them
 - Is it financial? Maybe you can connect the student to financial aid office?
 - Is it coach/team related? Maybe you can arrange a mediation.
 - Is it academic? Maybe you can connect the student to additional tutoring or connect their student with an advisor to adjust schedule.
- Provide access to counseling (does your institution have it on site?)
- Consider partnering with **third parties to provide mental health support!**

Questions? **Bricker Graydon**

[REGISTER HERE!](#) For the second half of The College Athletic Department Toolkit Series

- *Tuesday, October 3, 2023* - Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate
- *Tuesday, October 10, 2023* - Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"


• Other trainings:

- *Wednesday, January 24, 2024* – Hazing Investigation Bootcamp (additional information coming soon!)

The College Athletic Department Toolkit
Series: Balancing Compliance and
Competitive Success in an Era of Change

October 3, 2023
12:00 p.m. – 1:30 p.m.

INCompliance | **Bricker Graydon**



Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate

Disclaimer **Bricker Graydon**

This isn't legal advice!
(but please ask questions if you have them)

Your Presenters **Bricker Graydon**



Kasey Nielsen
Attorney



Joel Nielsen
Higher Education Specialist



Erin Butcher
Attorney


About this Series **Bricker Graydon**

- Tuesday, September 19, 2023
 - Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know
- Tuesday, September 26, 2023
 - Session 2: Student-Athlete Conduct and Health, Safety, and Well-being
- **TODAY – Tuesday, October 3, 2023**
 - Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate
- Tuesday, October 10, 2023
 - Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"



Agenda **Bricker Graydon**

- Employment Issues
 - Coaches Contracts & Compensation
 - Coaches Conduct
- Revenue Generation and Risk Management
 - Fundraising
 - Multimedia Rights
 - Licensing
 - Facilities
- Other Operational Risks – Travel



Learning Outcomes **Bricker Graydon**

1. Learn how to identify and navigate challenging issues involving coaches contracts, coaches compensation, and coaches conduct.
2. Understand the different revenue streams within an athletic department and learn how to develop effective strategies for financial sustainability and program success while mitigating risk.
3. Recognize the importance of travel policies both domestic and international.



Employment Issues

- Coaches Contracts & Compensation
- Coaches Conduct


Revenue Generation and Risk Management

- Fundraising
- Multimedia Rights
- Licensing
- Facilities

Other Operational Risks – Travel

Employment Issues

Coaches Contracts & Compensation



Coaches Contracts

Termination with cause

- Triggering events
- Moral clauses
- Money owed on the contract? None? Negotiated?

Termination without cause


- Buy-out provisions – all? Or a percentage?
- Liquidated damages

NCAA required provisions

- Violation of NCAA regulation
- Athletically-related income

Bonuses

- Approach to bonuses
- Quantifiable
- Consistency – Title IX



Coaches Compensation

Title IX

Gender equity in education

Title VII


Employment discrimination

★ Equal Pay Act

Gender-based wage discrimination

Title IX **Bricker Graydon**

- Do coaches of men's and women's teams receive equivalent **compensation**?
 - If not, can differences in pay be justified by factors that could be nondiscriminatory? (*For example, experience, number of athletes, extra responsibility to supervise other coaches, outstanding record of achievement, nondiscriminatory factors related to the context of recruiting and hiring coaches for specific sports*)



Not the most useful tool because it is from the student-athlete perspective.

Title VII & Equal Pay Act **Bricker Graydon**

- Provides benchmarks for contracting parties
- Plaintiffs are typically female coaches of women's teams
- Suits usually arise during coaches contract negotiations
- Analysis:
 - 1. Is the Plaintiff paid less than a male counterpart for performing substantially equal jobs, requiring equal skill, effort, and responsibility; and
 - 2. if so, can the college justify the unequal pay in a manner recognized by law?
- Important because remedies are significant
 - Compensating the Plaintiff for the full difference between Plaintiff's actual wages and that of the comparator
 - Bad faith = could be doubled
 - Reasonable attorney's fees and court costs

Equal Pay Act EEOC Guidance **Bricker Graydon**

[Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions](#)


Coach's Burden

- Select a proper comparator
- Demonstrate that the job she and the comparator perform are substantially equal
- Demonstrate that women's coach receives lower wages


➔

Institution's Burden

- Assert recognized defenses (4)
 - Revenue defense
 - Extra duties defense
 - Marketplace defense
 - Prior salary




Equal Pay Act & the Courts




- Fact specific analysis
- Typically depends on Plaintiff's ability to prove there is another comparator
 - Might be easier if the same sport, but not always!

