

## TITLE IX AND FINANCIAL ASSISTANCE IN THE NIL ERA<sup>\*</sup>

BARBARA OSBORNE<sup>\*\*</sup>

*This article discusses the intersection of Title IX and Name, Image, and Likeness (NIL) related spending in college athletics. Title IX of the Education Amendments of 1972 is landmark civil rights legislation that prohibits sex discrimination in all programs or activities at educational institutions that receive federal funding. Name, image, and likeness are three components of the rights of publicity, which became a change agent in college athletics when the NCAA allowed student-athletes to monetize their ability to capitalize on their NIL without jeopardizing their athletics eligibility on July 1, 2021. Student-athletes immediately took advantage of the opportunities, with \$917 million spent on NIL in the first year. However, that spending skewed heavily toward football and men's basketball players, with female athletes receiving less than 15% of NIL dollars. The Title IX regulations prohibit discrimination on the basis of sex, including in college athletics, and in providing financial assistance to student athletes. The financial assistance regulations specifically require schools to provide proportionate funding to student-athletes based on sex, with a disparity of less than 1% assumed to be compliant. The Title IX regulations also extend to third parties who provide financial assistance to student athletes with the assistance of the school or athletics department. Commercial sponsorship or endorsement contracts that are negotiated directly with student-athletes would not be subject to the Title IX regulations, but this type of NIL compensation is only about 20% of spending in the NIL marketplace. Most NIL funding or benefits are being provided by Collectives, which are organizations created by boosters or fans that are independent of the academic institution. However, these organizations are intrinsically tied to the athletics department, and, therefore, the Title IX financial assistance*

---

<sup>\*</sup> © 2025 Barbara Osborne.

<sup>\*\*</sup> Barbara Osborne is a Professor at the University of North Carolina at Chapel Hill with a joint appointment in the School of Law and Department of Exercise and Sport Science. She wants to thank 3L Allie Benson for her research assistance.

*regulations apply to funding provided to student-athletes for their NIL and need to be equitable.*

INTRODUCTION .....	32
I. TITLE IX HISTORY AND REGULATORY FRAMEWORK .....	36
II. OFFICE FOR CIVIL RIGHTS ENFORCEMENT AND CASE LAW .....	43
III. THE PROPOSED TITLE IX FINANCIAL ASSISTANCE FRAMEWORK FOR NIL ACTIVITIES COMPLIANCE .....	47
IV. APPLICATION OF THE TITLE IX FINANCIAL ASSISTANCE FRAMEWORK TO NIL ACTIVITIES .....	50
V. FINANCIAL ASSISTANCE AND THE NIL COMMERCIAL MARKETPLACE .....	54
VI. FINANCIAL ASSISTANCE AND NIL COLLECTIVES .....	55
A. <i>Examples of NIL Activity by Collectives</i> .....	56
B. <i>Applying the Financial Assistance Framework to Collectives</i> .....	59
VII. RELEVANCE OF THE FINANCIAL AID FRAMEWORK FOR THE FUTURE OF COLLEGE ATHLETICS .....	63
CONCLUSION .....	65

## INTRODUCTION

On July 1, 2021, the National Collegiate Athletic Association (NCAA), the largest voluntary membership governing body for college athletics, revoked all rules prohibiting student-athletes from profiting from their name, image, and likeness (NIL), dramatically changing the intercollegiate sports landscape.<sup>1</sup> The announcement provided little guidance other than that members were to comply with the laws of their state or create institutional policies if their state did not have a law.<sup>2</sup> Cell phone carrier, Boost Mobile, announced the first endorsement deal that used NIL, with then Fresno State basketball players Hanna and Haley Cavinder by putting their images on a billboard in New York City Times Square.<sup>3</sup>

---

1. *Interim NIL Policy*, NCAA (July 2021), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf).

2. *See id.*

3. *Boost Mobile Announces the First Name, Image, and Likeness Deal, In Time Square*, BILLBOARD INSIDER (July 2, 2021, 12:05 AM), <https://billboardinsider.com/55357-2/>.

Name, image, and likeness are components of the right of publicity.<sup>4</sup> The right of publicity is generally defined as the right of an individual, especially a public figure or celebrity, to control the commercial value of their name, picture, or likeness and to prevent others from unfairly appropriating this value for commercial benefit.<sup>5</sup> This right is typically recognized through common law or state statutes; there is no federal right of publicity.<sup>6</sup> NIL is commonly used in reference to college athletes' rights.<sup>7</sup>

The sudden change in NCAA policy was precipitated by simmering public sentiment that some student-athletes, particularly football and men's basketball players, were not being treated fairly as NCAA rules limited their "compensation" to an athletics scholarship and prohibited them from monetizing their NIL through endorsements.<sup>8</sup> Athletes filed lawsuits challenging the NCAA rules as early as 2004 when Olympic skier and University of Colorado football player Jeremy Bloom lost his case to keep his skiing endorsements and sponsorships.<sup>9</sup> Years later, the NCAA compensation rules continued to make headlines with *In Re: NCAA Student-Athlete Name & Likeness Licensing Litigation* (2013).<sup>10</sup> This litigation was a consolidated case class action claiming that the NCAA misappropriated student-athletes NIL in the EA Sports NCAA football video games in violation of the statutory and common law rights of publicity under California law.<sup>11</sup> Defendants EA Sports and Collegiate Licensing Company settled for \$40 million.<sup>12</sup>

---

4. INTELLECTUAL PROPERTY COUNSELING & LITIGATION, Ch. 18 Privacy, Publicity and Intellectual Property, § 18.02 [4][c] (Lester Horwitz & Ethan Horwitz eds., 2024).

5. *Id.*

6. *Id.* at 3.

7. David Ubben & Tess DeMeyer, *What is NIL, how has it changed college sports, and why are schools under investigation?*, THE ATHLETIC (Feb. 2, 2024), <https://www.nytimes.com/athletic/5245564/2024/02/02/nil-explained-ncaa-name-image-likeness-investigation/>.

8. See generally Julia Chaffers, *The Hypocrisy of the NCAA's Amateurism Model*, PRINCETON UNIV. (Mar. 4, 2020), <https://aas.princeton.edu/news/opinion-hypocrisy-ncaas-amateurism-model>; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

9. *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004).

10. *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

11. *Id.*

12. Tom Farey, *Players, game makers settle for \$40M*, ESPN (May 30, 2014, 11:18 PM), [https://www.espn.com/espn/otl/story/\\_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm](https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm).

The NCAA settled the right of publicity claims for \$20 million and provided a blanket eligibility waiver for current athletes who were compensated under the settlement.<sup>13</sup> Plaintiff Ed O'Bannon opted out of the settlement to put forth antitrust claims that the NCAA rules prohibiting schools from paying student-athletes for use of NIL restrained trade.<sup>14</sup> In *O'Bannon v. NCAA*, the Ninth Circuit held that the NCAA rule was a violation of antitrust law.<sup>15</sup> While the court agreed with the NCAA that amateurism was an important element of the college athletics market, extending the value of an athletic scholarship to include cost of attendance was a reasonable alternative that still promoted amateurism.<sup>16</sup>

Criticisms of the NCAA increased to a slow boil as California enacted the Fair Pay to Play Act in 2019 making it illegal for California universities to prohibit college athletes from receiving compensation.<sup>17</sup> Not wanting to be left behind, other states also enacted legislation,<sup>18</sup> creating a patchwork of laws that created anything but a level playing field and put the NCAA in the untenable position of having to sue its member institutions for complying with state laws or suing the states directly.

College athletics, particularly NCAA Division I institutions, have experienced rapid and unprecedented change over the past few years. In the first year of NIL, 2021–2022, spending was reported at \$917 million.<sup>19</sup> By 2024–25 that figure is projected to be \$1.67 billion.<sup>20</sup> Only 20% of the NIL activity involves compensation in the form of sponsorship or endorsement deals for student-athletes in the commercial marketplace.<sup>21</sup> Slightly more than three-quarters of these deals involve football players (76.6%), and all other athletes receiving less than the

---

13. *NCAA reaches settlement in EA video game lawsuit*, NCAA (June 9, 2014, 10:53 AM), <https://www.ncaa.org/news/2014/6/9/ncaa-reaches-settlement-in-ea-video-game-lawsuit>.

14. *O'Bannon v. NCAA*, 802 F.3d 049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

15. *Id.*

16. *Id.*

17. Fair Pay to Play Act, 2021 Cal. SB No. 26, ch. 159 (codified 2021).

18. *Tracker: Name, Image and Likeness Legislation by State*, BCS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> ((last updated July 28, 2023)).

19. OPENDORSE, NIL AT 3: THE ANNUAL OPENDORSE REPORT 3 (2024).

20. *Id.* at 5

21. *Id.*

remaining quarter: women's basketball (10.2%), men's basketball (8.6%), women's volleyball (2.9%), and women's track and field and cross country (1.6%).<sup>22</sup> Collectives<sup>23</sup> have created 80% of the overall NIL market opportunities, with emphasis on recruitment and retention for football (72.2%), men's basketball (21.2%), and baseball (3.6%) leaving only 3% for women's basketball (2.3%) and women's volleyball (0.8%).<sup>24</sup>

The NCAA has provided little additional guidance,<sup>25</sup> the private collectives NIL market has confused the meaning of NIL,<sup>26</sup> and lawsuits continue to challenge the NCAA regulations without regard for the impact on the majority of student-athletes.<sup>27</sup> The focus on college football and men's basketball purports a "those who make the most should get the most" mentality; this perspective does not take into consideration that intercollegiate athletics exists in a higher education environment, not a commercial marketplace.<sup>28</sup> Neither does it consider that the student-athletes in the most popular (as defined by fan support) sports are also those who are already getting the most within their athletics departments.<sup>29</sup> Most importantly, it fails to consider that

---

22. *Id.*

23. Collectives are organizations that were created soon after the NCAA loosened its NIL restrictions. They are separate from the athletics departments and schools, and typically pool funds from boosters and businesses to facilitate NIL deals for athletes. *See* Chase Garrett, *What are NIL Collectives And What Do They Do?*, ICON SOURCE, <https://iconsource.com/blog/nil-collectives/> (last visited Mar. 17, 2025).

24. OPENDORSE, *supra* note 19, at 5.

25. *See* Michelle Brutlag Hosick, *Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement*, NCAA (Jun. 30, 2021, 4:20 PM), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf); NCAA, NCAA DIVISION I,

INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES (2022).

