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NIL Data Transparency

Tan T. Boston*

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ABSTRACT

Since July 2021, intercollegiate athletes have earned nearly \$1 billion from monetizing their names, images, and likenesses (NILs), with some earning more than professional athletes.¹ Such earnings were made possible by state NIL laws and by the NCAA's simultaneous retreat from enforcing restrictions on athletes' ability to earn compensation for the use of their NILs.² Commentators argue that the unforeseeably impressive NIL figures are driven by disproportionate institutional support for athletes in certain high-profile sports. If true, this may raise Title IX concerns, as NIL earnings for female athletes lag considerably behind that of their male counterparts.³ Although most state NIL laws require athletes to report NIL data to their schools, schools are not required to make reported NIL data publicly available—not even in redacted form. The current lack of NIL transparency by schools makes it virtually impossible to accurately identify potential gender disparities.

This Article explores the relationship between the lack of NIL transparency and incentives for colleges and universities to meet Title IX's

1. OPENDORSE, NIL: ONE YEAR OF NAME, IMAGE AND LIKENESS 4 (June 30, 2022), https://opendorse.com/wp-content/uploads/2022/07/NIL_Full_063022_3.pdf [<https://perma.cc/HRJ2-GSJA>] [hereinafter OPENDORSE, NIL: ONE YEAR] (estimating that intercollegiate NIL will surpass \$1 billion in 2022); Evan Crowell, *Jalin Hyatt Logs Multimillion Dollar NIL Deal*, SPORTS ILLUSTRATED (Jan. 19, 2023, 8:00 AM EST), <https://www.si.com/college/tennessee/football/jalin-hyatt-logs-multimillion-dollar-nil-deal-represents-tennessee-football> [<https://perma.cc/G7GU-RNGV>] (indicating that although intercollegiate athletes have been permitted to earn NIL compensation for only two football seasons, the profiled athlete has received “an estimated \$3 million” during that time); Anthony Holzman-Escareno, *2023 NFL free agency explainer: Vital information on franchise tags, contract terms, salary cap and more*, NFL (Feb. 28, 2023, 4:05 PM), <https://www.nfl.com/news/2023-nfl-free-agency-explainer-vital-information-on-franchise-tags-contract-term> [<https://perma.cc/3G33-6BG8>] (listing \$750,000 as the starting NFL salary for the 2023 season, which is less than some intercollegiate athletes' seasonal NIL earnings).

2. Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/6EMF-4TNK>]; NCAA, INTERIM NIL POLICY (effective July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [<https://perma.cc/HP65-DRUN>].

3. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 7; Associated Press, *Male athletes lead way in NIL money, according to third-party data*, ESPN (Jan. 27, 2022), https://www.espn.com/college-sports/story/_/id/33160929/male-athletes-lead-way-nil-money-per-data [<https://perma.cc/6F48-NBXB>].

requirements for NIL. It argues that shielding NIL data from public scrutiny is inappropriate given Title IX's culture of disclosure. This Article further argues that stakeholders will be unlikely to implement a NIL framework that aligns with Title IX's purpose without a universal disclosure mandate. After exploring how a lack of NIL transparency frustrates Title IX's purpose, this Article concludes with a workable proposal for collecting and disclosing NIL data.

INTRODUCTION

“The majority of schools don’t make public the number of deals and amounts their athletes have received”

- Erica Hunzinger, Sports Writer⁴

NIL produced nearly \$1 billion in earnings for intercollegiate athletes in its first year.⁵ Commentators argue that the astonishingly high numbers are likely the result of disproportionate institutional support for certain sports.⁶ Football and men’s basketball, in particular, out earned all other

4. Erica Hunzinger, *Name, image and likeness money estimated at \$917M*, ARK. ONLINE (July 7, 2022, 2:27 AM), <https://www.arkansasonline.com/news/2022/jul/07/nil-money-estimated-at-917m> [<https://perma.cc/TWF7-3EQ6>]. The NCAA defines NIL as “an activity that involves the use of an individual’s name, image and likeness for commercial or promotional purposes.” NAT’L COLLEGIATE ATHLETIC ASS’N, NAME, IMAGE AND LIKENESS POLICY: QUESTION AND ANSWER 1 (Feb. 2023), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf [<https://perma.cc/46HZ-GLML>]. For purposes of this Article, the terms *NIL* and *NIL compensation* are used interchangeably, as appropriate.

5. OPENDORSE, *NIL: ONE YEAR*, *supra* note 1, at 4 (estimating that intercollegiate NIL will surpass \$1 billion in 2022). Prior to July 1, 2021, the NCAA enforced its amateurism rules that prohibited intercollegiate athletes from receiving compensation for performance or the use of their NILs. NCAA, NCAA DIVISION I MANUAL §§ 12.01–12.12 (2021) [hereinafter NCAA DIVISION I MANUAL]. The NCAA announced interim amateurism rule changes allowing NIL on June 30, 2021. Hosick, *supra* note 2; NCAA, *supra* note 2.

6. Lev Akabas, *Football and Social Media Dominate Rapidly Growing NIL Market: Data Viz*, SPORTICO (July 5, 2022), <https://finance.yahoo.com/news/football-social-media-dominate-rapidly-164819134.html> [<https://perma.cc/F7B4-TFC7>] [hereinafter Akabas, *Football and Social Media*] (quoting professor Neal Ternes’s remarks that “[o]ne of the major challenges that we face right now with NIL is that a lot of athletes have a disproportionate amount of institutional support in promoting their image”).

sports in NIL's inaugural year, according to data furnished by private NIL exchanges.⁷

This data also reveals potential gender disparities between male and female athletes.⁸ These disparities, however, cannot be confirmed because schools generally refuse to disclose NIL data—with most arguing that to do so would violate the Family Educational Rights and Privacy Act (FERPA).⁹ FERPA is a federal law that protects the privacy of student education records.¹⁰ It essentially prohibits schools from disclosing education records containing personally identifiable information (PII) to third parties without written consent.¹¹ FERPA defines *education records* as documents containing information that directly relates to a student and is maintained by a school or its agents.¹² Courts have interpreted the definition of education records broadly such that they can encompass documents that do not contain academic information.¹³ As a result, schools have relied on FERPA to protect the privacy of NIL data.

Despite schools' reluctance to reveal NIL data, transparency is necessary for several reasons. Scholars have written extensively about the need for NIL transparency for purposes of malfeasance detection, market analysis, and NCAA compliance.¹⁴ Yet there is a dearth of legal

7. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 7; Associated Press, *supra* note 3.

8. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 7.

9. 20 U.S.C. § 1232(g); Cullen Browder, *As college athletes cash in, schools keep records of name, image, likeness deals under wraps*, WRAL (Feb. 28, 2022, 6:24 PM EST), <https://www.wralsportsfan.com/as-college-athletes-cash-in-schools-keep-records-of-name-image-likeness-deals-under-wraps/20163152> [<https://perma.cc/KX35-8XYP>].

10. *Hall v. McRaven*, 508 S.W.3d 232, 236 (Tex. 2017) (“FERPA is a federal privacy law that withholds federal funding from institutions that have a ‘policy or practice of permitting the release of education records . . . or personally identifiable information.’”).

11. 20 U.S.C. § 1232g(b)(1).

12. *Id.* § 1232g(a)(4)(A).

13. *See United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1154 (S.D. Ohio 2000).

14. *See* Jeffrey F. Brown et al., *A Proposal for Group Licensing of College Athlete NILs*, 12 HARV. J. OF SPORTS & ENT. L. 1, 8 (2021) (noting that “a central clearinghouse . . . could help identify disguised recruitment efforts and predatory deals”); Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. OF SPORTS & ENT. L. 247, 298 (2020) (discussing the importance of establishing market rates for NIL). With respect to compliance, it is important to note that NCAA guidance prohibits schools from

scholarship on NIL transparency to ensure that athletes are treated equitably under Title IX of the Education Amendments of 1972 (Title IX).¹⁵ This Article seeks to fill that void.

Title IX has been a beacon of light for gender equity in the United States for over half a century.¹⁶ The 37-word statute was the federal solution to systematic gender discrimination that prevented women from reaching their potential in education and society during less enlightened times.¹⁷ Title IX's scope covers "education program[s] or activit[ies]" that receive federal funding and includes athletics.¹⁸ Congress enacted Title IX in 1972 to achieve two explicit goals: preventing the use of federal funds to perpetuate sex discrimination and protecting individuals against such discrimination.¹⁹

Before the 1970s, many U.S. colleges and universities did not allow women to enroll, and those that did set strict enrollment limits.²⁰ Even by

using NIL as a recruiting inducement. NCAA, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT (effective July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [<https://perma.cc/7BWR-AHKP>] [hereinafter THIRD PARTY NIL GUIDANCE]. *Recruiting* is defined as solicitation of prospective athletes or their families by school employees or Athletics Representatives, with the goal of obtaining a commitment from the athlete to participate on a school's athletics team. NCAA DIVISION I MANUAL, *supra* note 5, § 13.02.14.