Examples:

- **Unsuccessful:** *Stanley v. University of Southern California* 178 F. 3d 1069 (9th Cir. 1999)
 - District court found that the male men's basketball coach was **not** a close enough comparator (substantially equal) to the female women's basketball coach (men's coach had extra duties + greater responsibility)
- **Successful:** *Perdue v. City Univ. of New York*, 13 F. Supp. 2d 326, 332 (E.D.N.Y. 1998)
 - District court found that men's basketball coach was a close enough comparator to the female women's basketball coach + school was unable to provide a successful defense
 - Jury awarded the coach \$274,980 in back wages, unpaid employer matching retirement benefits, liquidated damages, attorney's fees and costs



Volunteer Coaches - Litigation



- Two anti-trust cases brought against the NCAA in California
 - Allege that the NCAA and its schools conspired to fix compensation for certain Division I volunteer coaches at \$0
 - NCAA bylaw that restricted pay was withdrawn in January 2023
 - Prospective classes of volunteer coaches between 2019 and 2022 (baseball, soccer, swimming and track and field)
 - Each case seeks damages of more than \$5 million
- Latest development: On July 27, 2023, the NCAA's motion to dismiss anti-trust allegations was **denied** so the case is moving forward

Volunteer Coaches - Risks



- Employee or independent contractor?
- FLSA concerns
 - Volunteers cannot displace paid employees
- Consider a volunteer application and agreement form with proper waivers
 - Consistent throughout the institution



Assistant Coaches – Realities



- We just addressed concerns with volunteers – the same extends to volunteer assistant coaches
- Employees – FLSA and Title VII – this is a primary-duties analysis that is very fact-specific, but generally, assistant coaches will be non-exempt
- Student-employees – see above and beware the stipend
- Track these employees' hours

Assistant Coaches – Primary Duties



- The Department of Labor (“DOL”) has some special classifications for institutions of higher education – meaning, essentially, which employees are eligible for overtime and which are not.
- To make these assessments, the DOL will look at the “primary duties” of the position.
- There are two categories of Assistant Coaches (1) those whose primary duty is teaching, and (2) everyone else. The former are exempt, but the latter are not.




Assistant Coaches – Teaching




- Assistant Coaches will be “exempt” and ineligible for overtime pay (meaning past 40 hours) if their primary duty is imparting knowledge by instructing.
- These Assistant Coaches are employees, but there is no minimum salary or hourly pay requirement. (Note that state laws may vary on this)
- The minimum salary requirement (the DOL is intending to up this from \$35,568 to \$55,068 – and several areas and states have higher minimums) does not apply to these Assistant Coaches
- It is permissible (but not required) to pay a stipend and/or provide tuition assistance.
- Benefit eligibility is based on eligibility requirements, terms and conditions of employee benefit plan documents.


Assistant Coaches – Everyone Else 

- Primary duty is non-teaching activities, such as (no limited to):
 - Scouting
 - Recruiting
 - Conditioning athletes
 - Arranging for equipment
 - Devising game strategies
 - Making travel plans
 - Formulating budgets
- Must be paid on an hourly basis, at least minimum wage (federal is \$7.25/hr, but check your state minimum wage) and overtime in excess of 40 hours per work week, regardless of any stipend or tuition assistance provided or other benefits

Assistant Coaches – Scenario 


Champion University's women's softball team has two assistant coaches –Aaliyah and Missy. Coach Aaliyah, a former catcher on the team, lives in the community, and asked to help out on the team as a volunteer assistant coach to work with the catchers. Coach Missy is a graduate student in sports management and works with team for a \$5,000 stipend annually.




Assistant Coaches – Coach Aaliyah 

Coach Aaliyah, a former catcher on the team, lives in the community, and asked to help out on the team as a volunteer assistant coach to work with the catchers.


- Would this volunteer role otherwise be filled by an employee?
 - Has any assistant coach ever been paid? Yes – see Coach Missy (next slide)
 - But maybe never had an assistant coach for just catching? Not sure this would sway the DOL
 - Also, see the risks we discussed with volunteer coaches
- Less risky route: employee
 - Teaching catching or conditioning?




Assistant Coaches – Coach Missy 

Coach Missy is a graduate student in sports management and works with team for a \$5000 stipend annually.

- The DOL has a carve out for research assistants – they are not considered employees and not required to have a minimum salary or hourly pay – must perform research under a faculty member’s supervision, in the course of obtaining a degree
 - Unless there is a very detailed research program plan that Missy is conducting as part of her sports management degree and the coach is a faculty member, steer clear – the DOL is likely to find this as a work around
- DOL is likely to see her as an employee
 - Is she teaching as her primary duty? As discussed in the last slide, it will depend what she is doing
 - Is she conducting non-teaching activities – aka, whatever the coach tells her to do?





Exempt v. Non-Exempt Assistants 

If an Assistant Coach is exempt (again – make sure the primary duty is teaching) – then non-minimum salary or pay requirement – can pay a stipend. So if Coach Aaliyah was really just teaching catchers, as opposed to conditioning them, as her primary duty, then she is an employee and could be for a stipend.

If an Assistant Coach is **non-exempt** (again – the primary duty is not teaching) – then must pay minimum hourly wage and subject to overtime, unless paying above minimum threshold (currently \$35,568).

- This will, in reality, be most of your assistant coaches.
- Employer responsible for tracking hours worked, or court will defer to employee! Time and a half for over 40 hours.