26. *See infra* Part III.

27. *See generally In re Coll. Athlete NIL Litig.*, No. 20-cv-03919, 2023 WL 7106483 (N.D. Cal. Sept. 22, 2023) (order granting motion for certification of injunctive relief class); *Fontenot v. NCAA*, No. 1:23-cv-03076 (D. Colo. filed Nov. 20, 2023); *Tennessee v. NCAA*, 715 F.Supp.3d 1048 (E.D. Tenn. 2024).

28. *See generally* Barbara Osborne, *The Myth of the Exploited Student-Athlete*, 7 J. OF INTERCOLLEGIATE SPORT 143, 143 (2014).

29. *See* U.S. DEP'T OF EDUCATION, EQUITY IN ATHLETICS DATA ANALYSIS (2023), <https://ope.ed.gov/athletics/#/>; Eli Boettger, *An Analysis of College Football Return on Investment*, ADU, <https://athleticdirector.com/articles/analysis-of-college-football-return-on-investment/> (last visited Mar. 17, 2025).

educational institutions are required by law to prohibit discrimination based on sex under Title IX of the 1972 Civil Rights Act.<sup>30</sup>

The purpose of this research is to examine activity in the current NIL landscape to determine if and how Title IX may apply. First, we examine the history of Title IX, its regulatory framework, and relevant case law. Using this information, we create a model to analyze Title IX compliance related to NIL. This framework is then applied to examples of current NIL practices in the college sport industry to provide guidance for athletics administrators who are required to comply with Title IX while navigating the evolving NIL landscape. Continued ignorance of Title IX in the NIL space could create significant legal risk to colleges and universities, and this model framework may help mitigate those risks.

## I. TITLE IX HISTORY AND REGULATORY FRAMEWORK

Title IX of the Educational Amendments in the Civil Rights Act of 1972 is civil rights legislation enacted to prohibit sex discrimination in educational institutions that receive federal funding.<sup>31</sup> The legislation states: “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>32</sup>

Title IX was needed to address the significant educational inequities for girls and women that existed before its passage.<sup>33</sup> Girls had limited access to various academic courses, such as higher-level math and science courses as well as vocational track classes such as wood shop, auto mechanics, or metal shop.<sup>34</sup> Not all colleges and universities admitted women, and some of those limited admission to only the minimum necessary to meet quotas.<sup>35</sup> These institutions also

---

30. *See generally* Title IX, the Education Amendments of 1972 (1972), 20 U.S.C. §§ 1681–1688.

31. *Id.* § 1681(a).

32. *Id.*

33. *See generally* U.S. DEP’T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX (2012) (hereinafter DOJ EQUAL ACCESS).

34. Sarah Pruitt, *How Title IX Transformed Women’s Sports*, HISTORY (Aug. 16, 2023), <https://www.history.com/news/title-nine-womens-sports>; Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 18–19 (2003).

35. Pruitt, *supra* note 34.

typically required women applicants to be exceptional, by demonstrating higher grades and test scores than male applicants.<sup>36</sup> For those women admitted to co-educational institutions, scholarships and curricular options were also limited.<sup>37</sup> Women were directed toward teacher education programs and sometimes prohibited from professional schools such as engineering, medicine, and law.<sup>38</sup> Boys and men were also gender stereotyped in their academic choices, as they generally were not allowed to take home economics classes or nursing courses.<sup>39</sup>

Competitive athletics opportunities for women were also limited and, in many schools, nonexistent, before Title IX's enactment.<sup>40</sup> In the 1966-67 academic year, there were ten times as many intercollegiate athletics opportunities for male student-athletes than for females: 15,182 women versus 151,198 men.<sup>41</sup> When Title IX was passed in 1972, there were approximately 31,852 women participating in college sports, compared to 172,447 men.<sup>42</sup> Some leaders within sports and politics were concerned about the impact of Title IX on college athletics and tried to have the legislation amended.<sup>43</sup> They proposed exempting revenue-generating sports from Title IX and exempting donations or receipts generated by specific sports from being shared with women's sports.<sup>44</sup> While Congress rejected the notion that revenues from those sports could somehow be segregated and treated differently than any other athletics department revenue, the Javits Amendment was passed in 1974 which required the (then) Department of Health, Education, and Welfare to propose regulations for intercollegiate athletics including "reasonable provisions considering the nature of particular sports."<sup>45</sup>

---

36. DOJ EQUAL ACCESS, *supra* note 33, at 2.

37. *Id.*

38. *See id.*; DOJ EQUAL ACCESS, *supra* note 33, at 2, 4.

39. DOJ EQUAL ACCESS, *supra* note 33, at 2 n.7.

40. Samuels & Galles, *supra* note 34, at 18–19.

41. NCAA, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT (1956-57 THROUGH 2021-22) 129 (Oct. 27, 2022) (hereinafter NCAA PARTICIPATION RATES REPORT).

42. Samuels & Galles, *supra* note 34, at 18–19.

43. *See* 117 CONG. REC. 30406-07 (1971).

44. *See* CONG. RSCH. SERV., SUMMARY: S.2106—94TH CONG. (1975–1976); S. 2106, 94th Cong. § 3 (as reported to the Senate Committee on Labor and Public Welfare, July 15, 1975).HYPERLINK ["https://www.congress.gov/bill/94th-congress/senate-bill/2106?r=8&s=1"](https://www.congress.gov/bill/94th-congress/senate-bill/2106?r=8&s=1)

45. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612.

As required by the General Education Provisions Act,<sup>46</sup> the proposed Title IX Regulations were submitted to Congress for review in 1975.<sup>47</sup> During the review process, congressional representatives made several more attempts to limit Title IX's impact on revenue-generating sports.<sup>48</sup> These attempts were meant to exempt athletics from the scope of Title IX's non-discrimination mandate or, alternatively, to allow revenue-generating sports to retain their own revenue instead of requiring those funds to be distributed in a way that would provide equitable opportunities for all student-athletes.<sup>49</sup> Some proposals attempted to eliminate the Title IX Regulations entirely,<sup>50</sup> while others proposed eliminating the sections related to athletics programs and scholarships.<sup>51</sup> Excluding athletics from the scope of Title IX would have allowed athletics programs to continue to maintain their attention on revenue-producing men's sports rather than providing athletics opportunities for women and girls that were equitable to those available for men and boys.<sup>52</sup> Congress again rejected all such attempts and approved the Title IX Regulations<sup>53</sup> which were signed into law by President Gerald R. Ford.<sup>54</sup>

---

46. Education Amendments of 1974, Pub L. No. 93-380 § 504(2)(B)(2), 88 Stat. 561; 20 U.S.C. § 1232(f) (2000).

47. See CONG. RSCH. SERV., *supra* note 45 ("Provides that Title IX of the Education Amendments of 1972, relating to discrimination, shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity"); *Prohibition of Sex Discrimination, 1975: Hearing on S. 2106 Before the Subcommittee on Educ. of the Comm. on Labor & Public Welfare*, 94th Cong. 46-47 (1975), <https://files.eric.ed.gov/fulltext/ED136136.pdf>.

48. CONG. RSCH. SERV., SUMMARY: S. CON. RES. 46—94TH CONG. (1975-1976).

49. Samuels & Galles, *supra* note 34, at 20-21; see, e.g., Cong. Rsch. Serv., *supra* note 45 ("Provides that title IX of the Education Amendments of 1972, relating to discrimination, shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity").

50. See S. Con. Res. 46, 94th Cong. (1975); H.R. Con. Res. 310, 94th Cong. (1975); H.R. Con. Res. 311, 94th Cong. (1975); H.R. 8394, 94th Cong. (1975).

51. Samuels & Galles, *supra* note 34, at 21 (sharing that Representative Patsy Mink described these failed resolutions as an attempt to imply "that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX.")

52. H.R. 8394, 94th Cong. (1975).

53. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. §106.4 (1975).

54. See 34 C.F.R. § 106.1 (2024). As stated in the statute, all educational institutions that receive federal funding are prohibited from discriminating on the basis of sex. Educational institutions receiving federal funds are required to provide assurance of compliance with the statute or indicate they are taking remedial measures to comply. See *id*



The Title IX Regulations address every aspect of sex discrimination in education, including athletics.<sup>55</sup> Generally, institutions cannot provide any aid, benefit or service to a student that discriminates based on sex, and cannot aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.<sup>56</sup>

Because funding is important in any discussion regarding access to opportunities, including NIL activities,<sup>57</sup> the Title IX Regulations addressing financial assistance state:

[I]n providing financial assistance to any of its students, a recipient [of federal funding] shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; [or]

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex[.]<sup>58</sup>

The Title IX Regulations specific to athletic scholarships required that “ . . . athletic scholarships or grants-in-aid . . . must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”<sup>59</sup>

---

§ 106.4(a). Other broad policy rules include the requirements to designate a Title IX coordinator, disseminate a non-discrimination policy, and adopt grievance procedures. *Id.* § 106.8.

55. *Id.* § 106.21 (admissions process), § 106.32 (housing), § 106.37 (financial aid), § 106.40 (marital and parental status of students), § 106.51 (employment), § 106.41 (athletics). The regulations remain in effect today.

56. 45 C.F.R. § 86.31(a), (b)(2), (b)(6) (2024).

57. *See id.* (discussing the regulations that most directly relate to the NIL landscape in college athletics).

58. 34 C.F.R. § 106.37(a)(1)–(2) (2024).

59. *Id.* § 106.37(c).

In addition to the financial assistance regulations, the Title IX Regulations require equal participation opportunities and equal treatment for male and female athletes.<sup>60</sup> Equal participation opportunities include the quantity and level of competition.<sup>61</sup> Equal treatment for male and female athletes is measured across a non-exclusive list of athletics program components, including publicity, the provision of equipment and supplies and the provision of training and competition facilities.<sup>62</sup> Title IX does not require equal spending by sex, but wholistically measures whether the experience of the student-athletes by sex is equal.<sup>63</sup>

The Office for Civil Rights (OCR) within the Department of Health, Education and Welfare was charged with enforcing Title IX.<sup>64</sup> Just four months after the Title IX Regulations became effective, the OCR issued a memorandum to state education officials, local school superintendents, and college and university presidents to clarify expectations for compliance with Title IX.<sup>65</sup> The memorandum explained that for each listed program component included in the Title IX Regulations, Title IX requires comparison of the men's athletics program as a whole to the women's athletics program as a whole.<sup>66</sup> A disparity in one program component can alone constitute a Title IX violation if it is substantial enough to deny equality of athletic opportunity to students of one sex.<sup>67</sup> Identical programming is not required, and differences in treatment due to the application of gender-neutral rules are permissible, so long as the application does not create a discriminatory disparity in the experience for student-athletes based on sex.<sup>68</sup>

---

60. *Id.* § 106.41(c).