15. 20 U.S.C. §§ 1681–1688.

16. *Id.*

17. *Id.* Remy Tumin, *Fifty Years On, Title IX's Legacy Includes Its Durability*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/sports/title-ix-anniversary.html> [<https://perma.cc/AR2M-5423>] (describing the social and political context that led to Title IX's passage).

18. 20 U.S.C. § 1681; Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 908, 102 Stat. 28 (1988) ("For the purposes of this section, the term 'program or activity' and 'program' mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . ."); 34 C.F.R. § 106.2(h) (2023).

19. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

20. NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 1, 8 (June 2002). Established in 1636 to provide religious instruction to male clerics, Harvard University maintained a quota system of four men to each woman until 1977. Collen Walsh, *Hard-earned gains for women at Harvard*, THE HARV. GAZETTE (Apr. 26, 2012), <https://news.harvard.edu/gazette/story/2012/04/hard-earned-gains-for-women-at-harvard/> [<https://perma.cc/R88V-LKVW>]. Founded in 1819, the University of Virginia did not become a fully co-educational until 1970. Sierra Bellows et al., *Women at the University of Virginia*, UVA MAG. (2011), https://uvamagazine.org/articles/women_at_the_university_of_virginia [<https://perma.cc/K4X9-2JHR>].

the early-1970s, men still greatly outnumbered women on college campuses, and the same was true for intercollegiate athletics—which had fewer than 30,000 women competing.²¹ Today, women’s enrollment in college exceeds that of men by nearly three million students, and women’s participation in intercollegiate athletics has expanded to over 200,000.²²

Title IX applies to educational institutions that receive federal funds.²³ Thus, commentators have argued that because third parties largely fund NIL opportunities, Title IX does not apply.²⁴ But as discussed in previous articles, such arguments lack merit.²⁵ *The NIL Glass Ceiling*, for example, argues that NIL serves a recruiting function to which Title IX applies.²⁶ Schools also have become more involved in NIL than was originally anticipated, and Title IX applies to schools’ NIL activities directly.²⁷

U.S. military academies did not admit women until 1975, when required to do so by law. See Department of Defense Appropriation Authorization Act, Pub. L. No. 94-106 § 803, 89 Stat. 531 (1975).

21. NAT’L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS (Jan. 2021), https://nces.ed.gov/programs/digest/d20/tables/dt20_303.10.asp [<https://perma.cc/4LTP-2T84>]; WOMEN’S SPORTS FOUND., 50 YEARS OF TITLE IX: WE’RE NOT DONE YET 8 (May 2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf [<https://perma.cc/2DKD-6A7V>].

22. NAT’L CTR. FOR EDUC. STAT., *supra* note 21; NCAA, TITLE IX 50TH ANNIVERSARY: THE STATE OF WOMEN IN COLLEGE SPORTS 16 (2022), https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf [<https://perma.cc/27P7-TU46>].

23. 20 U.S.C. § 1681(a).

24. See Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. OF SPORTS & ENT. L. 175, 199 (2021) (“These third parties would not trigger Title IX scrutiny because they are not educational institutions.”); Alicia Jessop & Joe Sabin, *The Sky Is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men’s Sport and Women’s Sport Athletes*, 31 J. LEGAL ASPECTS OF SPORT 253, 271 (2021) (“Related to the 10 [Title IX] factors, third-party payments made to athletes by corporations for the use of the athletes’ NIL does not immediately trigger Title IX scrutiny.”); Associated Press, *supra* note 3 (“Title IX . . . does not apply because schools are not striking the deals.”).

25. Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. (forthcoming May 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4218277 [<https://perma.cc/XL2J-R8PW>] (analyzing third-party NIL under Title IX).

26. *Id.*

27. Adam Sparks, *How new Tennessee law allows colleges to facilitate NIL payments to players*, KNOXVILLE NEWS SENTINEL (Apr. 25, 2022, 10:00 PM ET), <https://www.knoxnews.com/story/sports/college/university-of->

Classifying NIL documents as education records also supports the proposition that Title IX applies to NIL. To the extent that schools use NIL for recruiting and are involved in facilitating NIL transactions that become education records, it would be contradictory to deny NIL's Title IX implications.²⁸

Title IX applies to education and athletics, including recruiting and almost every other aspect of athletics in which schools are involved.²⁹ For many schools, their involvement includes NIL.³⁰ Further, U.S. Department of Education Secretary Miguel Cardona recently conveyed that NIL gender equity is of concern, and requiring schools to report on NIL activities remains a distinct possibility.³¹

That said, the focus of this Article is not Title IX's applicability to NIL. This Article assumes that Title IX applies to all NIL, regardless of source, and instead focuses on whether the current lack of NIL transparency is appropriate considering Title IX's gender equity requirements.

tennessee/2022/04/26/tennessee-nil-law-allows-colleges-facilitate-payments-vols-vanderbilt-memphis/7423300001/ [https://perma.cc/EC58-2CK7]; Dennis Dodd, *Ohio State AD Gene Smith: Schools being involved with NIL deals could help crack down on inducements*, CBS SPORTS (Jun 27, 2022, 12:02 PM ET), <https://www.cbssports.com/college-football/news/ohio-state-ad-gene-smith-schools-being-involved-with-nil-deals-could-help-crack-down-on-inducements/> [https://perma.cc/XG89-BLF6] [hereinafter Dodd, *Ohio State AD Gene Smith*].

28. See Boston, *supra* note 25; Dodd, *Ohio State AD Gene Smith*, *supra* note 27.

29. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2023); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979) (codified at 45 C.F.R. pt. 86) [hereinafter 1979 Policy Interpretation].

30. See, e.g., Dan Murphy, *Schools brokering name, image and likeness deals adds layer to college conundrum*, ESPN (Feb. 7, 2022), https://www.espn.com/college-football/story/_/id/33229931/schools-brokering-name-image-likeness-deals-adds-layer-college-conundrum [https://perma.cc/6K7U-RGG5]. See also Peter Burke, *Florida strips NIL restrictions under new law giving schools more involvement*, WPTV (Feb. 16, 2023), <https://www.wptv.com/sports/college-sports/florida-strips-nil-restrictions-under-new-law-giving-schools-more-involvement> [https://perma.cc/BN78-32K8]; Sparks, *supra* note 27.

31. Paula Lavigne, *Education Secretary Miguel Cardona on Title IX compliance: 'It shouldn't be that the federal government has to watch – it's everyone's job'*, ESPN (June 15, 2022), https://www.espn.com/college-sports/story/_/id/34084273/education-secretary-miguel-cardona-title-ix-compliance-the-federal-government-watch-everyone-job [https://perma.cc/464R-G56D].

Title IX is perhaps best known for improving opportunities for women in sports.³² Yet it was enacted to improve opportunities and eliminate gender discrimination against women in education generally.³³ Its loftier, and often more understated, purpose is to eliminate gender stereotypes and disparities in society, using educational settings as an incubator.³⁴ Therefore, it likely would be disheartening for Title IX's pioneers to learn that there are already sizeable gender disparities in a new athletics benefit that has life-changing potential for female athletes.

Athletics is known for building confidence and self-esteem in those who participate.³⁵ By contrast, inequities in athletics participation can have the opposite effect. Gender inequities can send messages to women that their contributions remain less valuable, despite the great strides that female athletes have made over the past 50 years. In fact, the current NIL landscape might lead some to question whether Title IX has been effective at all in improving sports opportunities for women. Fortunately, such questions can be answered swiftly with reference to data that is publicly available.³⁶ The same is not true for NIL.³⁷

With respect to NIL, schools have paradoxically called for more transparency in one breath but have refused to disclose NIL data in the

32. Tumin, *supra* note 17.

33. *Id.*; *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/CL99-2J4W>].