 **Key Takeaways – Coaches Contracts & Compensation** 


- Review your coaches’ contracts
- Be aware of potential gender equity claims when negotiating coaches contracts
- Take a hard look at your assistant coach positions and their duties
- Be willing to rethink things
- Bring in your legal counsel and HR
- Be consistent throughout your department
- Always remember Title IX



- Employment Issues
 - Coaches Contracts & Compensation
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- Other Operational Risks – Travel


Employment Issues

Coaches Conduct



Overview

- NCAA atmosphere of compliance
- Hiring and firing
- Education and training
- Pregnancy, parental leave, and coaching



NCAA Atmosphere of Compliance

- Across all NCAA divisions
- New for 2023: Head coaches will be held responsible for Level I/II violations they commit and those committed by staff who report directly or indirectly to the head coach. The Division I Committee on Infractions will consider **whether the head coach promoted compliance and monitored the program in determining penalties.**
- [Head Coach Responsibility Educational Document](#)
 - Aggravating and Mitigating factors

Situation: Head coach responsibility allegations not brought by the enforcement staff

1 The enforcement staff will bring a Rule 11.1.1.1 violation when an appeal committee is not presented with an appropriate number of Level I/II violations. Although the appeal committee is not required to bring the violation, the enforcement staff should bring the violation if the following:

- The head coach communicated an intention to violate a rule violation for athletes.
- The coaching staff communicated with, participated in, or otherwise monitored the documentation of inappropriate conduct by athletes and other staff members.
- There is a documented pattern of coaching staff members' conduct and practices violating the competition rule and its associated consequences.

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Religious Practices

- *Kennedy v. Bremerton School District*, 991 F. 3d 1004 (2022)
 - Facts: High school football coach prayed at midfield after each game – first alone, but later with players and even some members of the opposing team joining him. School asked the coach to stop based on the risk of an Establishment Clause lawsuit.
 - Issue: Is this a violation of the Establishment Clause? Or is it protected speech?
 - Findings: Kennedy's prayers were not while he was acting within the scope of his duties as a head coach (during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities), so it was protected speech.

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Hiring and Firing Coaches

- Have a plan
- Timing is important
- Consult with your institutional response team!

Bob Huggins threatens lawsuit against West Virginia as ex-Mountaineers basketball coach seeks reinstatement



Alabama baseball coach Brad Bohannon fired after link to suspicious bets, sources say



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Who should gather?

Institutional Response Team

Public Safety?

Athletics Admins?

Coaches?


PR Team?

President? Board?


Conference?

Advancement offices?



Title IX Coordinator?

Pregnancy and Parental Leave 

- Don't forget that your coaches can be parents too!
- Coaches (and assistant coaches) are entitled to your college's benefits for parental leave and are protected under the law just like any of your other employees.
- You cannot NOT hire or retain a coach because she is pregnant and may need to take off for parental leave during the season.

And the rest... 

- And your coaches are also people who may be injured, sick, dealing with mental health struggles, family issues, and other matters just like any other employee.
- The Americans With Disabilities Act ("ADA") as amended provides for accommodations and potentially limited leave
- The Family Medical Leave Act ("FMLA") provides for leave for personal or immediately family medical leave (and there are additional provisions for active service military members and their immediate family).


 **Key Takeaways** 

- Ensure your coaches have the proper training, education and **document those compliance meetings**
 - If this is your responsibility, meet with your coaches on a regular basis
- Intervene your legal counsel when dealing with First Amendment issues
- Engage your institutional response team when dealing with a big issue (especially if it will create a PR nightmare)
- Remember that coaches are employees and people too.




Revenue Generation and Risk Management Fundraising


- Employment Issues
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- Other Operational Risks – Travel



Fundraising – The Basics


- Raising money for your athletic programs are done through the:
 - Institution’s advancement office
 - Athletic department
- Collaborate!
- Assess your needs and prioritize
 - Annual vs. capital
 - Departmental vs. sport-specific
 - Title IX issue?
 - Health and safety issue?





Fundraising – Title IX Implications

- Remember your Title IX obligations and educate your fundraising staff (including coaches)!
 - Three “bucket” compliance areas
 - Funding does not have to be the same but the tangible benefits have to be equitable
 - School could be on the hook to offset disparities if a donation and/or fundraising effort creates one
- Coaches need to be provided equal opportunity to fundraise (allow teams to use facilities, etc.)