61. *Id.* § 106.41(c)(1).

62. *Id.* § 106.41(c).

63. *Id.* § 106.41(c). "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

64. *About OCR*, U.S. DEP'T OF EDUC. (Jan. 15, 2025), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

65. PETER E. HOLMES, *ELIMINATION OF SEX DISCRIMINATION IN ATHLETIC PROGRAMS* 3 (1975).

66. *Id.* at 8.

67. *Id.* at 7–8.

68. *Id.* at 8.

The OCR memorandum also reminded institutions that funding provided to a team or the athletics program from private sources “does not remove [the team or program] from the reach of the statute and hence the regulatory requirements.”<sup>69</sup> While the Department of Health, Education, and Welfare strengthened Title IX through additional direction to schools, lawmakers who opposed Title IX continued proposing amendments to limit the legislation’s reach within athletics, and specifically to limit its application to revenue-producing sports.<sup>70</sup> Amendments were also introduced to eliminate extracurricular activities broadly (which would include athletics)<sup>71</sup> as well as to narrow the scope of Title IX’s applicability to only those educational programs or activities that directly received federal financial assistance and those that are integral to the required curriculum.<sup>72</sup> Once again, all attempts to protect revenue producing sports or limit the scope of Title IX failed.<sup>73</sup>

On December 11, 1979, the OCR published *A Policy Interpretation: Title IX and Intercollegiate Athletics (Policy Interpretation)* to provide additional guidance for colleges and universities to comply and assess their compliance with Title IX in the athletics context.<sup>74</sup> The *Policy Interpretation* includes a detailed explanation of how the OCR determines Title IX compliance in intercollegiate athletics programs, adds two new program components (recruiting and support services) and provides a process to evaluate the components on the equal-treatment list.<sup>75</sup> By expressly referencing the many failed legislative efforts to exclude revenue producing sports from Title IX, *The Policy Interpretation* reiterated that football programs must comply with the prohibition against sex discrimination within the athletics program as a whole.<sup>76</sup>

---

69. *Id.* at 3; U.S. DEP’T OF HEALTH, EDUC., & WELFARE, *Elimination of Sex Discrimination in Athletic Programs* (Sept. 1975), <https://files.eric.ed.gov/fulltext/ED119583.pdf>.

70. Samuels & Galles, *supra* note 34, at 19–23.

71. *See* Amend. 389, 94th Cong., 2d Sess. (1976), 122 CONG. REC. 28136 (1976); *see also* S. 2106, 94th Cong., 1st Sess. (1975); 121 CONG. REC. 22778 (1975).

72. *See* S. 535, 95th Cong., 1st Sess. (1977); 123 CONG. REC. 2781 (1977).

73. *See* 122 CONG. REC. at 28147.

74. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413. (“to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses.”).

75. *See id.* at 71415.

76. *Id.* at 71419 (Appendix A.).

According to the *Policy Interpretation*, the test for athletics scholarships compliance requires funding for men and women athletes to be substantially proportionate to their participation rates, and any disparity must be explained by legitimate non-discriminatory factors.<sup>77</sup> It further explains that financial assistance includes forms other than scholarships, and when such “financial assistance is provided in forms other than grants, the distribution of” these benefits will also be measured by examining whether equivalent benefits are proportionately available to male and female athletes.<sup>78</sup>

Section B of the *Policy Interpretation* addresses Title IX’s equal-treatment analysis.<sup>79</sup> Determining whether an athletics program provides equal-treatment of men and women athletes requires educational institutions to examine the availability, quality and kinds of benefits, opportunities, and treatment for student-athletes of both sexes for each component listed and identify any disparities.<sup>80</sup> Then, the institution must examine whether any identified disparity can be justified by non-discriminatory factors (such as the unique needs of a particular sport).<sup>81</sup> The men’s program as a whole is compared to the women’s program as a whole to determine whether policies are discriminatory on their face or as applied, if the disparities are substantial and unjustified, or if the disparities are substantial enough to deny equality of athletics opportunity.<sup>82</sup>

In 1984, the Supreme Court did what the legislature failed to do and limited the scope of Title IX to only those educational programs and activities that directly received federal funding.<sup>83</sup> In *Grove City College v. Bell*, the Supreme Court concluded that Grove City College was subject to Title IX but applied a program-specific approach—only those educational programs and activities that received federal financial aid within the institution were subject to Title IX.<sup>84</sup> This limited the application of Title IX at Grove City College to their financial aid

---

77. *Id.* at 71415.

78. *Id.*

79. *d.* at 71415–17.

80. *Id.* at 71415.

81. *Id.*

82. *Id.* at 71417.

83. *See Grove City College v. Bell*, 465 U.S. 555 (1984).

84. *See id.*

program—the direct recipient of financial aid—rather than the institution as a whole.<sup>85</sup>

Congress disagreed with the Supreme Court’s narrow, program-specific application of Title IX; to overturn the Supreme Court’s ruling, Congress passed the Civil Rights Restoration Act on March 22, 1988.<sup>86</sup> This legislation adopted an institution-wide approach, specifying that *all* programs and activities at educational institutions that receive any federal funding directed to any part of the institution must comply with Title IX.<sup>87</sup> The plain language of Title IX and its implementing regulations, combined with Congress’s reaffirmed intent demonstrated in the Civil Rights Restoration Act, clearly establishes that intercollegiate athletics programs are subject to Title IX and that the benefits, opportunities, and treatment of male and female student-athletes must be equivalent.<sup>88</sup>

## II. OFFICE FOR CIVIL RIGHTS ENFORCEMENT AND CASE LAW

The following section details the decisions and laws that were developed to enforce Title IX. A person who believes a school is not complying with Title IX or has experienced discrimination they believe is in violation of Title IX has legal options to address this injustice. The OCR in the U.S. Department of Education is responsible for enforcing federal civil rights laws such as Title IX.<sup>89</sup> Individuals who believe Title IX has been violated may file a complaint with the OCR, and they do not need to have standing as the victim of the alleged discrimination as they would in a civil lawsuit.<sup>90</sup> Victims of discrimination have the option of filing an OCR complaint or filing a civil lawsuit; it is not necessary to exhaust administrative options before filing.<sup>91</sup> When the OCR investigates a complaint, it determines whether discrimination occurred and provides the complainant and the school with a letter

---

85. *See id.*

86. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28.

87. *Id.*

88. *See* Samuels & Galles, *supra* note 34, at 19.

89. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418.

90. *See OCR Discrimination Complaint Forms*, U.S. DEP’T. EDUC., <https://www2.ed.gov/about/offices/list/ocr/complaintintro.html> (last visited Sept. 4, 2024 ).

91. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) (“Unlike those statutes, Title IX has no administrative exhaustion requirement and no notice provisions. Under its implied private right of action, plaintiffs can file directly in court. . .”).

explaining the results of its investigation.<sup>92</sup> These documents are publicly available through the Department of Education Office for Civil Rights Recent Resolution search.<sup>93</sup> As of 2024, a search of that database elicited only eight OCR complaints relating to § 106.37(a)'s financial assistance regulations.<sup>94</sup> § 106.37(a) prohibits the school from discriminating on the basis of sex related to amounts, types or sources of financial assistance and also prohibits the school from engaging or assisting external funding sources which discriminate on the basis of sex.<sup>95</sup> A school can express interest to voluntarily resolve the complaint prior to the conclusion of the OCR's investigation and, if appropriate, OCR can decide to come to a resolution agreement.<sup>96</sup> Of the eight OCR complaints relating to § 106.37(a) and financial assistance, all were voluntarily resolved.<sup>97</sup>

The only court interpretation of the financial aid regulations comes from *Fisk v. Board of Trustees of the California State University*.<sup>98</sup> While this case is specific to athletics financial aid, it provides guidance on how courts could address financial assistance more broadly related to our analysis of financial assistance and NIL. This case addresses § 106.37(c), which states that schools must provide reasonable opportunities for athletic scholarships or grants-in-aid for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics.<sup>99</sup> Compliance is measured by whether there are "substantially equal amounts," of aid to men's and women's athletic programs or if the "disparity can be explained by 'legitimate, nondiscriminatory factors,'" with an unexplained disparity of 1% or more as a strong presumption that there is a violation.<sup>100</sup>

In *Fisk*, the "[p]laintiffs, 'past and current female varsity student-athletes at'" San Diego State University (SDSU) sued the

---

92. See *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T. EDUC., <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last visited Sept. 7, 2024).

93. See *OCR Search*, U.S. DEP'T. EDUC., <https://ocras.ed.gov/ocr-search> (last visited Sept. 22, 2024) (limiting database search to cases after 2013).

94. See *id.*

95. 34 C.F.R. §106.37 (2024).

96. U.S. DEP'T. EDUC., *supra* note 92.

97. See *OCR Search*, U.S. DEP'T. EDUC., <https://ocras.ed.gov/ocr-search> (last visited Sept. 22, 2024) (limiting database search to cases after 2013).

98. *Fisk v. Bd. of Trs. of the Cal. State Univ.*, No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at \*18-19 (S.D. Cal. Apr. 12, 2023).

99. *Id.*

100. *Id.*

school alleging, among other Title IX claims, unequal provision of financial aid.<sup>101</sup> Plaintiffs' relevant claims for this discussion included that they were harmed by SDSU's failure to provide proportional athletic financial aid to female student-athletes in the following ways: (1) being denied the opportunity to compete for and receive equal financial aid because of their sex (lost opportunity theory); "(2) they received smaller financial aid awards because of their sex (smaller financial award theory) . . . ." Ultimately, the court ruled that the plaintiffs have standing and a redressable claim that survived the defendant's motion for summary judgment.<sup>102</sup>

The plaintiffs argued that Title IX protects the "opportunity to compete for aid on an equal basis" and the court acknowledged that no other court has addressed the "argument in the Title IX financial aid context."<sup>103</sup> The plaintiffs analogized cases in the equal protection context to the relevant financial aid context, using three cases to do so.<sup>104</sup> First, the plaintiffs argued that the injury in fact "is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."<sup>105</sup> They proposed that "a plaintiff need only demonstrate that she is 'able and ready' to compete for the benefit 'and that a discriminatory policy prevents [her] from doing so on an equal basis.'"<sup>106</sup> The plaintiffs then cited to *Pederson*,

---

101. *Id.* at \*4.