34. See R. SHEP MELNICK, *THE TRANSFORMATION OF TITLE IX: REGULATING GENDER EQUALITY IN EDUCATION* 19 (2018).

35. Ruth Igielnik, *Most Americans who are familiar with Title IX say it's had a positive impact on gender equality*, PEW RSCH. CTR. (Apr. 21, 2022), <https://www.pewresearch.org/fact-tank/2022/04/21/most-americans-who-are-familiar-with-title-ix-say-its-had-a-positive-impact-on-gender-equality> [<https://perma.cc/VG64-MERQ>] (“Among people who participated in organized, competitive sports in high school or college, most say that their involvement in sports had a positive impact on their health and confidence or self-esteem.”).

36. *The tool you need for Equity in Athletics analysis*, U.S. DEP'T OF EDUC., <https://ope.ed.gov/athletics/#> [<https://perma.cc/V8KG-MFPD>] (last visited Oct. 9, 2022) [hereinafter EADA Cutting Tool]; *Finances of Intercollegiate Athletics Database*, NCAA, <https://www.ncaa.org/sports/2019/11/12/finances-of-intercollegiate-athletics-database.aspx> [<https://perma.cc/LU6Z-BAHA>] (last visited Oct. 9, 2022).

37. Paula Lavigne & Dan Murphy, *Alabama Crimson Tide among schools to not disclose NIL data*, ESPN (Oct. 7, 2022), https://www.espn.com/college-football/story/_/id/34739678/following-nick-saban-jimbo-fisher-nil-spat-schools-answer-call-transparency [<https://perma.cc/Z5MU-VDFC>] (discussing the lack of voluntary NIL disclosures despite calls for NIL data transparency).

next.³⁸ As a result, NIL presents a classic collective-action problem, which leads to the next two questions: Should schools have to publicly disclose gender-based NIL data? If so, how?

In answering these questions, this Article explores the tension between the lack of NIL transparency and Title IX's requirements for gender equity in all aspects of intercollegiate athletics programs. To this end, Part I describes the current NIL datascape. Part II details how the lack of NIL transparency prevents stakeholders from determining whether systematic NIL gender disparities exist. In addition, this Part argues that NIL transparency not only will help identify potential gender equity concerns, but also will help identify other concerns, such as malfeasance, market irrationality, and NCAA compliance risks. This Article concludes with proposals for implementing NIL data transparency.

I. THE CURRENT NIL DATASCAPE

On Thursday, July 1, 2021, intercollegiate athletics changed forever. On that day, the NCAA abruptly halted enforcement of amateurism regulations that had once prohibited its nearly 500,000 athletes from monetizing their NILs.³⁹ Athletes are now able to exploit NIL opportunities using various facilitators with minimal NCAA oversight.⁴⁰

NIL transactions can be divided into three categories: self-, school-, and third-party facilitated.⁴¹ Self-facilitated NIL transactions are those where athletes seek out NIL opportunities for themselves, whereas school-facilitated NIL transactions involve schools assisting with or arranging NIL opportunities for their athletes.⁴² Lastly, third-party facilitated NIL

38. *Id.*

39. Hosick, *supra* note 2; NCAA, *supra* note 2. Prior to July 1, 2021, the NCAA enforced amateurism regulations that generally prohibited intercollegiate athletes from receiving compensation for performance or the use of their NILs. NCAA DIVISION I MANUAL, *supra* note 5, §§ 12.01–12.12. With that said, it is important to note that the NCAA is a member-driven organization consisting of conferences and schools that govern themselves, with the support of the NCAA's national office staff. *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> [<https://perma.cc/2FKH-46UC>] (last visited Aug. 15, 2022).

40. Mark Wogenrich, *Penn State's James Franklin Calls NIL 'the Wild, Wild West'*, SPORTS ILLUSTRATED (Dec. 26, 2022, 12:37 AM EST), <https://www.si.com/college/pennstate/football/penn-state-football-james-franklin-nil-wild-wild-west> [<https://perma.cc/PT7M-MARQ>].

41. Boston, *supra* note 25.

42. *Id.* See, e.g., Ross Dellenger, *Behind the Scenes as the Cavinder Twins Became the Faces of Day 1 of NIL*, SPORTS ILLUSTRATED (July 1, 2021),

transactions involve entities, such as collectives or NIL technology exchanges, that match athletes seeking NIL opportunities with sponsors willing to provide them.⁴³ With multiple methods of facilitation and seemingly limitless opportunities, NIL has rapidly manifested its destiny to become a billion-dollar industry.⁴⁴

Yet NIL also seems destined to replicate existing gender disparities in intercollegiate athletics, at least according to some sources.⁴⁵ But does anyone really know? NIL information is provided by various sources, including exchanges, sponsors, collectives, schools, and the athletes themselves.⁴⁶ Among these sources, exchanges currently provide the most comprehensive NIL information.⁴⁷ But, as private entities, they are under no continuing obligation to make the information that they collect

<https://www.si.com/college/2021/07/01/hanna-haley-cavinder-twins-nil-deal-basketball-tiktok> [<https://perma.cc/75WW-3ETP>] (illustrating self-facilitated NIL); Murphy, *supra* note 30 (illustrating school-facilitated NIL).

43. Boston, *supra* note 25. A NIL collective is a private organization that pools resources from fans, alumni, and donors to fund NIL opportunities for athletes at a particular school. Dennis Dodd, *Inside the world of 'collectives' using name, image and likeness to pay college athletes, influence programs*, CBS SPORTS (Jan. 26, 2022, 1:03 PM ET), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/> [<https://perma.cc/R26Y-5QWW>] [hereinafter Dodd, *Inside the World Of 'Collectives'*]. Collectives establish partnerships with businesses or charities and then leverage those partnerships to create NIL opportunities for interested athletes. See *Frequently Asked Questions*, GARNET TRUST, <https://garnettrust.com/faq> [<https://perma.cc/GE8E-3W4R>] (last visited Aug. 1, 2022) (describing how the Garnett Trust Collective provides NIL opportunities for University of South Carolina athletes). NIL exchange companies, such as Opendorse and INFLCR, offer online portals that streamline the operational aspects of NIL. Athletes set up individual profiles on the portals to connect with interested sponsors. Justin Birnbaum, *College Athletes Are Ready to Reap the Rewards Of \$ Billion-Dollar NIL Market. Opendorse Is Here to Help*, FORBES (June 24, 2021, 8:00 AM EDT), <https://www.forbes.com/sites/olivia-evans/2021/06/24/college-athletes-are-ready-to-reap-the-rewards-of-the-billion-dollar-nil-market-opendorse-is-here-to-help> [<https://perma.cc/96SH-ZA73>] (describing Opendorse's and INFLCR's technology platforms).

44. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 4 (estimating that intercollegiate NIL will surpass \$1 billion in 2022).

45. *Id.* at 6 (summarizing gender-based NIL statistics from July 2021 to June 2022); Associated Press, *supra* note 3.

46. Lavigne & Murphy, *supra* note 37.

47. *Id.*

available to the public.⁴⁸ And although schools may collect NIL data from athletes pursuant to state law, very few report any of that data publicly—including schools subject to public records laws.⁴⁹

For instance, Louisiana’s NIL law has consistently required athletes to disclose NIL contracts to their schools, stating that “[a]n intercollegiate athlete who enters into a contract for compensation for the use of the athlete’s name, image, or likeness shall disclose the contract to the postsecondary education institution in which the athlete is enrolled, in the manner designated by the institution.”⁵⁰ Yet when a local television station made a public records request in 2021 for copies of Louisiana State University (LSU) athletes’ NIL agreements, the university refused, citing FERPA—which protects the privacy of student education records.⁵¹ The news outlet later sued to compel disclosure, arguing that NIL agreements are more accurately characterized as unprivileged “business records” in which the public’s interest outweighs any privacy concerns.⁵² The trial court disagreed.⁵³ Soon after, LSU challenged the legislature to amend Louisiana’s NIL law to ensure that NIL agreements would remain confidential.⁵⁴ The legislature readily accepted the challenge, and today, the Tigers’s NIL is no longer subject to public records disclosures.⁵⁵

The current lack of transparency surrounding NIL diverges from intercollegiate athletics’ culture of disclosure. Modern intercollegiate athletics programs have, until very recently, operated within a culture of

48. Public records laws generally do not apply to private entities. *See, e.g.*, LA. REV. STAT. §§ 44:1(A), 44:31 (2023) (providing the right to examine the “public records” of “public bodies” as defined).

49. Lavigne & Murphy, *supra* note 37.

50. LA. REV. STAT. § 17:3703(K) (2023).

51. Daniel Libit, *Georgia, LSU NIL Deals Spark Fights Over Media and Privacy Rights*, SPORTICO (Nov. 22, 2021, 10:00 AM), <https://www.sportico.com/leagues/college-sports/2021/nil-georgia-lsu-face-1234647071/> [<https://perma.cc/6ADN-MVXX>].