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Fundraising – NCAA and Other Issues

- NCAA compliance and “booster” involvement
 - A booster is any individual who has attended the school, purchased game tickets, or made a financial contribution
 - Generally, boosters **CANNOT**:
 - Engage in recruiting activities that are designed to secure a prospect’s enrollment
 - Provide extra benefits (cash, gifts, free or reduced admission to events or meals, etc.)
 - The NCAA holds the institution accountable for the actions of its fans, businesses, and donors
 - Employment of student-athletes is permissible with parameters
 - NIL and boosters – STAY TUNED for Session 4!
- Protect your student-athletes and staff
 - Boosters are often at functions where there is alcohol involved

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Fundraising – Key Takeaways

- Understand the relationship between the university and athletic department
 - Develop coordinated efforts
- Train and educate those raising money for athletics (including advancement office on campus & coaches!) on Title IX implications
- Have conversations with donors about the importance of Title IX
- Make sure donors are following the NCAA bylaws
 - Make sure they are not involved in the recruiting process
 - Be proactive by providing rules education

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Revenue Generation and Risk Management

Multimedia Rights

Multimedia Rights ("MMR") **Bricker Graydon**

Determine what rights you (versus your conference) hold
Models: Internal & External

MMR – Key Takeaways **Bricker Graydon**

- Review MMR contracts (if you have them) and understand the details
 - Know when the term of each contract expires
- Create a strong profile to sell your brand
 - Competitive teams
 - Community engagement

- *You own your rights*
- *You can monetize your rights*
- *You have to protect your rights*

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Revenue Generation and Risk Management Licensing

Licensing – Trademarks and Logos 

- A trademark is a word, phrase, symbol, design, or combination of those things that identifies goods and services.
 - "Trademark" is used for goods
 - "Service Mark" denotes a service
- Trademarks and service marks can be *registered* with the state and federal governments.





Licensing Programs 

- Licensing through a **Licensing Program** provides incremental revenue generation to the institution.
 - For example, OSU stated it generates \$12.5M annually
- Models:
 - **Internal** (at the institution) - Institution handles registration, licensing, enforcement
 - **External** (through third parties) - Third party handles most aspects of the licensing program and is able to help with enforcement. Take a cut off the revenue.

If partnering with **external** licensing program, consider the following as you contemplate partnerships.

- *Who should your licensing company be?*
 - There are options: negotiate to find the best one for your institution.
- *What functions do you want them to encompass?*
 - Developing and negotiating deals? Overall program management? Enforcement in the event of infringement?


 **Licensing – Key Takeaways** 

- Determine if (and how) licensing exists on your campus
- There is incremental revenue associated with selling products with those marks
- Have a relationship with the person on campus responsible for licensing
- Understand how enforcement of your marks work




Revenue Generation and Risk Management Facilities

- Employment Issues
 - Coaches Contracts & Compensation
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 - Facilities
- Other Operational Risks – Travel



Facilities

- Scheduling difficulties
 - Limited amount of space + shared by multiple sports
 - Remember your Title IX obligations
- Revenue opportunity: **Rent out facilities**
 - Local club teams, private instruction, camps/clinics, etc.
 - Not just for sports! Other non-athletic events
 - Opportunity for collaboration with other offices on campus
 - Be creative!





If you do rent out athletic facilities....

- Consider your legal risks and mitigate those!
- Legal risks include (but are not limited to) premise liability, minors on campus, etc.
- Mitigate risk by having strong facility rental contracts and/or participant waivers
 - Get your legal counsel involved!
 - Outline duties and responsibilities of the parties
 - Who can sell concessions?
 - Who is staffing the event?
 - How to handle damages to property?
 - Insurance?





Facilities – Key Takeaways



- Educate facilities and operations team on Title IX implications
- Be creative
- Determine if there are policies and procedures already on your campus that you can adopt and/or modify for athletic facility rentals
- Get your legal counsel involved and prepare template rental contracts and waivers for participants
- Make sure rental contracts are signed by someone who has proper signing authority (good rule of thumb: don't have coaches sign!)

“Guarantee Games”



- Growing in popularity at all levels, all sports
- Contract considerations:
 - Has your general counsel seen these?
 - Do you know if there are clauses prohibited by your institution?
 - State school and indemnification clauses
 - Cancellation of games, etc.
 - Are they signed by a person with authority to bind the institution?

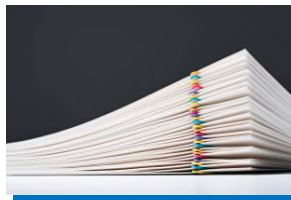




Key Takeaways – Revenue Generation



- Audit and inventory all these areas and leverage your position on campus
 - Fundraising
 - Multi-media rights
 - Licensing
 - Facilities
 - Guarantee Games





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Other Operational Risks – Travel



Travel

- Mode of transportation
 - Health & safety issues
 - Who is driving the vehicles, etc.
- Hotel and accommodations
 - What is your travel and/or housing policy at your institution?
 - Good idea to not have athletes share beds – might be looking at a funding issue.





International Travel

- Prepare a **policy and procedure** for coaches to plan international trips
 - Collaborate with your global outreach or international student office on campus for assistance
 - Use the [U.S. Department of State Traveler's Checklist](#) to help plan
 - Safety and security information, health precautions, currency limitations, other information
 - Consider the **NCAA bylaws** and foreign tour requirements (timing, max # of contests, insurance limitations)
 - Have an emergency plan, including requiring traveling students to complete an emergency medical information form
 - Train your student-athletes, coaches, and staff on trip expectations, country information, emergency plans and procedures, etc.