102. *See id.* at \*69.

103. *Id.* at \*21.

104. *Id.* at \*21–22, \*28 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (explaining how the prospective student had standing to challenge the university's use of race in undergraduate admissions because he was "able and ready to apply" but had been denied the opportunity to compete for admission on an equal basis); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) ("[T]o establish standing under a Title IX effective accommodation claim, a party need only demonstrate that she is 'able and ready' to compete for a position on the unfielded team."); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 871 (5th Cir. 2000).

105. *Fisk v. Bd. of Trs. of the Cal. State Univ.*, No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at \*21–22 (S.D. Cal. Apr. 12, 2023) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666).

106. *Id.*; *see also Gratz*, 539 U.S. at 262 (2003) (holding prospective student had standing to challenge university's "use of race in undergraduate admissions" because he was

which held that “to establish standing under a Title IX effective accommodation claim, a party need only demonstrate that she is ‘able and ready’ to compete for a position on the unfielded team.”<sup>107</sup> The plaintiffs argued that providing proportionately fewer “financial-aid dollars to female student athletes is a similarly actionable ‘barrier’” to *Pederson*, where the court held the plaintiffs had standing because of a discriminatory barrier since the university was providing proportionally fewer participation opportunities for women compared to men.<sup>108</sup> Second, the plaintiffs argued that they have a “protected interest in the opportunity to be considered for financial aid [not to the scholarship itself] on equal footing, without invidious discriminatory barriers.”<sup>109</sup>

While the defendants argued that the plaintiff “must show a causal relationship between the alleged funding disparity and the diminution of her scholarship award,”<sup>110</sup> the court noted that none of the cases cited by the defendants addressed the lost opportunity theory that the plaintiffs brought in *Fisk*.<sup>111</sup> Stating that “there are multiple ways to allege injuries-in-fact for Title IX financial aid claims,”<sup>112</sup> the court found that the plaintiffs had sufficiently proved there was a barrier based on sex<sup>113</sup> that prevented them from competing equally with male student-athletes for proportional funding, and that they had the ability to

---

“able and ready to apply” but had been denied the opportunity to compete for admission on an equal basis).

107. *Fisk v. Bd. of Trs. of the Cal. State Univ.*, No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at \*22–23 (S.D. Cal. Apr. 12, 2023) (quoting *Pederson*, 213 F.3d at 871).

108. *Id.* at \*23.

109. *Id.*

110. *Id.* at \*25. See *Anders v. Cal. State Univ.*, No. 1:21-cv-00179-AWI-BAM, 2021 U.S. Dist. LEXIS 137899, at \*1, \*52 (E.D. Cal. July 22, 2021) (citing *Beasley v. Alabama State Univ.*, 966 F. Supp. 1117, 1126 (M.D. Ala. 1997); *Balow v. Mich. State Univ.*, No. 1:21-CV-44, 2021 U.S. Dist. LEXIS 181250, at \*1, \*20 (W.D. Mich. Sept. 22, 2021) (citing *Anders*, No. 1:21-cv-00179-AWI-BAM, 2021 U.S. Dist. LEXIS 137899, at \*18); *Beasley*, 966 F. Supp. at 1126 (stating that a plaintiff’s standing to assert a claim in this context “must hinge on overall disproportionate provision of support funds to athletes of each gender, and on whether she can show a relationship of causation from that overall funding disparity to the asserted withdrawal of promised financial support from her”).

111. *Id.* at \*9.

112. *Fisk v. Bd. of Trs. of the Cal. State Univ.*, No. 22-CV-173 TWR (MSB), 2023 U.S. Dist. LEXIS 64620, at \*26 (S.D. Cal. Apr. 12, 2023).

113. *Id.* at 29–30 (citing *Braunstein v. Ariz. Dep’t of Trans.*, 683 F.3d 1177, 1186 (9th Cir. 2012)).



compete for that funding.<sup>114</sup> The court found that the plaintiffs were able to provide sufficient facts to allege an injury-in-fact.<sup>115</sup>

While *Fisk* does not provide an interpretation of the financial assistance regulations of § 106.37(a), it is helpful in developing our model for assessing Title IX compliance for NIL activities. As a decision on motions to dismiss for a lack of standing, the *Fisk* case does not analyze the actual legal issues at hand.<sup>116</sup> However, *Fisk* shows that courts are willing to examine standing and redressability in Title IX financial aid regulation athletics cases, and to consider novel theories regarding the opportunity for equal treatment.<sup>117</sup>

### III. THE PROPOSED TITLE IX FINANCIAL ASSISTANCE FRAMEWORK FOR NIL ACTIVITIES COMPLIANCE

Based on the history of Title IX, its regulations, and other guidance documents, I propose the following framework for college and university athletics administrators to determine whether NIL activities comply with the financial assistance requirements. The inquiry begins by asking: does the activity involve a college or university that receives federal funding?<sup>118</sup> As stated in the statute, Title IX only applies to educational programs and activities at institutions that receive federal funding.<sup>119</sup> If the college or university receives federal funding, as the overwhelming majority do, the analysis can proceed.

Next, ask: who is making the payment? If the school is making the payment to a student-athlete directly, Title IX applies.<sup>120</sup> If a third party is making the payment to the student-athlete, an investigation is required as to whether the institution provides significant assistance to the third party.<sup>121</sup> This is discovered by asking if there is solicitation, listing, approval, provision of facilities, or other services or assistance provided to, or for, the third party or student-athlete.<sup>122</sup> If so, then Title

---

114. *Id.* at 28.

115. *Id.* at 31.

116. *See generally, id.* at \*31.

117. *Id.* at \*31.

118. Title IX, 20 U.S.C. § 1681(a); 34 C.F.R. § 106.37(a)(1)-(2) (2024).

119. 20 U.S.C. § 1681(a).

120. *See* 34 C.F.R. §§ 106.37(a)(1)-(2) (2024).

121. *See id.*

122. *See id.*

IX will apply. If the institution is not involved in any way, Title IX would not apply.

If Title IX applies, the next inquiry is whether the payment is based on sex.<sup>123</sup> Relevant questions include: is there a difference in a program, benefit, aid, or service that is based on sex?<sup>124</sup> Are there different amounts or types of assistance provided based on sex?<sup>125</sup> Is eligibility for this payment limited to a particular type or source or is different criteria applied for eligibility based on sex?<sup>126</sup> If the payment is being made because of a sex-based category, such as sex-based team membership, then the payments would need to comply with the equitable distribution framework for financial assistance. As mentioned, this framework requires total payments for male and female athletes in proportion with the total percentage of male and female athletes in the athletics program.<sup>127</sup> A disparity of less than 1% of the total funding will be presumed compliant with Title IX.<sup>128</sup>

*NCAA v. Alston* provides an example of a direct education-related financial award.<sup>129</sup> NCAA member institutions may provide student-athletes a cash award for academic achievement as a result of the 2021 decision in *Alston*.<sup>130</sup> Although these cash awards, commonly called “Alston payments,” are not NIL related payments, they are a financial award provided to the student-athlete that are not an athletic scholarship, thus triggering the financial assistance regulations.<sup>131</sup> If an athletics department has a policy that Alston payments are designated for athletes on a specific team, such as football, men’s basketball, or

---

123. See 20 U.S.C. § 1681(a).

124. See 45 C.F.R. § 86.31(a), (b)(2)(6) (2024).

125. See 34 C.F.R. § 106.41(c) (2024).

126. See 34 C.F.R. §§ 106.37(a)(1)-(2) (2024). See also *Cohen v. Brown Univ.*, 101 F.3d at 177 (1st Cir. 1996).

127. See 34 C.F.R. § 106.37(c) (2024).

128. Dear Colleague Letter from Mary Frances O’Shea, Dept. of Education, to Bowling Green State University at 10 (July 23, 1998), <https://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>.

129. *NCAA v. Alston*, 594 U.S. 69 (2021). The Court affirmed the judgement of the district court that the NCAA violated the Sherman Act (15 U.S.C.S. §1) by limiting education-related benefits that schools could provide to student-athletes. The District Court enjoined the NCAA from limiting cash awards for academic achievement to an amount not lower than the amount allowed for athletic achievement, which was \$5,980 at the time. *Id.* at 85. Thus, these cash awards for academic achievement, paid directly to student-athletes by their schools, have come to be known as “Alston awards.”

130. *Id.*

131. *Id.*; see 34 C.F.R. §§ 106.37(a)(1)-(2) (2024).

women's basketball, this is a sex-based criteria.<sup>132</sup> Using the current NCAA athletics scholarship limits, approximately eighty-five football players, thirteen men's basketball players, and fifteen women's basketball players would be receiving the payments.<sup>133</sup> The policy would not be in compliance because the ratio of male to female athletes receiving payments (87% to male athletes and 13% to female athletes) would not be within 1% of the overall ratio of male to female athletes in the department.<sup>134</sup> To become compliant, if the school wanted to provide Alston payments for all football and men's basketball players, then those same payments would need to be made to as many female athletes as necessary to reach proportionality with the ratio of male and female student-athletes at the institution.<sup>135</sup> Alternatively, the institution could also be in compliance by choosing to provide full funding to each of the women's basketball players and divide a proportionate amount of funding between all football and men's basketball players.<sup>136</sup> Title IX does not dictate how the institution distributes the funding; it simply requires that the funding the school provides be proportionate to the ratio of men and women athletes in the department.<sup>137</sup>

It is unclear how Alston payments should be counted if the payment is being made based on a non-discriminatory policy. It can be argued that the payments will be presumed equitable as long as the criteria for payment in the policy applies equally to all student-athletes.<sup>138</sup> If Alston payments are made under a policy that awarded funding based on the student-athlete achieving a certain grade point average, that payment would be based on a non-discriminatory academic criteria, not a sex-based criteria. As long as all student-athletes, regardless of sex or team membership, are eligible for these payments, and the qualifying criteria does not change based on the team or sex of the athlete, then it could be argued that the school would not have to monitor for proportionality in funding, as all similarly situated athletes would be treated equally.<sup>139</sup> However, it can also be argued that

---

132. O'Shea, *supra* note 128, at 6.

133. NCAA Division I 2023-24 Manual, Bylaw 15.5.5.1 Men's Basketball; Bylaw 15.5.5.1 Women's Basketball; Bylaw 15.5.6.1 Football FBS.