52. Petition for Writ of Mandamus at ¶ 23, *Gray Media Group, Inc. v. Tate*, No. C-712007 (19th Jud. Dist. Ct. Nov. 29, 2021).

53. *See Gray Media Group, Inc. v. Tate*, No. C-712007 (19th Jud. Dist. Ct. Nov. 29, 2021) (denying Gray Media Group’s petition for a writ of mandamus to compel LSU to disclose the requested NIL records).

54. Lavigne & Murphy, *supra* note 37 (“LSU, for example, requested that state officials enact a law to make NIL information confidential, said Louisiana State Sen. Patrick Connick, the Republican who sponsored the bill.”).

55. S.B. 250, 2022 Reg. Sess. (La. 2022) (codified at LA. REV. STAT. § 17:3703(M) (2022)).

transparency that facilitates the discovery of gender-based disparities.⁵⁶ The U.S. Department of Education's (ED) Equity in Athletics Disclosure (EADA) website, for example, provides customizable public-facing reports on gender in athletics for each reporting school.⁵⁷ Although the EADA database provides useful gender-based data, its legislative authority does not originate from Title IX.⁵⁸ EADA was separately enacted in 1994 in response to an NCAA gender equity study revealing substantial disparities in the funding of women's intercollegiate athletics programs.⁵⁹ Today, gender-based data on intercollegiate athletics' finances, staffing, and participation rates is available on-demand to the public in a searchable database.⁶⁰

A second example of intercollegiate athletics' culture of transparency is furnished by the NCAA.⁶¹ Its financial database provides aggregate information on school finances by gender for each NCAA division, subdivision, and sport.⁶² Additionally, the NCAA offers a separate database that provides demographic information for all of its athletes.⁶³ The databases do not, however, provide disaggregated data for each NCAA member school, which makes the data less useful for Title IX purposes.⁶⁴ Taken together, the EADA and NCAA databases provide a healthy number of data points that can be analyzed by gender.⁶⁵ But NIL is not one of those data points.⁶⁶

56. See *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1059–61 (6th Cir. 2022) (noting that plaintiffs may appropriately introduce EADA data at the preliminary injunction stage of Title IX proceedings).

57. EADA Cutting Tool, *supra* note 36.

58. 20 U.S.C. § 1092(g).

59. *Id.* The NCAA's study culminated in EADA legislation, which requires schools that receive federal financial aid funds to submit annual gender-based reports on intercollegiate athletics participation rates, revenues, expenses, financial aid, salaries, and other pertinent information. *Id.*

60. EADA Cutting Tool, *supra* note 36.

61. *Finances of Intercollegiate Athletics Database*, *supra* note 36.

62. *Id.*

63. *NCAA Demographics Database*, NCAA (Dec. 2022), <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx> [<https://perma.cc/7XC> V-C2MV].

64. *Id.*; *Finances of Intercollegiate Athletics Database*, *supra* note 36.

65. *NCAA Demographics Database*, *supra* note 63; *Finances of Intercollegiate Athletics Database*, *supra* note 36; EADA Cutting Tool, *supra* note 36.

66. *NCAA Demographics Database*, *supra* note 63; *Finances of Intercollegiate Athletics Database*, *supra* note 36; EADA Cutting Tool, *supra* note 36.

At first, the NCAA planned to collect NIL data using a third-party administrator.⁶⁷ But it later abandoned those efforts in the wake of *NCAA v. Alston*, where a unanimous U.S. Supreme Court held that the NCAA violated federal antitrust laws with its restrictions on athletes' educational benefits.⁶⁸ The Supreme Court's June 2021 decision is said to have all but invited future antitrust challenges to the NCAA's longstanding athlete compensation restrictions.⁶⁹ Justice Kavanaugh's concurrence, in particular, suggested that the NCAA's remaining compensation restrictions and justifications may not survive future Supreme Court challenges.⁷⁰ The third-party administrator originally sought by the NCAA not only would have collected NIL data, but it also would have helped enforce any applicable compensation restrictions.⁷¹ Because of pending litigation challenging remaining NIL compensation restrictions, the NCAA is unlikely to revisit NIL data collection in the near future.⁷²

Currently, the NCAA, like the general public, must rely on voluntary disclosures to obtain NIL information—even for investigatory purposes.⁷³ This puts the organization in a precarious position because schools may

67. Eben Novy-Williams, *Oliver Luck's NIL Nonprofit To Build National Database with ASU*, SPORTICO (July 26, 2022, 8:00 AM), <https://www.sportico.com/leagues/college-sports/2022/nil-deals-database-arizona-state-1234683528> [<https://perma.cc/XYQ8-62L4>].

68. *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021); Novy-Williams, *supra* note 67.

69. *Sherman Act — Antitrust Law — College Athletics — NCAA v. Alston*, 135 HARV. L. REV. 471, 475 (2021) (arguing that “[a]lthough the Supreme Court did not . . . review the NCAA’s rules regarding compensation unrelated to education, its decision laid the groundwork for the dismantling of those rules in future proceedings.”).

70. *See Alston*, 141 S. Ct. at 2166–67 (Kavanaugh, J., concurring) (“I add this concurring opinion to underscore that the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws.”).

71. Novy-Williams, *supra* note 67 (noting that the NCAA has abandoned the concept of engaging a “third party administrator” to track deals, educate stakeholders and help enforce regulations.”).

72. *House v. NCAA*, 545 F. Supp. 3d 804 (N.D. Cal. 2021) (holding that intercollegiate athletes may proceed with litigation claiming that the NCAA and its member conferences violated antitrust laws with rules barring athletes from receiving compensation for the commercial use of their NILs).

73. Lavigne & Murphy, *supra* note 37 (noting that the NCAA too must rely on voluntary NIL disclosures). The NCAA is rumored to have investigated multiple athletics programs for possible violations of its athletics scholarship limits and interim NIL guidelines prohibiting recruiting inducements and pay-for-play. Dodd, *Inside the World Of ‘Collectives’*, *supra* note 43.

rightfully decline NCAA requests for NIL information, and the organization currently lacks the subpoena powers necessary to compel disclosures.⁷⁴ For example, during an NCAA investigation of the Division Street Collective for potential prohibited recruiting inducements, the University of Oregon cited FERPA (among other reasons) to deny NCAA requests for access to its athletes' NIL records.⁷⁵

Although NIL data is generally unavailable through the traditional channels, private NIL exchanges attempt to fill in some of the gaps.⁷⁶ Some exchanges distribute periodic reports containing information that facilitates gender-based NIL comparisons by sport, type of NIL activity, and source of compensation.⁷⁷ NIL exchanges disclose aggregate data from their clients, which means that their data does not include all schools or athletes.⁷⁸ Still, exchange data can help uncover certain trends. For example, Figure 1 below reveals significant NIL gender disparities in that football received more total NIL compensation than nearly every other sport combined.

74. *NCAA v. Tarkanian*, 488 U.S. 179, 197 (1988).

75. Andy Wittry, *State, federal laws protect NIL deals amid calls for transparency*, ON3 (July 19, 2022), <https://www.on3.com/nil/news/oregon-ducks-division-street-nil-collective-ncaa-enforcement-ferpa-state-laws> [https://perma.cc/X2ZA-MR2S] [hereinafter Wittry, *State, Federal Laws Protect NIL Deals*].

76. Lev Akabas, *A Year Into NIL Era, We Still Can't Reliably Track Financial Data*, SPORTICO (July 1, 2022), <https://www.yahoo.com/entertainment/nil-era-still-t-reliably-172003992.html> [https://perma.cc/6MJN-SZGZ] [hereinafter Akabas, *A Year into NIL Era*].

77. See OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 6–7.

78. See, e.g., *id.* at 4 (“Opendorse owns the industry’s largest data pool which tells the most comprehensive story of NIL.”).