Use of third party **travel agencies** – have legal counsel review those contracts!

 **Key Takeaways** **Bricker
Graydon**

- Whenever dealing with contracts in the athletic department, work with your procurement office and legal counsel
 - Make sure certain contracts have proper review and vetting process
 - Make sure those who sign contracts have that authority
- Develop policies and procedures related to domestic and international travel

Questions? **Bricker
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[REGISTER HERE!](#) For the **last session** of The College Athletic Department Toolkit Series

- *Tuesday, October 10, 2023* - Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"



Higher Education Free Webinar Series – Register [here!](#)

- Friday, October 6, 2023 – Employment Law Update


The College Athletic Department Toolkit Series: Balancing Compliance and Competitive Success in an Era of Change

October 10, 2023
12:00 p.m. – 1:30 p.m.

**Session 4:
The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"**

Disclaimer



This isn't legal advice!
(but please ask questions if you have them)

Your Presenters





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Joel Nielsen
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About this Series **Bricker Graydon**

- TODAY - Tuesday, September 19, 2023
 - Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know
- Tuesday, September 26, 2023
 - Session 2: Student-Athlete Conduct and Health, Safety, and Well-being
- Tuesday, October 3, 2023
 - Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate
- Tuesday, October 10, 2023
 - Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"



Agenda **Bricker Graydon**

- Name, Image, and Likeness
- Student-Athlete Employment
- NCAA Enforcement
- New Technology
- What's Next? Realignment, Restructure and Transformation



- Topics from the survey are in your materials

- Name, Image, and Likeness
- Student-Athlete Employment
- NCAA Enforcement
- New Technology
- What's Next? Realignment, Restructure and Transformation

Name, Image and Likeness

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Recent NIL Deals **Bricker Graydon**

Area Park Productions

You asked: We listened!

Celebrate the Cyclone win by Purchasing More Ham and Bacon!

#Porktober23 #AreaPark

Take it from these guys.

5:48 PM - Oct 23, 2023

Area Park Productions

Official merchandise available now! Shop the Cyclone store to get your school spirit on the go. We have a variety of apparel and accessories to choose from. Don't miss out on the best merchandise to wear with pride. Shop now!

#AreaParkProductions

4:44 PM - Oct 23, 2023

Area Park Productions

Great opportunity for our guys today thanks to @AreaParkProductions!

4:52 PM - Oct 23, 2023

[Link to story](#)

NCAA Guardrails **Bricker Graydon**

- Guidance:
 - **Third party involvement** (boosters, collectives)
 - Division I (May 2022)
 - Division II (July 2022)
 - Division III (October 2022)
 - Q&A – Division I and II
 - **Institutional Involvement**
 - Division I (October 2022)
 - Division III (April 2023)
- Enforcement: Miami (FL) (Feb 2024)
 - Focused on boosters and recruiting conversations
 - Standard of review for evaluating NIL violations
- Memos: NCAA strongly encourages schools to follow NCAA legislation, even if state law permits other activities

General Rule: Boosters (including collectives) cannot engage in recruiting activities with PSA for a recruiting purpose (cannot encourage a prospects enrollment at an institution).

[Link](#)

Institutional Involvement - NCAA **Bricker Graydon**

- Permissible and Impermissible situations under:
 - EDUCATION AND MONITORING
 - SUPPORT FOR STUDENT-ATHLETE NIL ACTIVITY
 - SUPPORT FOR NIL ENTITY/COLLECTIVE
 - NEGOTIATING, REVENUE SHARING AND COMPENSATING

[Link to story](#)

More detail...

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Support for Student-Athlete

- Assistance with deal
 - Can *inform* student-athletes about potential NIL opportunities
 - Can work with an NIL service provider to administer a "marketplace"
 - **Cannot** engage in negotiations
- Services and equipment
 - Can provide stock photos/graphics and arrange a space for student-athletes to meet collectives
 - **Cannot** provide free services or offer equipment that are not available to the general student body
- Promotion
 - Can promote student-athletes' NIL activities, but...
 - **Cannot** allow student-athletes to promote while they are participating in required athletic activity

Support for NIL entity


- School personnel
 - Can assist an NIL entity with fundraising through appearances or by providing autographed memorabilia but cannot donate cash directly
 - **Cannot** be employed by or have an ownership stake in an NIL entity
- Requesting funds from donors
 - Can request donors provide funds to collectives and other NIL entities, provided the schools do not request that those funds be directed to a specific sport or student-athlete.
- Tickets and suites
 - Can provide tickets or suites to NIL entities through sponsorship agreements, provided...

Revisions to the Guidance?

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Dan Murphy (@danmurphy1317)

Here's a look at some of the proposed changes that the NCAA group is considering (new ones are in red):



"The dollars that have flowed into our space are real," Alberts said. "Coaching salaries, AD salaries, let's be honest about where we are today. I'm not opposed to student-athletes participating in the sharing of ultimately what they're helping to generate. ... Change is hard, but ... I'd rather get busy changing than slowly dying a death by 1,000 cuts."