134. See 34 C.F.R. § 106.37(c) (2024).

135. *Id.*

136. *Id.*

137. *Id.*

138. See O'Shea, *supra* note 128 at 6.

139. *Id.*

because the school is *not* allowing those students outside of athletics who also meet the GPA standard to benefit from Alston awards, the athletics regulation for financial assistance should apply, which requires application of the proportionality standard.<sup>140</sup>

#### IV. APPLICATION OF THE TITLE IX FINANCIAL ASSISTANCE FRAMEWORK TO NIL ACTIVITIES

In allowing student-athletes to engage in activities related to their NIL, the NCAA provided a brief Interim Policy, effective July 1, 2021, to guide member institutions.<sup>141</sup> Highlights of the Interim Policy include:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located.<sup>142</sup> Colleges and universities may be a resource for state law questions.<sup>143</sup>
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.<sup>144</sup>
- Individuals can use a professional services provider for NIL activities.<sup>145</sup>
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.<sup>146</sup>

Under the interim policy, schools are allowed to be a resource for student-athletes' questions about state law and for gathering information regarding student-athlete NIL activities.<sup>147</sup> Using the framework, and assuming a school receives federal funding, a school would be directly involved as a resource for state law questions and for monitoring NCAA compliance that student-athlete NIL activities are consistent with school and conference rules—Title IX would apply. Because these activities do not involve financial assistance, the

---

140. See 34 C.F.R. § 106.37(c) (2024).

141. *Interim NIL Policy*, NCAA (July 2021), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf).

142. Brutlag Hosick, *supra* note 26.

143. *Interim NIL Policy*, *supra* note 143.

144. *Id.*

145. *Id.*

146. *Id.*

147. See *id.*

Financial Assistance Framework would not be applied. However, because a university provides services to student-athletes, the equitable treatment regulations will apply.<sup>148</sup> To provide equitable treatment, provision of resources and monitoring for compliance should not be based on team membership but made equally available for all student-athletes.<sup>149</sup>

Many NCAA member institutions created Athletics NIL Policies to identify institutional support and resources as well as balance institutional interests with student-athlete interests.<sup>150</sup> Institutions sought to mitigate risks by reinforcing state laws (where applicable) and NCAA rules, while also promoting relationships with promotional and educational partners.<sup>151</sup> For example, the University of North Carolina (UNC) Athletics' NIL policy states that: (1) student-athletes must disclose NIL agreements to the Athletic Department via Compass;<sup>152</sup> (2) any use of intellectual property must be approved by University Licensing; (3) student-athletes must have pre-approval to enter into NIL agreements with sponsors of the University or entities that compete with sponsors of the University; and (4) student-athletes need approval for use of athletic department facilities.<sup>153</sup> In applying the financial assistance framework, UNC's policy does not indicate any funding flowing from the institution to the student-athletes.<sup>154</sup> Additionally, the policy applies to all student-athletes, regardless of sex.<sup>155</sup> However, equal treatment provisions would warrant tracking of University Licensing approvals for use of intellectual property, athletics

---

148. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (proposed Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86.37(c)).

149. *Id.*

150. Anita M. Moorman, Adam Cocco, & Barbara Osborne, Presentation at the Sport and Recreation Law Association Annual Conference: An Examination of the Influence of State NIL Legislative Requirements on NIL Policy Development and Implementation of NIL Initiatives Among Universities in the ACC (Feb. 2024). Most NIL policies included clauses restricting endorsements that conflicted with university sponsors or involved prohibited categories such as gambling, firearms, alcohol, or adult entertainment; required permission for use of institutional intellectual property and/or facilities; required disclosure of athlete NIL deals to the athletics department.

151. *Id.*

152. Compass is a proprietary platform provided by Learfield to assist athletics departments with compliance monitoring. *Compass NIL*, LEARFIELD, <https://www.learfield.com/schools/compass-nil/> (last visited Mar. 5, 2025).

153. *UNC NIL Policy*, UNIV. OF N. CAROLINA ATHLETICS (Feb. 14, 2023), [https://goheels.com/documents/2023/2/14/UNC\\_NIL\\_Policy\\_2.14.23.pdf](https://goheels.com/documents/2023/2/14/UNC_NIL_Policy_2.14.23.pdf).

154. *See id.*

155. *See id.*

department approval for student-athlete endorsement opportunities with university sponsors or sponsors who conflict with a university sponsorship, and approval for use of athletic department facilities to ensure equal opportunities and treatment of athlete requests based on sex.<sup>156</sup>

Clemson University's (Clemson) NIL policy includes a clause that allows the university and its employees to transmit information regarding NIL opportunities to student-athletes and to provide student-athletes' contact information to potential sponsors for NIL purposes.<sup>157</sup> Further, the policy requires any Clemson employees, coaches, and staff obtain an Athletic Compliance clearance prior to communicating with or engaging with a collective.<sup>158</sup> Clemson's NIL policy does not provide any direct payments to student-athletes, but it does provide more direct involvement in connecting student-athletes with financial opportunities. This additional level of involvement would require scrutiny as to whether there are differences in benefits, aid or services based on team membership (which is a sex-based category).<sup>159</sup> If so, then the financial assistance proportionality provision of less than 1% would apply;<sup>160</sup> if not, then the general Title IX equal treatment provisions would apply.<sup>161</sup>

Beyond the NIL policy, institutions have various contracts with third parties to provide NIL services. For example, the UNC Athletics Department has contracts with several third-party service providers: Altius, Brandr, INFLCR, and Compass.<sup>162</sup> My proposed Title IX analysis would require examining whether the institution is providing

156. See 34 C.F.R. § 106.41(c) (2024); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (proposed Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86.37(c)).

157. *Name, Image, and Likeness Information Page*, CLEMSON TIGERS (June 27, 2023), <https://clemsontigers.com/nilinfo/>.

158. See *id.*

159. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415 (proposed Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86.37(c)).

160. O'Shea, *supra* note 128.

161. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415 ("When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes.").

162. Information acquired through publicly available documents, *supra* note 155, 159, 162.

significant assistance to the third party.<sup>163</sup> The Altius contract provided the athletics department with consulting services related to NIL policy development which is purely an administrative endeavor.<sup>164</sup> Similarly, the Compass contract provides employees and administrators, student-athletes, boosters and donors with education and training on NIL, tools for measuring participation, engagement, and comprehension of NIL, tracking of NIL activity for student-athletes, a centralized source for NIL communication, and data and reports for NIL activities.<sup>165</sup> The services provided under these contracts do not involve payments to student-athletes, so the Financial Assistance Framework is not triggered;<sup>166</sup> services are provided to all student-athletes, so the equal treatment provisions would be satisfied as well.<sup>167</sup>

The Brandr<sup>168</sup> contract was for services related to the development of a group licensing program for UNC athletics.<sup>169</sup> This contract involves former men's basketball student-athletes.<sup>170</sup> It is unclear whether Title IX would apply to services involving former student-athletes as the regulations refer to "male or female participants in the athletic program . . . ."<sup>171</sup>

The INFLCR contract with UNC provides a platform for UNC student-athletes to manage brand ambassador social media channels and content.<sup>172</sup> INFLCR hosts an exchange (the exchange) to connect student-athletes with NIL deals by facilitating connections, providing

163. See *Altius Agreement*, UNIV. OF N. CAROLINA ATHLETICS (May 15, 2021), [https://goheels.com/documents/2021/9/16/Altius\\_UNC\\_Agreement.pdf?id=25945](https://goheels.com/documents/2021/9/16/Altius_UNC_Agreement.pdf?id=25945). Altius Sports Partners is a consulting company that provides NIL education, strategies, and infrastructure plans for its institutional clients. ALTIVUS SPORTS PARTNERS, <https://altiuspartners.com/>.

164. *Compass Agreement*, UNIV. OF N. CAROLINA ATHLETICS (June 15, 2021), [https://goheels.com/documents/2021/9/16/Compass\\_UNC\\_Agreement.pdf?id=25946](https://goheels.com/documents/2021/9/16/Compass_UNC_Agreement.pdf?id=25946).

165. *Compass Agreement*, UNIV. OF N. CAROLINA ATHLETICS (June 15, 2021), [https://goheels.com/documents/2021/9/16/Compass\\_UNC\\_Agreement.pdf?id=25946](https://goheels.com/documents/2021/9/16/Compass_UNC_Agreement.pdf?id=25946).

166. See 34 C.F.R. § 106.37(a)(1)–(2) (2024).

167. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415.

168. The Brandr Group is a consulting firm that assists universities with a variety of NIL related services. *About Us*, BRANDR GROUP, <https://thebrandrgroup.com/about-us/> (last visited Feb. 15, 2025).

169. See *Brandr Agreement*, UNIV. OF N. CAROLINA ATHLETICS (Nov. 12, 2020), [https://goheels.com/documents/2021/9/16/Brandr\\_UNC\\_Agreement.pdf?id=25947](https://goheels.com/documents/2021/9/16/Brandr_UNC_Agreement.pdf?id=25947).

170. *Id.*

171. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415.

172. *INFLCR Agreement*, UNIV. OF N. CAROLINA ATHLETICS (June 4, 2020), [https://goheels.com/documents/2021/9/16/INFLCR\\_UNC\\_agreement.pdf?id=25948](https://goheels.com/documents/2021/9/16/INFLCR_UNC_agreement.pdf?id=25948).

direct payments to the student-athletes, and automating disclosure through the INFLCR compliance ledger.<sup>173</sup> While UNC employees may not negotiate deals or contracts, they can direct student-athletes to the exchange.<sup>174</sup> Finally, the UNC compliance office approves requests by potential sponsors to register for the exchange.<sup>175</sup> In the case of INFLCR, a third party is making financial payments to student-athletes, and there is significant involvement by the institution, so the Title IX financial assistance framework applies.<sup>176</sup> As none of the services provided are based on sex (services are available to all student-athletes equally), the equal treatment provisions are satisfied.<sup>177</sup> The UNC Compliance Office should monitor requests by potential sponsors to determine whether there are any disparities in approvals based on the sex of the team or athlete which would trigger the financial assistance rule.<sup>178</sup>

#### V. FINANCIAL ASSISTANCE AND THE NIL COMMERCIAL MARKETPLACE

When the NCAA implemented their interim policy allowing student-athletes to receive compensation for their NIL, these opportunities were intended to come from the commercial marketplace and not be related to pay for play.<sup>179</sup> The NIL commercial marketplace includes deals made between a student-athlete and a commercial entity, typically to promote or endorse a business, product or service.<sup>180</sup> Since 2021, student-athlete NIL deals in the commercial marketplace continue to grow, but such activity is only 20% of the NIL market.<sup>181</sup> Individual athlete endorsements are purely market transactions: the student athlete works directly with the company (perhaps with the help of a marketing

---

173. *Id.*

174. *Id.*

175. *Id.*

176. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71415.