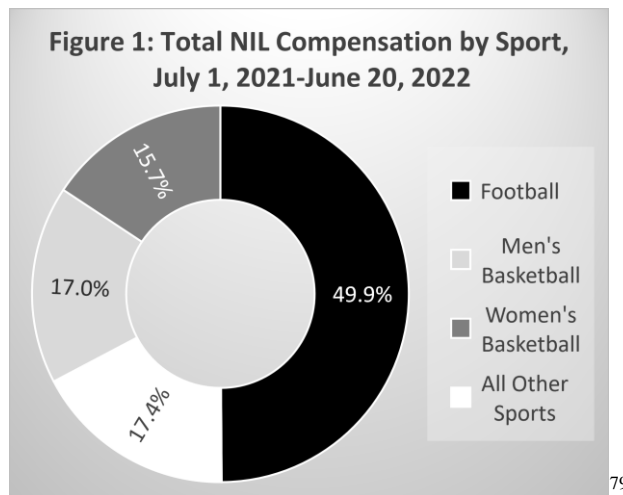


Figure 1's data, although incomplete, is at least anecdotally confirmed by media reports.⁸⁰ For example, the NIL data provided to the media by University of Maryland, Ohio State University, and University of Texas reveal that football players receive the overwhelming majority of total NIL compensation at their respective schools.⁸¹

Although the vast majority of NIL deals go unreported, several publicly known NIL deals stand out. Brigham Young University's (BYU) athletic department, for instance, brokered a NIL deal that provides NIL opportunities for the entire BYU football team, including walk-ons.⁸² In return, the team must wear the sponsor's branding on practice helmets and make promotional appearances, among other obligations.⁸³ The first known NIL deal for an entire women's team provides \$25,000 to each member of the Texas Tech women's basketball team in exchange for promoting the sponsor and its partner businesses through social media and appearances.⁸⁴

79. *Id.* at 7.

80. *See, e.g.,* Lavigne & Murphy, *supra* note 37.

81. *Id.*

82. Casey Lundquist, 'Built Brands' to Pay Tuition for All BYU Football Walk-Ons, *SPORTS ILLUSTRATED* (Aug. 12, 2021, 12:34 PM EDT), <https://www.si.com/college/byu/news/built-brands-to-pay-tuition-for-all-byu-football-walk-ons> [<https://perma.cc/X6CV-BDMB>].

83. *Id.*

84. Andy Wittry, *Level 13 Agency to pay Texas Tech women's basketball players \$25K*, *ON3* (Aug. 9, 2022), <https://www.on3.com/nil/news/texas-tech->

Although team-wide NIL deals are more egalitarian, individual NIL deals are more common.⁸⁵ The most lucrative individual deals reportedly favor football players in men’s sports and basketball players in women’s sports.⁸⁶ Notable NIL earners include LSU gymnast, Olivia Dunne, at \$2.7 million and Arizona State quarterback, Jaden Rashada, once valued at \$13.5 million.⁸⁷ While commentators are quick to note that when football is removed, women’s sports out earn men’s, there is insufficient information to confirm whether that is the case generally.⁸⁸

Paradoxically, schools have expressed frustration regarding the lack of NIL transparency, while, at the same time, shielding their own data from public scrutiny.⁸⁹ NCAA Vice President of Enforcement Jonathan Duncan noted that “many schools want instant justice, full transparency and draconian penalties when it’s some other school”⁹⁰ He continued, “They don’t necessarily want those same things when it’s them.”⁹¹

lady-raiders-womens-basketball-nil-deals-level-13-agency-25000 [https://perma.cc/2LH2-HYNA].

85. See, e.g., *NIL Deal Tracker*, ON3, <https://www.on3.com/nil/deals> [https://perma.cc/YT9P-NUFC] (last visited Mar. 10, 2023).

86. OPENDORSE, *NIL: ONE YEAR*, *supra* note 1, at 6–7.

87. Jennifer Gerson, *Olivia Dunne fuels the earning power of college athletes — but who is keeping her safe?*, LA. ILLUMINATOR (Jan. 21, 2023, 6:00 AM), <https://lailluminator.com/2023/01/21/olivia-dunne-fuels-the-earning-power-of-college-athletes-but-who-is-keeping-her-safe> [https://perma.cc/4WE5-VYH9] (Dunne’s NIL “is said to be valued at \$2.7 million, and she is the only woman student athlete in the top 10 NIL values in college sports.”); Evan Crowel, *Jaden Rashada’s NIL Figure Creates New Precedent*, SPORTS ILLUSTRATED (Feb. 6, 2023, 7:00 PM), <https://www.si.com/college/tennessee/football/jaden-rashada-large-nil-deal-changes-college-football-recruiting> [https://perma.cc/9U54-7234] (“Andy Staples reported that the deal came in at \$13.85 million with stipulations Rashada had to meet to reach incentives.”).

88. Scripps News, *How college athletes’ name, image and likeness changed the game*, WPTV (June 28, 2022, 12:18 PM), <https://www.wptv.com/news/national/how-college-athletes-name-image-and-likeness-changed-the-game> [https://perma.cc/8WK9-5Z5H] (quoting Blake Lawrence, CEO of Opendorse’s, observation that “[i]f you remove college football from the data set, women’s sports student-athletes are out-earning the men’s sports student-athletes.”).

89. Compare Parrish Alford, *Saban defends comments, proposes transparency for NIL deals*, NE. MISS. DAILY J. (May 31, 2022), https://www.djournal.com/sports/college/sec/saban-defends-comments-proposes-transparency-for-nil-deals/article_fcd7883c-4ff3-5fc2-9baa-583d6ff0bb30.html [https://perma.cc/U8QB-KFDX], with Lavigne & Murphy, *supra* note 37.

90. Lavigne & Murphy, *supra* note 37.

91. *Id.*

Thus, the current state of NIL reflects a classic collective-action problem that occurs when pursuit of group members' individual interests produces undesirable outcomes for the group's common interests.⁹² That is, some schools would prefer to keep their own NIL data confidential but would also prefer NIL transparency to prevent ethical breaches by other schools.⁹³ If all schools were to disclose their NIL data, then all could share in the benefits of an accurate and complete NIL dataset that could be used for benchmarking and for identifying outliers that could pose regulatory compliance risks. Yet not all schools are willing to share their NIL data, and the NCAA has declined to lead disclosure efforts.⁹⁴ As with similar collective-action problems in the past,⁹⁵ a federal solution may be necessary.

Since 2019, over a half dozen attempts to enact federal NIL legislation have failed.⁹⁶ Included in those failed attempts are the Collegiate Athlete Compensation Rights Act (CACR) and the College Athlete Economic Freedom Act (CAEF), both of which would have required an independent third party to collect NIL data and make it available to the general public.⁹⁷ Specifically, CACR called for the creation of a "private, independent, self-

92. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION 2* (1965) (theorizing that "rational, self-interested individuals will not act to achieve their common or group interests").

93. Compare Aaron Suttles, *Nick Saban addresses Texas A&M, NIL comments: 'I have no problem with Jimbo'*, *ATHLETIC* (May 31, 2022), <https://theathletic.com/4176453/2022/05/31/nick-saban-addresses-texas-am-nil-comments-i-have-no-problem-with-jimbo/> [<https://perma.cc/HF2H-WPZA>], with Lavigne & Murphy, *supra* note 37.

94. Novy-Williams, *supra* note 67.

95. Prior to Title IX, many colleges and universities did not permit women to enroll on the same terms as men, if women were able to enroll at all. *NAT'L COAL. FOR WOMEN AND GIRLS IN EDUC.*, *supra* note 20, at 8. Colleges and universities likely would have continued to restrict women's enrollment—a collective-action problem that was successfully resolved by Title IX. Today, women outnumber men on college campuses. *NAT'L CTR. FOR EDUC. STAT.*, *supra* note 21.

96. *Tracker: Name, Image and Likeness Legislation by State*, *BUS. OF COLL. SPORTS* (last updated Feb. 16, 2023), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state> [<https://perma.cc/3NX3-BDJZ>] (listing state and federal NIL bills).

97. Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. § 5(d) (2020) (listing public disclosure requirements); College Athlete Economic Freedom Act, S.B. 238, 117th Cong. § 4 (2021) (listing public disclosure requirements).

regulatory, nonprofit” entity.⁹⁸ The entity’s responsibilities would have included publishing an annual NIL report containing information such as “the average amount of covered compensation earned by student athletes, disaggregated by sport,” among other things.⁹⁹ Relatedly, CAEF would have authorized grants for a business, nonprofit, or combined entity to conduct annual NIL market analyses and make its findings publicly available.¹⁰⁰ CAEF’s reports would have been ideal for gender equity purposes, as they would have been disaggregated by race, gender and sport.¹⁰¹ Despite including transparency provisions, neither CACR nor CAEF survived their respective legislative sessions.¹⁰²

After unsuccessful attempts in 2020, Senator Roger Wicker (R-Miss.) reintroduced CACR in 2022 with several amendments.¹⁰³ The most notable, for purposes of this Article, is that the NIL reporting requirements from prior versions of CACR were deleted.¹⁰⁴ The new CACR includes a confidentiality provision specifying that schools “may not publicly disclose any information with respect to a name, image, and likeness agreement between a student athlete and a third party without the express written consent of the student athlete.”¹⁰⁵ Thus, the latest version of CACR, if passed, would effectively create a nationwide intercollegiate NIL exception to state public records laws.