[Link to story](#)

NCAA Movement

Bricker Graydon

- October 3, 2023 the NCAA announced proposals:
 - ✓ Creation of a voluntary registry for NIL service providers, such as agents and financial advisors
 - ✓ Requirements for disclosure of NIL deals worth more than \$600 by athletes to their schools
 - ✓ Development of a standardized NIL contract
 - ✓ Education programs for both high school prospects and college athletes



[Link to story](#)

**Bricker
Graydon**

First NIL lawsuit

- The contract between Dexter and Big League Advance Fund II, LP:
 - Dexter gets \$436,485 for the use of his NIL during an "initial term" and an "extended term"
 - BLA gets 15% of pre-taxed NFL earnings (potentially over \$1M for his initial deal!)
- Dexter is arguing that the deal is invalid under Florida's NIL law and Florida's Athlete Agent Act

Florida legislator says Bears DT Gervon Dexter's NIL deal violated law

Mark Schlabach, ESPN Senior Writer
Nov 2, 2023, 10:30 AM ET

Do these deals call for increased oversight and regulation?

[Link to story](#)

**Bricker
Graydon**

Disclosure and public records


- What happens when a request comes in for your athlete's NIL contract?
- First, evaluate what NIL records your university maintains.
- Second, evaluate your FERPA considerations and options (PII, redaction, etc.).

Name	Sport	Position	Number of NIL contracts	Total NIL compensation	Parties to the contract
Student-Athlete	Football	Quarterback	2	\$122,000	Star Car Dealership, Apparel Store

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Structure of Collectives

- Collectives and their contractual arrangement with institutions
 - Permissible under NCAA guidance?
- Impact of coaching changes and collective support
 - How sustainable are collectives when dealing with coaches transitions?



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Not just P5

- Division II and III collectives
- Opportunity for local partnerships and to connect with alumni

7926

Empowering the student-athletes of Centre College to profit from their name, image and likeness.


We have a newly formed NIL committee. We will be creating a policy and guidelines and working with the athletic department to ensure compliance.

[Link to story](#)

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NIL & Title IX

- Focal point of legal implications surrounding NIL
- Collectives: the closer a collective is aligned with an institution, the more likely Title IX will apply
- Remember your "benefit and treatment" areas!



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Is it worth it?

- For you? Internal NIL positions at institutions are growing, especially at the P5 level (<https://www.nilnewsstand.com/directory-nil-directors-and-staff>)
 - What's in the name?
- For your boosters? Donations to *collectives* likely not tax deductible based on IRS recent guidance

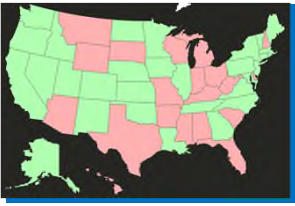
Name, Image and Likeness Coordinator	Assistant Athletics Director for NIL and Compliance	Director of External Operations/NIL Liaison	Assistant Coach/Director of NIL	NIL Athletic Marketing Manager, Altius Sports Partners
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[Link to story](#)

Federal legislation **Bricker Graydon**

	Notable Provisions
College Athlete Economic Freedom Act	<ul style="list-style-type: none"> International students can engage in NIL Revenue sharing provision Collectives registering with FTC
★ The Protecting Athletes, Schools and Sports Act of 2023	<ul style="list-style-type: none"> *endorsed by NCAA President Charlie Baker Protections for colleges Transparency of deals Limitation on transferring Health and safety provisions Collectives required to be affiliated with a university Establishing a Uniform Standard Contract
Student Athlete Level Playing Field Act	<ul style="list-style-type: none"> FTC clearinghouse for NIL deals Ban recruiting inducements, ensure student athletes are NOT employees
College Athletes Protection and Compensation Act of 2023	<ul style="list-style-type: none"> Central oversight entity Health and safety provisions

High School & NIL **Bricker Graydon**



- The landscape
 - Permitted: 30 states (and D.C.)
 - Not Permitted: 20 states
- Important because you may have incoming students who may be from a state where NIL was allowed in high school

Link to story

Student-Athlete Use of School Marks **Bricker Graydon**

- First, understand your school's trademark portfolio.
- Second, understand how your school allows its trademarks to be used.
- Third, double-check your applicable state NIL laws.
- Protect the brand!

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What you can do now

- Know your school's marks and how they are managed.
- Develop (and refine) how marks can be used.
- Educate student-athletes on mark usage.
- Police your marks and understand the consequences of doing so and of not doing so.

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Alston payments

- Don't underestimate!
- Flexibility to put parameters in place surrounding *Alston* payments
- *House v. NCAA*
 - As of last week, certified class action lawsuit which could mean billions for the NCAA

"I'd like to stress that the one thing that will help all athletes, more than NIL, is funding the Alston stipends (\$5,980) this year," [UCLA](#) quarterback [Chase Griffin](#), who was named the Male Athlete of the Year at the inaugural NIL Summit, previously told Ong in an email. "That is honestly more than most athletes are making on NIL."