177. *Id.*

178. 34 C.F.R. § 106.37(a)(1)–(2) (2024).

179. Michelle Brutlag Hosick, *NCAA adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx#:~:text=Interim%20policy%20goes%20into%20effect%20Thursday%20%22This,likeness%20opportunities%2C%22%20NCAA%20President%20Mark%20Emmert%20said.>

180. OPENDORSE, *supra* note 19, at 3.

181. *Id.* at 5.



agent, attorney, or NIL platform) and engages in marketing activities to promote the product, organization, or event for compensation as specified in a contract.<sup>182</sup> This is the actual use of the athlete's name, image, and likeness in the commercial marketplace.<sup>183</sup> In this case, there is no institutional involvement in facilitating or maintaining this type of transaction and the Title IX financial assistance regulations would not apply as the educational institution that receives federal funding is not providing the activity nor substantially assisting with the transaction.<sup>184</sup>

## VI. FINANCIAL ASSISTANCE AND NIL COLLECTIVES

The NIL commercial marketplace is distinct from financial assistance provided by collectives.<sup>185</sup> When college athletes became eligible to benefit from their own name, image, and likeness, several prominent alumni and donors of the University of Oregon (Oregon) launched Division Street in September 2021 to empower Oregon student athletes and elevate their NIL opportunities.<sup>186</sup> Division Street is considered to be the first NIL collective. There are now more than 200 collectives, for-profit, or not-for-profit companies established to provide boosters, companies, and other interested parties the opportunity to contribute financial resources to athletes at the specific institution that the collective was created to support.<sup>187</sup>

The NCAA issued additional NIL Guidance in May 2022 to address concerns about “booster” involvement in promoting athletics interests.<sup>188</sup> Without specifically using the term “collective,” the NCAA referenced third-party entities promoting and supporting specific institutions by providing NIL opportunities to prospective and current student-athletes. The guidance noted that third-party promotions trigger

---

182. *Id.*

183. 2 Intellectual Property Counseling & Litigation § 18.02(c) (2024).

184. *See* 34 C.F.R. § 106.37(a)(1)–(2) (2024).

185. OPENDORSE, *supra* note 19, at 3.

186. *Helping Oregon Athletes Win on a New Playing Field*, DIVISION STREET, <https://www.divisionst.com/about> (last visited Sep. 24, 2024).

187. Daniel Libet, *NIL Collectives Take Tax Shelter Amid a Storm of College Cash*, SPORTICO (Jan. 5, 2024), <https://www.sportico.com/leagues/college-sports/2024/blueprint-sports-nil-collective-nonprofit-1234761748/>.

188. Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement, NCAA [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf).

the definition of a booster.<sup>189</sup> Additionally, member institutions are reminded that NCAA rules prohibit boosters from engaging in recruiting activities and/or directly or indirectly providing benefits to recruits.<sup>190</sup> The guidance also specifies that coaches and staff are prohibited from providing information on recruits to boosters and/or facilitating communication or meetings between boosters and recruits.<sup>191</sup> Finally, NIL agreements must be based on an “independent, case-by-case analysis of the value that each athlete brings to an NIL agreement” and not as incentives for enrollment, rewards for athletics performance, or membership on a team.<sup>192</sup>

Collectives now contribute more than 80% of the total NIL market spending regardless of the NCAA rules and guidance.<sup>193</sup> As collectives have heavily focused on recruitment and retention of football and men’s basketball players,<sup>194</sup> examination of these reported deals using the Financial Assistance Framework as well as the NCAA recruiting regulation is warranted.<sup>195</sup>

#### A. *Examples of NIL Activity by Collectives*

In July 2022, all eighty-five scholarship players and twenty walk-ons at Texas Tech University (Texas Tech) received a \$25,000 per year NIL contract via the Matador Club Collective.<sup>196</sup> The women’s

---

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* The following NCAA rules from the NCAA Constitution and NCAA Division I Manual support the NCAA’s guidance regarding “booster”/third party entities involvement with recruits: NCAA Constitution 2.1.2 and 2.8.1; NCAA Division I Manual Bylaw 11.1.3, 12.1.2, 12.1.2.1.4.1, 12.1.2.1.5, 13.01.2, 13.10, 13.1.2.1, 13.02.14, 13.2.1.

193. OPENDORSE, *supra* note 19, at 5. The report represents NIL compensation for NCAA Division I student-athletes disclosed to or processed by Opendorse between July 1, 2021, and June 7, 2024.

194. *Id.* Note, recruiting and retention payments made by Collectives may not be truly related to compensation for NIL, but are labeled NIL, nonetheless.

195. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979). Note, analysis is provided based on the information collected through publicly available reports cited. To determine whether the institution is in compliance with Title IX would require a complete audit of all financial assistance activities which is beyond the scope of this research.

196. Max Olson, *Texas Tech Collective to Offer \$25,000 NIL Deals to 100-Plus Football Players*, ATHLETIC (July 19, 2022), <https://theathletic.com/4165622/2022/07/19/texas-tech-collective-to-offer-25000-nil-deals-to-100-plus-football-players/>.

softball team also received \$10,000 for each player from the Matador Club's team NIL deal.<sup>197</sup> Another NIL collective, Level 13 Agency, gave \$25,000 per year to all Texas Tech women's basketball players.<sup>198</sup> Texas Tech's entire baseball team also was signed to five-figure NIL deals but the exact amount is undisclosed.<sup>199</sup>

Similarly, the Boulevard Collective affiliated with Southern Methodist University made a team deal with both the football and men's basketball teams where players received \$3,000 per month.<sup>200</sup> The Anchor Impact Fund signed the Vanderbilt University baseball team to a team-wide NIL deal.<sup>201</sup> Likewise, The Volunteer Club Collective provided the entire baseball team at The University of Tennessee with an NIL deal.<sup>202</sup> Michigan State University reported a women's team NIL deal: the This is Sparta! Collective and Charitable Gift America gave each member of the women's gymnastics team \$5,000 with the stipulation that they give 5% of it to a charity of their choice.<sup>203</sup> At the University of Oklahoma (OU), the Crimson and Cream collective made a team NIL deal with both the entire football and entire men's basketball teams.<sup>204</sup> A different collective, 1Oklahoma, signed the

---

197. *Matador Club Offering \$10k Annual Contracts to All Tech Softball Players*, LUBBOCK AVALANCHE-J. (Sept. 29, 2022, 2:06 PM CT), <https://www.lubbockonline.com/story/sports/college/red-raiders/2022/09/29/matador-club-offering-10k-contracts-to-all-texas-tech-softball-players/69526342007/>.

198. Clare Brennan, *Texas Tech Women's Basketball Players Each Will Receive \$25K NIL Deal*, JUST WOMEN'S SPORTS (July 29, 2022), <https://justwomenssports.com/reads/texas-tech-womens-basketball-25k-nil-deal/>.

199. Mason Horodyski, *Matador Club Signs Entire Texas Tech Baseball Team to NIL Deal*, EVERYTHING LUBBOCK (May 16, 2023, 3:46 PM CDT), <https://www.everythinglubbock.com/sports/matador-club-signs-entire-texas-tech-baseball-team-to-nil-deal/>.

200. Pete Nakos, *New Boulevard Collective to Pay SMU Athletes \$3.5 Million Annually Through NIL*, ON3 (Aug. 8, 2022), <https://www.on3.com/nl/news/smu-mustangs-football-basketball-boulevard-collective-nil-3-5-million-36-annually-chris-kleinert/>.

201. Alan George, *Anchor Impact Fund Announces Team-Wide Deal for Vanderbilt Baseball*, NIL NEWSSTAND (Nov. 15, 2023), <https://vucommodores.com/anchor-impact-and-vanderbilt-sports-properties-announce-official-partnership/>.

202. Pete Nakos, *Volunteer Club Inks Team-Wide NIL Deal with Tennessee Baseball Ahead of College World Series*, ON3 (June 17, 2023), <https://www.on3.com/nl/news/volunteer-club-team-wide-nil-deal-tennessee-baseball-college-world-series-cws/>.

203. Pete Nakos, *Michigan State Women's Gymnastics Signs Team-Wide Deal with Charitable NIL Collective*, ON3 (Aug. 25, 2022), <https://www.on3.com/nl/news/michigan-state-womens-gymnastics-nil-charitable-gift-america-this-is-sparta/>.

204. Jeremy Crabtree, *Oklahoma-Focused Crimson and Cream Announces Teamwide NIL Deal for Football Roster*, ON3 (Jan. 13, 2023),

whole OU women's basketball team to NIL deals.<sup>205</sup> In March 2024, it was reported that the Buffs4Life Collective was providing \$2,000 each semester to football walk-ons to provide the same opportunities that scholarship football players receive through Alston awards at the University of Colorado.<sup>206</sup>

At Brigham Young University (BYU), The Royal Blue collective made a deal with BYU's football team where they would pay an undisclosed amount to all 123 players on the football roster.<sup>207</sup> As discussed in more detail below, news articles describe the deal's alignment with the head coach's leadership and imply some involvement between the collective and coach.<sup>208</sup> Prior to this deal, a company called Built Bars paid tuition for all BYU walk-on football players and each scholarship football player received \$1,000.<sup>209</sup> After a small scandal with the deal, involving players alleging that they had not been paid, a quote from Built Bars revealed direct involvement between them and the football coach.<sup>210</sup> Built Bars "would ensure more would reach their pockets after some payments to BYU Licensing and to a 'football discretionary fund' controlled by head coach Kalani Sitake were made."<sup>211</sup> Desert News reported that the coach had not received the funds to distribute yet and was asking the players for patience.<sup>212</sup>

---

<https://www.on3.com/nil/news/oklahoma-sooner-focused-crimson-and-cream-announces-teamwide-nil-deal-for-football-roster/#>.