Federal NIL legislation, like Title IX, will not become the law of the land until the timing is just right. And, at this time, there does not appear to be a general consensus within Congress that NIL is an urgent matter.¹⁰⁶

98. Collegiate Athlete Compensation Rights Act, S.B. 5003, 116th Cong. § 6(A) (2020).

99. *Id.* § 5(d)(5).

100. College Athlete Economic Freedom Act, S.B. 238, 117th Cong. § 4 (2021).

101. *Id.* § 4(c)(1)(B).

102. Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. § 5(d) (2020); College Athlete Economic Freedom Act, S.B. 238, 117th Cong. § 4 (2021).

103. Collegiate Athlete Compensation Rights Act, S.B. 4855, 117th Cong. (2022); Ross Dellenger, *Republican Senator Reintroduces Bill That Takes Aim at NIL’s Recruiting Influence*, SPORTS ILLUSTRATED (Sept. 14, 2022), <https://www.si.com/college/2022/09/14/ncaa-nil-federal-bill-congress-roger-wicker> [<https://perma.cc/U2EV-M9HZ>].

104. Collegiate Athlete Compensation Rights Act, S.B. 4855, 117th Cong. § 5(b) (2022).

105. *Id.*

106. Dan Murphy, *Members of Congress to host virtual summit in hopes of stoking momentum for NCAA reform*, ESPN (Mar. 24, 2022), https://www.espn.com/college-sports/story/_/id/33583916/members-congress-host-virtual-summit

If it was, then at least one of the eight previously proposed NIL bills might have survived at least one chamber of Congress.¹⁰⁷ Relatedly, some commentators have argued that federal NIL legislation is not a priority because Congress, like the Supreme Court, is generally not inclined to protect the NCAA from competition.¹⁰⁸

Should intercollegiate athletics wait for Congress to enact comprehensive federal NIL legislation before pursuing NIL gender equity? And is it necessary to do so? Congress committed itself and the entire country to gender equity in school settings in 1972.¹⁰⁹ Notably, Title IX was passed that year without much fanfare, after centuries of women being treated as inferior in virtually every aspect of U.S. society.¹¹⁰ Thus, although U.S. public policy on NIL remains uncertain, U.S. gender equity policy, by contrast, is more defined.¹¹¹ Title IX requires gender equity in all aspects of intercollegiate athletics programs.¹¹²

A. Title IX and NIL

Many expected that allowing intercollegiate athletes to monetize their NIL would become yet another testament to Title IX's gender equity successes, especially since women influence 85% of all consumer spending decisions.¹¹³ But according to statistics from the leading NIL

-hopes-stoking-momentum-ncaa-reform [<https://perma.cc/TZD4-A5HM>] (“More than a half dozen members of Congress have introduced bills during the past two years . . . but so far none has made significant progress toward becoming law.”)

107. *Tracker: Name, Image and Likeness Legislation by State*, *supra* note 96.

108. Michael McCann, *One Year After Senate NIL Hearing, A Federal NIL Law Remains Elusive*, SPORTICO (July 2, 2022, 8:55 AM), <https://www.sportico.com/law/analysis/2022/federal-nil-bill-1234680391> [<https://perma.cc/U5KV-JQXK>].

109. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

110. Tumin, *supra* note 17.

111. See, e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (prohibits workplace discrimination on the basis of sex).

112. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; 1979 Policy Interpretation, *supra* note 29.

113. See, e.g., Steve Gorman, *Women's sports may reap big gains from California law on college endorsement deals*, REUTERS (Oct. 2, 2019, 12:09 AM), <https://www.reuters.com/article/us-sport-california-education/womens-sports-may-reap-big-gains-from-california-law-on-college-endorsement-deals-idUSKBN1W H0C2> [<https://perma.cc/VH4F-FWPK>]. *But see, e.g.*, Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1215 (2016) (arguing that NIL

exchange, men's sports received well over 50% of total NIL compensation in each of the NCAA's three divisions.¹¹⁴ These statistics are perplexing because women's basketball fans, for example, are typically more engaged than those of men's basketball.¹¹⁵ Higher fan engagement would normally translate into more value for sponsors, which in turn would produce higher earnings for female athletes. Yet football and men's basketball are NIL's top two earners.¹¹⁶

Title IX was enacted to curtail practices that devalue women's contributions to education and athletics.¹¹⁷ Yet available NIL statistics, if true, signal that women's athletics contributions continue to be devalued.¹¹⁸ While it is debatable as to whether NIL documents are education records, NIL is now an integral aspect of the intercollegiate athletics experience.¹¹⁹ Title IX requires gender equity in all aspects of intercollegiate athletics programs, and NIL is no exception.¹²⁰

Although NCAA guidance prohibits schools from using NIL as a recruiting inducement, doing so has nevertheless become the norm at many

will exacerbate gender inequities). LEARFIELD, INTERCOLLEGIATE FAN PULSE REPORT: EMPOWERING THE INFLUENCE OF THE FEMALE FAN 4 (Mar. 2022), <https://www.learfield.com/wp-content/uploads/2022/03/LEARFILE-FemaleFanReport-Mar2022.pdf> [<https://perma.cc/7SQA-35EL>] (noting women's spending power).

114. *NIL Insights: July 1, 2021–February 28, 2023*, OPENDORSE, <https://opendorse.com/nil-insights> [<https://perma.cc/8KAA-FSSM>] (last visited Mar. 12, 2023) [hereinafter *NIL Industry Insights*]; see discussion *infra* Part II; Akabas, *A Year into NIL Era*, *supra* note 76.

115. LEARFIELD, *supra* note 113 (comparing fan social media engagement for women's basketball, men's basketball, football, and "general athletics").

116. OPENDORSE, *NIL: ONE YEAR*, *supra* note 1, at 7.

117. See Greg Johnson, *The origins of Title IX*, NCAA (June 23, 2022, 10:15 AM), <https://www.ncaa.org/news/2022/6/23/features-the-origins-of-title-ix.aspx> [<https://perma.cc/29K5-945Z>] (noting that Title IX author Sen. Birch Bayh, D-Ind., "was as just as concerned about women not having the opportunity to play sports as he was about not being able to get into medical school or law school.").

118. OPENDORSE, *NIL: ONE YEAR*, *supra* note 1, at 7.

119. See, e.g., Jeremy Crabtree, *On3 exclusive: Top recruits open up about NIL's influence*, ON3 (July 26, 2022), <https://www.on3.com/nil/news/on3-exclusive-survey-top-recruits-open-up-about-nils-influence> [<https://perma.cc/J938-KRWT>] (quoting an anonymous SEC staffer who has speculated that the number of recruits whose school selection process centers NIL is "probably around 50 [percent]").

120. Boston, *supra* note 25 (arguing that because NIL implicates both the publicity and recruiting benefits to which Title IX applies, Title IX also applies to NIL benefits under certain specified circumstances).

schools.¹²¹ According to Arkansas-based sports agent Chris Turnage, although NIL “was intended not to be a recruiting tool . . . [that’s] exactly what it’s become”¹²² While somewhat doubtful in NIL’s early days, there is a general consensus now that NIL and recruiting are inextricably intertwined—which raises Title IX concerns.

Recruiting is a Title IX equal treatment factor.¹²³ As a result, recruiting efforts must be “equivalent in kind, quality or availability” for men’s and women’s teams.¹²⁴ Although Title IX does not require *identical* recruiting efforts, it does require that recruiting efforts are, at a minimum, “equal in effect.”¹²⁵ This standard can be met even if recruiting expenses differ for men’s and women’s teams.¹²⁶ The EADA defines recruiting expenses as:

All expenses an institution incurs attributable to recruiting activities. This includes, but is not limited to, expenses for lodging, meals, telephone use, and transportation (including vehicles used for recruiting purposes) for both recruits and personnel engaged in recruiting, and other expenses for official and unofficial visits, and all other expenses related to recruiting.¹²⁷

Consider how Title IX’s gender equity standards might apply to recruiting expenses at the University of Florida, which reported 302 male athletes and 263 female athletes in its EADA disclosures.¹²⁸ EADA data reveals

121. THIRD PARTY NIL GUIDANCE, *supra* note 14; Crabtree, *supra* note 119.

122. Richard Davenport, *The Recruiting Guy: NIL deals becoming more absurd*, ARK. DEMOCRAT GAZETTE (Jan. 9, 2022, 3:56 AM), <https://www.arkansasonline.com/news/2022/jan/09/nil-deals-becoming-more-absurd> [<https://perma.cc/6Y5C-8N9J>] (describing the terms of various NIL deals). *See, e.g.*, Nick Suss, *Lane Kiffin’s mastery of transfer portal and NIL adding up to wins for Ole Miss football*, CLARION LEDGER (Apr. 3, 2022, 9:00 PM CT), <https://www.clarionledger.com/story/sports/college/ole-miss/2022/04/04/lane-kiffin-ole-miss-football-nil-transfer-portal-recruiting-changes/7170849001> [<https://perma.cc/7JNF-KHSZ>]; Madeline Coleman, *Nick Saban Says NIL Rules Creates System Where ‘You Can Basically Buy Players’*, SPORTS ILLUSTRATED (Apr. 13, 2022), <https://www.si.com/college/2022/04/13/nick-saban-nil-rules-system-you-can-basically-buy-players> [<https://perma.cc/JDY5-WSZU>].