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Key Takeaways

- Educate your student-athletes, coaches, and staff
- Familiarize yourself with the state law.
- Follow NCAA (or NAIA) guidance.
- Analyze whether you want/need an internal NIL position
- If applicable, identify a staff member to engage and understand the state high school NIL law.
- Focus on *Alston* payments
- Be strategic and thoughtful about brand by student-athletes
- It's here to stay!



- Name, Image, and Likeness
- Student-Athlete Employment
- NCAA Enforcement
- New Technology
- What's Next? Realignment, Restructure and Transformation

Student-Athlete Employment



The latest...

California Assembly passes bill allowing college athletes to be paid by schools

News Release
10/10/2023
Published 11:10 am EDT on 10/10/2023

Dartmouth men's basketball team files petition to unionize with National Labor Relations Board

News Release
10/10/2023
Published 11:10 am EDT on 10/10/2023


Significant NLRB Move Will Aid Pursuit of College Athletes Becoming Employees

The organization plans to pursue unfair labor practice charges against USC, the Pac-12 and the NCAA.
10/10/2023

Explaining Johnson v. NCAA and What's at Stake in Wednesday's Court Hearing

A group of athletes is arguing that all college athletes should be recognized as employees. Here's where things stand and the impact this case could have.
10/10/2023

[Link to Dartmouth story](#), [Link to NLRB Story](#), [Link to California Story](#), [Link to Johnson v. NCAA](#)



Background

Money in College Athletics

Power Five Head Coaches Average Salary:

- \$6.2 Million (Men's Football);
- \$3.35 Million (Men's Basketball)

Advertising:

CFP 12 team format = \$2 Billion annually


ESPN Advertising Revenue is upwards of \$800 Million annually

➔

Frustration.

Sentiment: Everyone is making money except the athletes.

BUT, what of the "revered tradition of amateurism"?

Student Athletes As Employees (FLSA) 


- Fair Labor Standards Act (FLSA)
 - “Employee” – “any individual employed by an employer”
 - What does it mean to be “employed”?

2016 *Berger v. NCAA*
843 F.3d 285 (7th Cir. 2016)


Held: Student-athletes are **not** employees under the FLSA: 1) voluntary participation 2) tradition of amateurism.

2023 *Johnson v. NCAA*
Docket No. 22-1223 (3rd Cir.)

Question: **Can** student athletes be employees under the FLSA?

Student Athletes As Employees (NLRB) 

September 2021:	December 2022:	May 2023:	September 2023:
<p>Memorandum (21-187) from NLRB General Counsel. Guidance for institutions: Student athletes are employees under the NLRB. Signaling move away from Northwestern case.</p> <p>Misclassifying them as “student athletes” who are unable to take advantage of the Act has a chilling effect on Section 7 organizing and is an independent violation of the Act</p>	<p>NLRB’s Los Angeles office determined that an unfair labor practice charge filed against the NCAA, Pac-12, & USC had “merit” and could proceed.</p> <p>NLRB General Counsel stated that the finding was “based on a determination that the respondents were joint employers” and “maintained unfair rules and unlawfully misclassified football and basketball players as mere student athletes.”</p>	<p>Complaint and Notice of Hearing issued on May 18, 2023 in the USC case. Hearing will be in November.</p> <p>Complaint alleged the university misclassified the university’s scholarship, non-scholarship, and walk-on players as non-employee student athletes as opposed to employees.</p>	<p>Dartmouth Men’s Basketball petitioned to unenforce</p> <p>Hearing was held October 2023</p>

California HB 252: “College Athlete Protection Act” 

- Revenue generating college athletic programs to develop a trust fund that essentially pays college athletes a portion of the sports teams’ revenue.
- Under the proposed bill, student-athletes will receive **fair market value** compensation for their athletic participation.
- At least half of the revenue generated by each college team is reserved to compensate the athletes either **through grant-in-aid scholarships or revenue sharing payments**.
- The bill specifies that payments to college athletes would be capped at \$25,000 annually but athletes could receive any surplus upon graduation within six years.
- The College Athlete Protection Act also includes provisions for institutions to cover the medical costs for sports related injuries and insurance, guaranteed scholarships for six years, publicly updated information on Title IX compliance, and a prohibition preventing athletic programs for cutting varsity sports if the athletic director makes over \$500,000 per year.

Key Takeaways **Bricker Graydon**

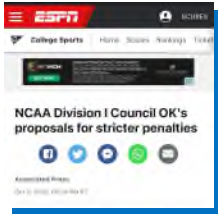
- **Tabletop:**
 - What would happen on your campus if student-athletes were deemed employees?
 - Entitled to minimum wages under FLSA? Yes.
 - How would they be classified under the FLSA? Salary or hourly? Overtime pay?
 - Equal Pay Act/Title IX/Title VII implications
 - Visa status for international students
 - How would that impact your operations?
 - What would it mean for your Title IX compliance obligations?