205. Ross Lovelace, *Barry Switzer's NIL Collective Signs Oklahoma Women's Basketball Team to NIL Deals*, ON SI (Feb. 13, 2023, 5:10 PM EST), <https://www.si.com/college/oklahoma/womens-basketball/1oklahoma-barry-switzers-nil-collective-has-the-oklahoma-womens-basketball-team-to-nil-deals>.

206. Pete Nakos, *Buffs4Life collective to match Colorado's Alston benefits for walk-ons*, ON3 (Mar. 7, 2023), <https://www.on3.com/nil/news/buffs4life-collective-nil-colorado-buffaloes-alston-benefits-walk-ons-deion-sanders/>.

207. Mitch Harper, *BYU's NIL Collective Launches Program that Pays Every Football Player*, KSL SPORTS (Aug. 30, 2023), <https://kslsports.com/504185/byu-nil-collective-the-royal-blue-pays-every-player-kalani-sitake/>.

208. *See id.*; Jeff Hansen, *The Royal Blue to Pay Every Player on BYU's 123-Man Roster*, 247 SPORTS (Aug. 30, 2023, 4:32 PM), <https://247sports.com/college/byu/article/byu-football-royal-blue-collective-215063332/>.

209. Mitch Harper, *NCAA Looking into BYU Football's High-Profile NIL Deal with Built Bar*, KSL SPORTS (Dec. 10, 2021, 5:57 PM) <https://kslsports.com/474620/byu-football-ncaa-built-bar-nil-probe/>.

210. *See* Jay Drew, *Built Bar Pays BYU Football Players an 'Additional \$600' After Questions Arose About NIL Deal Payments*, DESERET NEWS (June 2, 2023, 4:43 PM), <https://www.deseret.com/2023/6/2/23747426/byu-football-nil-built-energy-protein-bars-pays-players-600-dollars-more-nick-greer-kalani-sitake/>.

211. *Id.*

212. *Id.*

The only women's sports team found to receive a deal at BYU was its women's volleyball team, via the Royal Blue collective.<sup>213</sup> The deal prescribed a total of \$700,000 to be divided among each team member over multiple years.<sup>214</sup>

Another collective program that received significant media attention was the Dodge Ram Truck deal at the University of Utah (Utah). In this deal, the Utah Crimson Collective provided (paid the lease on) trucks for all eighty-five scholarship football players at the Utah as long as the player remained eligible and enrolled.<sup>215</sup> The deal was announced with the athletes and vehicles lined up on the football field.<sup>216</sup> The Crimson Collective also provided similar deals to the men's and women's basketball teams and women's gymnastics teams who were able to choose between a 2024 Jeep Grand Cherokee or a 2024 Ram 1500 Big Horn Truck.<sup>217</sup>

B. *Applying the Financial Assistance Framework to Collectives*

These are just a few examples of the myriad types of NIL opportunities being provided by collectives to student-athletes at various schools. As discussed, to ascertain whether an institution is at risk of violating the Title IX financial assistance regulations, the Financial Assistance Framework is applied. The first step is to determine whether the institution receives any type of federal funding. The easiest way to check federal funding is to use the Federal School Code list of all colleges and universities that receive federal funding for financial aid

---

213. See Mitch Harper, *BYU's NIL Collective Launches Team-Wide Deal for Women's Volleyball Program*, KSL SPORTS (Sep. 22, 2023, 8:01 AM), <https://kslsports.com/505133/byu-womens-volleyball-nil-collective-the-royal-blue/>.

214. *Id.*

215. *Utah Football NIL Deal Gives Every Scholarship Player a Car*, SPORTS ILLUSTRATED (Oct. 4, 2023, 4:31 PM), <https://www.si.com/college/utah/football/utah-football-nil-deal-gives-every-scholarship-play-a-car>.

216. Josh Furlong (@JFurKSL), X, (Oct. 4, 2023, 3:25 PM), <https://x.com/JFurKSL/status/1709646029178773925>.

217. Austin Eames, *Utah's Crimson Collective Surprises Athletes with Expanded NIL Deal: Luxury Cars for Basketball and Gymnastics Teams*, SPORTS ILLUSTRATED (Dec. 13, 2023, 3:21 PM), <https://www.si.com/college/utah/basketball/utahs-crimson-collective-surprises-athletes-with-expanded-nil-deal-luxury-cars-for-basketball-and-gymnastics-teams>.

programs.<sup>218</sup> Each of the schools in the examples provided above receives federal funding, so Title IX applies.<sup>219</sup>

Next, all the NIL payments were made by collectives, so one then needs to examine whether the institution provides significant assistance to the third party—this can be in the form of solicitation, listing, approval, provision of facilities or other services or assistance.<sup>220</sup> In many of the examples, the athletics program provides significant assistance. At Utah, the collective exists to benefit Utah athletics.<sup>221</sup> Per Utah’s NIL policy, student-athletes must disclose their NIL deals to the school, or the third party discloses the student athlete’s deal directly to the school.<sup>222</sup> Additionally, student-athletes must get permission from the school to use the institution’s intellectual property.<sup>223</sup> Further, Utah dictates which NIL deals students can and cannot make, restricting NIL beverage deals to Pepsi and restricting apparel NIL deals to Nike, Adidas, Lululemon, Reebok, New Balance, and Converse.<sup>224</sup> Additionally, the football players “NIL deal” was publicized on the Utah football field (using university facilities) and was lauded by athletics department personnel indicating significant assistance and involvement with the athletics program.<sup>225</sup>

Further, many of the collective’s websites indicate significant involvement of the schools with the collective. Several of the collective websites had quotes from university staff showing involvement between the university and the collective. For example, 502 Circle (University of Louisville’s Collective) quotes the Louisville athletic director on the front page of its website, stating “Name, Image, and Likeness is at the forefront of a constantly changing collegiate athletics landscape . . .

218. See *Federal School Code Search*, FED. STUDENT AID [https://studentaid.gov/fafsa-app/FSCsearch?locale=en\\_US](https://studentaid.gov/fafsa-app/FSCsearch?locale=en_US) (last visited Sep. 27, 2024).

219. *Id.* (each institution’s name was entered into the Federal School Code Search to determine whether they receive federal financial aid funding, the most common federal funding to colleges and universities).

220. See *supra* notes 113–15 and accompanying text; 34 C.F.R. § 106.37(a)(1)–(2) (2024); See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

221. See CRIMSON COLLECTIVE, <https://www.crimsoncollective.org/> (last visited Sep. 27, 2024).

222. *Name, Image, Likeness Policy & Procedure*, UTAH UTES, <https://utahutes.com/sports/2022/5/26/name-image-likeness-policy-guidelines.aspx> (last visited Sep. 27, 2024).

223. *Id.* (Intellectual property includes logos, colors, and trademarks).

224. *Id.*

225. Furlong, *supra* note 216.

your support will allow our programs to continue to compete at an elite level.”<sup>226</sup> Auburn’s ON TO VICTORY Collective’s website indicates that “OTV works closely with Auburn to keep the university informed of our procedures and progress.”<sup>227</sup>

As noted above, the BYU example indicated significant involvement between the collective and athletics department administration and coaches.<sup>228</sup> A local paper quoted The Royal Blue collective, saying:

“The Royal Blue has stated that they’ve worked extensively with BYU Athletics to ensure alignment with the mission and ideals of the athletic department. BYU Administration responded favorably that although the [The Royal Blue’s] initial focus is on NIL opportunities for the BYU football and men’s and women’s basketball student-athletes, ultimately, [The Royal Blue] hopes to engage with student-athletes from every sport at BYU.”<sup>229</sup>

Further, the newspaper reported that BYU’s head football coach has been a massive proponent of team-wide NIL deals and The Royal Blue collective was quoted stating that their collective “is in alignment with the leadership of [BYU’s football coach].”<sup>230</sup> Meanwhile, The Royal Blue website states that it is not a BYU entity.<sup>231</sup> Similarly, another collective of BYU, Coug Connect, states that it is not affiliated with BYU Athletics.<sup>232</sup> However, disclaimers of this kind do not protect the schools from Title IX liability for the third party when there is significant involvement between the university and collective.<sup>233</sup>

Other signs of institutional involvement with a third-party collective are more subtle. 110 Society, a collective for Clemson, claims that they are the “official partner of Clemson Athletics.”<sup>234</sup>

---

226. *Change the Game, Shape the future of Louisville Athletics*, 502 CIRCLE, <https://502circle.com/> (last visited Sep. 10, 2024).

227. *FAQ’s*, ON TO VICTORY, <https://www.ontovictory.com/faq> (last visited Apr. 10, 2024).

228. See *supra* notes 192–95 and accompanying text.

229. Harper, *supra* note 209.

230. *Id.*

231. *Frequently Asked Questions*, THE ROYAL BLUE, <https://www.royalbluecollective.org> (last visited Apr. 10, 2024).

232. COUG CONNECT, <https://cougconnect.com> (last visited Apr. 10, 2024).

233. See 34 C.F.R. § 106.37(a)(1)–(2) (2024).

234. *110 Society Launches as Official “One-Stop NIL Shop” For Clemson*, CLEMSON TIGERS (Nov. 17, 2023), <https://clemson.tigers.com/110-society-launches-as-official-one-stop-nil-shop-for-clemson/#:~:text=Clemson%2C%20S.C.%20-%20To%20support%20Clemson,official%20partner%20of%20Clemson%20Athletics>.