123. 1979 Policy Interpretation, *supra* note 29, at 71415.

124. *Id.*

125. *Id.* at 71417.

126. *See id.*

127. EADA Cutting Tool, *supra* note 36.

128. *The Equity in Athletics Data Analysis Cutting Tool, Get Data for One School*, U.S. DEP’T OF EDUC., <https://ope.ed.gov/athletics/#/institution/details> [<https://perma.cc/4HL8-8FLK>] (last visited Oct. 1, 2022) (revealing EADA details of a search for the “University of Florida”).

that Florida spent \$492,537 and \$156,678 on recruiting for the men's and women's teams, respectively.¹²⁹ Per capita, this amounts to Florida spending over \$1,000 more to recruit each male athlete.¹³⁰ However, because expenses for identical transportation and lodging can vary dramatically based on various uncontrollable factors, it is at least conceivable that the women's teams at Florida received recruiting efforts that were "equal in effect."¹³¹

Unlike traditional recruiting expenses, such as travel and lodging, NIL is an area where gender disparities and a lack of parity will be much more obvious. For instance, if total NIL for the men's and women's teams at Florida was similarly reported as \$492,537 and \$156,678, respectively, it would be clear that these dollar amounts are neither equal, nor equal in effect. This makes inequities in NIL more easily discernable than other type of recruiting inequities and makes NIL an ideal candidate for transparency.¹³²

Even so, commentators have argued that NIL gender inequities are irrelevant because third parties fund NIL, and, therefore, Title IX does not apply.¹³³ Yet as explained above in the Introduction, those arguments are unavailing.¹³⁴ Title IX applies to NIL transactions in which schools are involved, and even if schools are not directly involved, it applies to NIL to the extent that it is used as an inducement for recruiting athletes to attend a particular school.¹³⁵

As noted above, this Article does not revisit Title IX's applicability to NIL.¹³⁶ This Article assumes that Title IX applies to school and third-party NIL for reasons stated previously and instead focuses on whether the current lack of NIL transparency is appropriate given Title IX's gender equity requirements.

The focus of the Article is of great importance to NIL gender equity because Title IX monitoring, enforcement, and remediation depend on the

129. *Id.*

130. *See id.*

131. 1979 Policy Interpretation, *supra* note 29, at 71417.

132. Akabas, *Football and Social Media*, *supra* note 6 (citing NIL statistics provided by Opendorse CEO Blake Lawrence). NIL should be reported separately for transparency purposes, as it is qualitatively distinguishable from other types of recruiting expenses.

133. *See, e.g.*, Yasser & Fox, *supra* note 24, at 199; Jessop & Sabin, *supra* note 24, at 271; Associated Press, *supra* note 3.

134. *See* discussion *supra* Introduction.

135. Boston, *supra* note 25.

136. This Article also does not address how NIL gender disparities will be measured, as this topic is addressed in Boston, *supra* note 25.

availability of gender-based data. Yet many schools have been reluctant to provide any NIL data at all.¹³⁷ This, of course, presents significant obstacles to achieving Title IX's ultimate goal of gender equity in education and athletics. Granted, some very limited NIL data is currently available from third-party NIL exchanges and from the handful of schools that choose to make it available either voluntarily or pursuant to Freedom of Information Act (FOIA) requests.¹³⁸ But these disclosures, while insightful, are inadequate.

Opendorse, for example, provides monthly and annual NIL reports that include gender comparisons by sport, type of NIL activity, and source of compensation.¹³⁹ But these reports have multiple shortcomings. One is that they are incomplete in that they only include NIL information from Opendorse clients. Another is that they are standard self-selected reports, as opposed to customizable reports generated by end users. This is significant because the data is aggregated such that it does not facilitate school-level comparisons. Lastly, because private NIL exchanges are not subject to public records laws,¹⁴⁰ the information that they provide cannot be independently verified.

A few schools, such as Ohio State, have opted to publicize their NIL data by gender and sport.¹⁴¹ But schools like Ohio State are the exception, not the rule. The general rule seems to be that NIL data must remain private, and states are amending their NIL laws to ensure that this rule will be followed.¹⁴² Louisiana's recent NIL law amendment is representative of this trend and states:

Any document disclosed by the intercollegiate athlete to the postsecondary education institution that references the terms and conditions of the athlete's contract for compensation shall be confidential and not subject to inspection, examination, copying,

137. Lavigne & Murphy, *supra* note 37.

138. *Id.*

139. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 6–7.

140. *See, e.g.*, LA. REV. STAT. §§ 44:1(A), 44:31 (2023) (providing the right to examine the “public records” of “public bodies” as defined).

141. Eugene Smith et al., Presentation at Ohio State University Legal, Risk and Compliance Committee Meeting: Name, Image and Likeness (Feb. 10, 2022), https://trustees.osu.edu/sites/default/files/documents/2022/02/0_LRC_Public%20Materials_February%202022.pdf [<https://perma.cc/5NXS-88KU>] (discussing NIL for Ohio State athletes).

142. *See, e.g.*, S.B. 6, 2022 Leg., Reg. Sess. (Ky. 2022) (codified at KY. REV. STAT. § 164.6947(7) (2023)); S.B. 250, 2022 Leg., Reg. Sess. (La. 2022) (codified at LA. REV. STAT. § 17:3703(M) (2022)).

or reproduction pursuant to the Public Records Law.¹⁴³

Whether the Louisiana law extends to aggregate, non-individualized NIL disclosures is an open question. But to date, there have been no publicly reported disclosures of aggregate NIL data furnished by LSU. Given schools' general reluctance to disclose NIL data voluntarily, Part II of this Article explores whether schools should have to do so.

II. SHOULD NIL DATA BE DISCLOSED?

Broader availability of NIL data will facilitate confirming or disputing reported NIL gender disparities. The current lack of transparency allows schools to conceal gender disparities and ultimately to evade Title IX monitoring and enforcement for NIL. In the long term, this likely will produce undesirable outcomes for NIL gender equity that could be difficult to remediate.

A. *The Consequences of NIL Secrecy*

Schools seldom comply with public records requests for NIL data, either individually or in the aggregate.¹⁴⁴ But they should. The current lack of full NIL transparency conceals gender disparities and departs from the culture of openness that permeates other aspects of intercollegiate athletics. Transparency facilitates the efficient monitoring and effective oversight of compliance risks, while secrecy creates monitoring inefficiencies, limits the scope of regulatory enforcement, and curtails accountability.

1. *Secrecy Conceals Gender Disparities*

Because schools are not required to publicly report NIL data, it is difficult to discover if NIL gender disparities exist at every school. This lack of transparency stands in stark contrast to intercollegiate athletics current culture of disclosure, even with unfavorable information. For example, the University of Georgia's website includes an EADA survey that reveals gender disparities in multiple financial categories.¹⁴⁵ Similarly, the NCAA's external auditor recently published a gender equity

143. LA. REV. STAT. § 17:3703(M) (2023).

144. *E.g.*, Lavigne & Murphy, *supra* note 37.

145. 2020 2021 EADA Report2, UNIV. OF GA., https://georgiadogs.com/documents/2021/11/18/2020_2021_EADA_Report2.pdf?id=14133 [<https://perma.cc/QVZ2-L62X>] (last visited Feb. 4, 2023).

report of NCAA championships, which revealed significant and systematic financial, marketing, and other gender disparities.¹⁴⁶ Available data suggests that similar gender disparities exist with NIL.¹⁴⁷ However, unlike EADA and NCAA audit data, schools with wildly disparate NIL figures for male and female athletes can conceal those disparities by refusing to disclose them.