NCAA Enforcement **Bricker Graydon**

- Name, Image, and Likeness
- Student-Athlete Employment
- **NCAA Enforcement**
- New Technology
- What's Next? Realignment, Restructure and Transformation

Stricter Individual Penalties **Bricker Graydon**

- **Changes:**
 - ✓ Attach school level penalties to show-cause orders
 - ✓ Suspensions include all athletic activities
 - ✓ Naming individuals
 - ✓ **Public facing database with info on violations**
 - ✓ Expanding disassociation penalties for boosters
- Consistent with modernization efforts
- Good time to educate your coaches and staff!



Notification-of-transfer windows 


60 days

➔

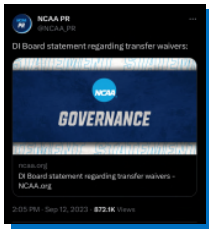
45 days

- Fall sports: 30 days in the fall, beginning seven days after a sport's championship selection, and 15 days in the spring (May 1-15).
- Winter sports: 45 days, beginning seven days after championship selection.
- Spring sports: 30 days in the spring, beginning seven days after a sport's championship selection, and 15 days in the fall (Dec. 1-15).



Enforcement of Transfer Waivers 

- Remember – 2 time transfers
- Universities challenging the NCAA and threatening anti-trust violations and investigations by state attorney generals
- Perspective: "Of those who entered the portal, 3% would be multiple time transfers who would require a waiver to compete immediately for this academic year if enrolled at a new school."
 - But – these are often high profile cases!



Addressing Sports Wagering 

- Protections for student-athletes, coaches, game officials from harassment and problem gambling
- Work with lawmakers for uniform laws:
 - ✓ Mandatory harassment reporting and penalties
 - ✓ Prohibited bettors list
 - ✓ Etc.



Key Takeaways **Bricker Graydon**


- Educate your coaches and staff members on NCAA legislation
- Take an inventory of your coaches/staff violations in preparation for database
- Have your coaches communicate with two time transfer student-athletes realistic expectations
- If filing or supporting a transfer waiver, provide sufficient information and understand the NCAA's interpretation of the waiver exceptions
- Educate your student-athletes on updated notification windows
- Have conversations with your student-athletes after hard losses and foster an environment where they can come to you


New Technology **Bricker Graydon**

- Name, Image, and Likeness
- Student-Athlete Employment
- NCAA Enforcement
- **New Technology**
- What's Next? Realignment, Restructure and Transformation

Wearables & Biometric Privacy **Bricker Graydon**



- Wearables can measure physical and physiological data points.
- Before using, ask:
 - Who will have access?
 - What will the data be used to determine?
 - Where will data be stored?
- Be mindful of:
 - Power imbalances with student-athletes.
 - How consent is obtained
- Consult counsel for intersection with:
 - FERPA
 - State biometric privacy laws
 - Deidentification



The Blessings & Burdens of AI 

- Performance Analysis
 - Personalized training
 - Player performance
 - Coach performance
 - Injury detection
- Fan Engagement & Experience
 - VR/AR
 - Streaming
 - Personalized content
 - Automated journalism

- Data Privacy/Security
- IP Rights
- Bias
- Ethical Use
- Associational Regulations

 **Key Takeaways** 

- If you are gathering data, understand:
 - What you are collecting
 - Why you are collecting it
 - Where it is being stored
 - Who has access to it
 - When it is deleted
- Technological advancements should be embraced but vetted.
- Know where expertise resides on campus (e.g., counsel, risk management, IRB)

- Name, Image, and Likeness
- Student-Athlete Employment
- NCAA Enforcement
- New Technology
- **What's Next? Realignment, Restructure and Transformation**

What's Next?
Realignment, Restructure and Transformation

"The business of college sports is growing faster than the governance of college sports" -Kevin Warren, former Big Ten commissioner

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Time for new model? Option 1

- Split off FBS football with oversight outside of the NCAA



[Link to story](#)

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Time for new model? Option 2

- National Governing Bodies model
- Ex. United States Golf Association ("USGA")




[Link to story](#)

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Time for new model? Option 3

- Regionalism
- Scheduling, travel and student-athlete well-being



[Link to story](#)

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Time for new model? (4)

- Professional sports model
- Economics of college football and basketball (based on TV money) aligning with that model



[Link to story](#)

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★ Key Takeaways

- Involve and support your student-athletes
- Evaluate if staying in your conference is sustainable for your institution; best fit, like-minded institutions, geography, etc.
- Maintain close relationship with university leadership
- Work with advancement office (and evaluate other revenue streams) to offset costs
- Understand the terms of your conference agreement
- Evaluate association membership (NCAA vs. NAIA)

Bricker Graydon

THANK YOU!

- Questions??
- Sign up for our Higher Education Free Webinar Series [here!](#)
- Participant feedback questionnaire coming soon

Contact us and find us
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