Similarly, on the website for Rising Spear, a collective for Florida State University (FSU) once stated they are a “proud partner of Florida State Athletics,” but then went on to state that they are not.<sup>235</sup> Under the Financial Assistance Framework, this type of relationship would warrant further investigation to determine whether the involvement meets the significant assistance.<sup>236</sup> Hypothetically, an organization or company could act completely independently of the institution, athletics department and/or its employees and provide an NIL deal, such as a promotional appearance, to a specific team if it contacted each student-athlete directly. In this situation, if the institution were not involved in any way, Title IX would not apply.<sup>237</sup>

The next question in the Financial Assistance Framework is whether the payment is based on sex. All of the examples above were directed to specific teams, which is sex-based criteria.<sup>238</sup> Because of this, the institution would need to comply with the equitable distribution framework for financial assistance which, as discussed, requires total payments for male and female athletes in proportion with the total percentage of male and female athletes in the athletics program.<sup>239</sup> In the examples provided, the majority of NIL deals<sup>240</sup> were provided to football players. This is reflective of the national data on NIL deals provided by collectives, which indicate that football players receive 72.2%, men’s basketball 21.2%, baseball 3.6%, women’s basketball 2.3%, and women’s volleyball 0.8%.<sup>241</sup> A funding disparity of less than 1% based on the proportion of male and female student-athletes in the program is presumed compliant.<sup>242</sup> The gross imbalance favoring male student-athletes in the examples provided make it seem unlikely that this standard could be achieved.<sup>243</sup> However, the Title IX inquiry requires a detailed examination of the financial assistance provided to the women’s program as a whole compared to the men’s program as a

---

235. RISING SPEAR, <https://risingspear.com> (last visited Apr. 10, 2023).

236. See 34 C.F.R. § 106.37(a)(1)–(2) (2024).

237. *Id.*

238. See A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979).

239. *Id.*

240. “NIL deals” are in quotations because the funding provided is not based on the value of the student-athlete’s NIL but is a uniform payment for membership on a team.

241. OPENDORSE, *supra* note 19, at 5.

242. O’Shea, *supra* note 128.

243. See A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979).



whole on an annual basis, an analysis that will be unique to each institution.<sup>244</sup>

#### VII. RELEVANCE OF THE FINANCIAL AID FRAMEWORK FOR THE FUTURE OF COLLEGE ATHLETICS

The college athletics environment continues to present new challenges and opportunities on a seemingly daily basis. By using the Financial Assistance Framework, institutions can assess their risk and make informed decisions regarding their involvement in the NIL marketplace.

As of August 1, 2024, the NCAA implemented new rules which will allow institutions to identify NIL opportunities and facilitate deals between student-athletes and third parties.<sup>245</sup> Student-athletes who engage in NIL deals of \$600 or more and disclose this information within thirty days of the agreement will be eligible for increased NIL-related support from their institutions.<sup>246</sup> The national Student-Athlete Advisory Committee supported the increased institutional involvement, as transparency and disclosure will provide some “stability and assistance to student-athletes in a very unstable environment.”<sup>247</sup> While the new rules allow more direct involvement by the institution, student-athletes are not obligated to work with the institution and are unilaterally responsible for satisfying the terms of their NIL agreements.<sup>248</sup> The new rules also appear to address the legal claims posed by Tennessee, Florida, New York, the District of Columbia, and Virginia, all of whom sued the NCAA claiming that the NCAA’s rule prohibiting prospective student-athletes from negotiating NIL deals with

---

244. *Id.*

245. Michelle Brutlag Hosick, *Division I Board of Directors ratifies transfer, NIL rule changes*, NCAA (Apr. 22, 2024, 5:18 PM), <https://www.ncaa.org/news/2024/4/22/media-center-division-i-board-of-directors-ratifies-transfer-nil-rule-changes.aspx>.

246. *Id.*

247. Meghan Durham Wright, *DI council approves NIL reforms, permits school assistance with NIL activity*, NCAA (Apr. 17, 2024, 6:32 PM), <https://www.ncaa.org/news/2024/4/17/media-center-di-council-approves-nil-reforms-permits-school-assistance-with-nil-activity.aspx>.

248. *Id.*

third parties, such as alumni and booster collectives, violates antitrust law.<sup>249</sup>

Under the new rules, the NCAA now allows the interaction between institutions and collectives that was previously prohibited.<sup>250</sup> More direct school involvement also increases the likelihood that institutional activities related to NIL will be subject to Title IX—both relative to financial assistance, but also for equal treatment to assure that institutional policies and practices relative to providing support and facilitating opportunities are equally available for male and female student athletes.<sup>251</sup>

Institutions are already taking advantage of the increased ability to collaborate more closely with collectives. The University of Kansas announced they would be providing priority points for donations to collectives.<sup>252</sup> Schools are also getting more creative with their NIL initiatives: University of Houston football student athletes will compete against fans who pay to play in an online College Football 25 tournament facilitated by a partnership between TheLinkU and HLX via the LinkingCoogs collective; fans can also win exclusive memorabilia.<sup>253</sup> However, institutions must still be mindful of their obligations under Title IX to create equitable NIL opportunities for a proportionate number of female student-athletes.<sup>254</sup>

The NCAA's legal landscape is still uncertain with significant litigation proceeding through the courts. Three major class action lawsuits, *House v. NCAA*,<sup>255</sup> *Hubbard v. NCAA*,<sup>256</sup> and *Carter v.*

249. *Tennessee v. Nat'l Collegiate Athletic Ass'n*, No. 3:24-CV-00033-DCLC-DCP, 2024 U.S. Dist. LEXIS 32050 (E.D. Tenn. Feb. 23, 2024).

250. See Brutlag Hosick, *supra* note 25.

251. See 34 C.F.R. § 106.37(a)(1)–(2) (2024); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415 (Dec. 11, 1979).

252. *Archive of Editions*, D1.TICKER (Sept. 4, 2024), <https://my.omedas.com/portal/report/EmailPreviewDeploymentExternal.jsp?aw5Ccm93c2VyPXkmU3BsaXRJZD0yMTA5MiZFbnZpcm9ubWVudElkPTEyNTY4>.

253. *Id.*

254. See 34 C.F.R. § 106.37(a)(1)–(2) (2024); DEP'T OF EDUC., OCR-00005, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415.

255. Complaint at 4, *House v. NCAA*, 4:20-cv-03919 (N.D. Cal. filed June 15, 2020) (arguing that the NCAA rules prohibiting NIL compensation and future revenue sharing violate the Sherman Act).

256. Complaint at 3, *Hubbard v. NCAA*, 4:23-cv-01593 (N.D. Cal. filed Apr. 4, 2023) (arguing that the NCAA rules prohibiting athlete compensation violate the Sherman Act).

NCAA,<sup>257</sup> assert that various NCAA rules prohibiting direct student-athlete compensation violate antitrust laws. The parties in the *House* litigation have proposed a settlement<sup>258</sup> that would allow revenue sharing with student-athletes; schools would decide how the funds would be distributed across their sports programs.<sup>259</sup> Should the settlement be approved, the Financial Assistance Framework, proposed in this paper, will be an essential tool for schools to determine compliance with the Title IX financial assistance regulations in addition to the schools' obligations to provide equal treatment for male and female student-athletes.<sup>260</sup> The *House* settlement does not prohibit future litigation. A similar case, *Fontenot v. NCAA*, asserted that NCAA rules prohibiting student-athletes from receiving compensation directly from their institutions or athletics conferences violates the Sherman Act by restraining competition will proceed whether or not the *House* settlement is approved.<sup>261</sup> Should the settlement be approved, or the plaintiffs win their cases, the Title IX financial assistance regulations will still apply.<sup>262</sup>

#### CONCLUSION

The volatility of the current college athletics landscape makes it clear that vigilance for compliance with Title IX to address discrimination based on sex is more important than ever. The preferential treatment for football and men's basketball players apparent in the private NIL marketplace created by collectives reflect the same discriminatory preferences that Congress expressly rejected in the 1970s.<sup>263</sup> Recognizing this, the Office for Civil Rights in the U.S. Department of Education issued guidance on January 16, 2025, that was

---

257. Complaint at 61, *Carter v. NCAA*, 4:23-cv-06325 (N.D. Cal. filed Dec. 7, 2023) (arguing that the NCAA's "anticompetitive price-fixing actions" violate antitrust laws).

258. See Plaintiffs' Motion for Preliminary Settlement Approval at 9, *House v. NCAA*, 4:20-cv-03919-CW (N.D. Cal. filed July 26, 2024).

259. DUANE MORRIS LLP, *NCAA Student-Athlete Settlement Proposal Takes Its Best Shot at Resolving Three Antitrust Cases* (Aug. 1, 2024), [https://www.duanemorris.com/alerts/ncaa\\_student\\_athlete\\_settlement\\_proposal\\_takes\\_best\\_shot\\_resolving\\_three\\_antitrust\\_cases\\_0824.html](https://www.duanemorris.com/alerts/ncaa_student_athlete_settlement_proposal_takes_best_shot_resolving_three_antitrust_cases_0824.html).

260. See 34 C.F.R. § 106.37(a)(1)–(2) (2024); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413, 71415.

261. See *id.* .

262. See *id.*

263. 34 C.F.R. § 106.37(a)(1)–(2) (2024); see Complaint *Schroeder v. Univ. of Or.*, 6:23-cv-01806-AA (D. Or. filed Dec. 1, 2023).

consistent with the Financial Assistance Framework proposed in this article.<sup>264</sup> The guidance reiterated that Title IX applies to all benefits, opportunities, and treatment provided by the institution related to NIL activities, and that student-athlete NIL agreements with third parties may also trigger the financial assistance regulations if there is institutional involvement.<sup>265</sup> On February 12, 2025, OCR rescinded this Title IX guidance.<sup>266</sup> However, the rescission of OCR guidance regarding NIL did not alter the law itself. The financial assistance regulations have been in effect since 1975 and remain intact, and educational institutions that receive federal funding must commit to compliance with the Title IX regulations to reduce their risk of OCR complaints or lawsuits.<sup>267</sup> The proposed Financial Assistance Framework provides an additional tool for institutions to identify inequities and protect the civil rights of student-athletes in their programs.

---

264. *Department of Education OCR Issues Guidance on How Schools Analyze NIL Activity Under Title IX*, MCGUIREWOODS (Jan. 17, 2025), <https://www.mcguirewoods.com/client-resources/alerts/2025/1/department-of-education-ocr-issues-guidance-on-how-schools-analyze-nil-activity-under-title-ix/>.

265. *Id.*

266. *The Department of Education Reverses Title IX NIL Guidance*, F3 LAW (Feb. 19, 2025), <https://www.f3law.com/insights/the-department-of-education-reverses-title-ix-nil-guidance-102k0ct/>.

267. 34 C.F.R. § 106.37(a)(1)–(2); see *Complaint Schroeder v. Univ. of Or.*, 6:23-cv-01806-AA (D. Or. filed Dec. 1, 2023).