2. Secrecy Prevents Monitoring and Oversight

The U.S. Department of Education's Office of Civil Rights (OCR) is responsible for Title IX oversight.¹⁴⁸ Lack of NIL data transparency limits OCR and other stakeholders' ability to monitor Title IX compliance and seek remediation of gender disparities. The same is not true for other intercollegiate athletics program areas, where data is publicly available in user-friendly formats.¹⁴⁹ For example, if a school had an annually increasing gender disparity in its athletics scholarships, such a trend would be revealed in the institution's publicly available EADA data.¹⁵⁰ But there is currently not an analogue that would allow stakeholders to monitor a school's NIL trends. Without disclosure and monitoring, it is unlikely that schools will be meaningfully incentivized to proactively remediate disparities.

3. Secrecy Limits Enforcement and Accountability

Similar to monitoring, the lack of NIL transparency limits Title IX enforcement, along with schools' accountability. Although there is current data suggesting significant NIL gender disparities in the aggregate, schools are *individually* accountable under Title IX.¹⁵¹ Without a school's

146. KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE I: BASKETBALL CHAMPIONSHIPS 1 (Aug. 2, 2021), <https://kaplanhecker.app.box.com/s/6fpd51gk9ki78f8vbhqcqh0b0o95oxq> [https://perma.cc/KE7J-LK8P] [hereinafter PHASE I GENDER EQUITY REVIEW]; KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE II 28–29, 36 (Oct. 25, 2021), <https://kaplanhecker.app.box.com/s/y17pvxpap8lotzqajjan9vyye6zx8tmz> [https://perma.cc/P2FF-G42D] [hereinafter PHASE II GENDER EQUITY REVIEW].

147. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 7.

148. *Title IX and Sex Discrimination*, *supra* note 33.

149. EADA Cutting Tool, *supra* note 36.

150. *Id.*

151. OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 7; The NCAA is not subject to Title IX because it is not a recipient of federal funding. *NCAA v. Smith*,

NIL data, stakeholders will be unable to prove that a school's disparities are egregious enough to trigger enforcement actions.

Private litigants enforce Title IX alongside OCR.¹⁵² EADA data can provide the preliminary evidence of noncompliance necessary for plaintiffs to proceed with Title IX litigation. For example, the plaintiffs in *Balow v. Michigan State University* recently relied on EADA data in the early stages of litigation, which sought to prevent the university from eliminating the women's swimming team.¹⁵³ The court held that "at the preliminary-injunction stage, it may be possible to show a strong likelihood of success on the merits based on EADA data"¹⁵⁴ Without publicly available data, plaintiffs like those in *Balow* might not have been able to move forward with litigation. Thus, limited data can limit stakeholders' ability to hold schools accountable.

Although schools have called for NIL transparency, some refuse to reveal their own data.¹⁵⁵ Instead, they stand by and wait for third parties and other schools to do so.¹⁵⁶ As stated in Part I, existing data from schools and third parties is incomplete, potentially inaccurate, and unable to be compared across schools.¹⁵⁷ Lack of universal disclosure allows non-disclosing schools to conceal gender disparities and evade Title IX monitoring and enforcement. Schools, especially those that are noncompliant or outliers, have very few incentives to make NIL data publicly available and multiple incentives to keep it secret. NIL presents a collective-action problem in this regard—one that may be best solved by requiring mandatory NIL disclosures.

Although the focus of this Article is on NIL transparency for purposes of discovering and remediating gender equity issues, there are several other benefits. For instance, gender-based NIL data could provide insight into whether schools are engaging in unethical or illegal behavior. For example, unusually high NIL numbers for a given team could signify pay-for-play or bribery, while unusually low NIL numbers might signify

525 U.S. 459 (1999) (holding that collecting dues from member schools that receive federal funds does not subject the NCAA to Title IX).

152. *Title IX and Sex Discrimination*, *supra* note 33 (noting that OCR enforced Title IX); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703 (1979) (holding that Title IX provides a private right of action).

153. *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1059–61 (6th Cir. 2022) (noting that plaintiffs may appropriately introduce EADA data at the preliminary injunction stage of Title IX proceedings).

154. *Id.* at 1061.

155. *See, e.g., Lavigne & Murphy*, *supra* note 37.

156. *See id.*

157. *See* discussion *supra* Part I.

underreporting. NIL transparency also could be useful in helping to determine prevailing market rates for intercollegiate athletes and teams at certain schools. Additionally, NIL data could provide a starting point for NCAA compliance investigations related to prohibited recruiting inducements and pay-for-play.

Thus, there are several key questions that school-level NIL data could answer: Are schools that refuse to disclose NIL data doing so to avoid revealing gender disparities or other irregularities in their athletics programs? Are male and female athletes reporting NIL data to schools at the same rate? Do male athletes out earn female athletes in NIL in all sports or select sports? In which sports do female athletes out earn male athletes? Is it accurate that female athletes out earn male athletes when football is removed? What types of schools have the largest NIL gender disparities? The public has a legitimate interest in all these questions, yet most are currently unanswerable with available data. To answer them, comprehensive NIL data is required. As a result, this Article concludes that NIL data disclosure should be mandatory and made publicly available. To this end, Part III of this Article explores the operational aspects of this proposal.

III. HOW SHOULD NIL TRANSPARENCY BE IMPLEMENTED?

As stated above in Part II, NIL disclosure in intercollegiate athletics presents a classic collective-action problem, and mandatory public NIL disclosure is the solution. That is, it is generally not in any one school's best interest to disclose NIL data, unless all schools are required to do so. Without mandatory NIL disclosure by all schools, there will be no comprehensive way to determine whether NIL gender disparities exist. While an exceptional handful of schools have provided limited NIL data voluntarily, others have refused to release even anonymized NIL data.¹⁵⁸ And still others have gone as far as lobbying state lawmakers to pass legislation exempting NIL data from public records requests due to FERPA privacy concerns.¹⁵⁹

While privacy is certainly a valid concern, it should not categorically block the disclosure of all NIL data. Schools rely on FERPA to support blanket denials of NIL records with no explanation,¹⁶⁰ when FERPA's

158. Lavigne & Murphy, *supra* note 37 (describing schools' varying responses to ESPN's FOIA requests for NIL data).

159. *Id.*

160. Paul Steinbach, *Payments to College Athletes Now Legal, Still Hidden*, ATHLETIC BUS. (Mar. 2, 2022), <https://www.athleticbusiness.com/operations/>

applicability to NIL records is questionable at best. Frank LoMonte, who leads the University of Florida's Brechner Center for Freedom of Information, noted that "[s]omething that was created by Nike or Coca Cola was never an education record."¹⁶¹ He continued, "Nothing about these agreements fits what Congress had in mind when they made education records confidential."¹⁶² Certain schools' refusal to disclose even anonymized NIL data makes it unnecessarily difficult to accurately determine whether NIL is a widespread source of gender disparities in intercollegiate athletics or whether such disparities are limited to certain schools.

Other than privacy, schools have also noted that disclosure of NIL data may result in competitive disadvantages or violate the confidentiality clauses in NIL agreements.¹⁶³ For example, a lawyer for the University of Iowa, Nathan Levin, refused to disclose even anonymized NIL data, noting that Iowa law protects government reports that would advantage competitors.¹⁶⁴ According to Levin, "If recruits or other universities were given access to this data, it would place the University of Iowa at a competitive disadvantage, especially in this current state of NIL uncertainty that is not being regulated by the NCAA."¹⁶⁵ However, this argument is specious in that recruits now routinely ask questions about NIL prospects, and it is in a school's best interest to respond.¹⁶⁶

Although concerns about competition and confidentiality are understandable in cases of detailed full disclosure, such concerns are less so with anonymized disclosures. Moreover, state disclosure laws designed to protect schools from lawful competition do not outweigh federal laws

marketing/article/15289152/payments-to-college-athletes-now-legal-still-hidden [https://perma.cc/37XP-6UVL].

161. *Id.*

162. *Id.*

163. Ethan Stein, *Iowa won't release NIL Data; said releasing data would hurt recruitment for Hawkeyes*, KCRG.COM (May 12, 2022, 9:21 PM CDT), <https://www.kcrg.com/2022/05/13/iowa-wont-release-nil-data-said-releasing-data-would-hurt-recruitment-hawkeyes/> [https://perma.cc/J3QV-44E2]; Wittry, *State, Federal Laws Protect NIL Deals*, *supra* note 75 (describing schools' reasons for denying requests for NIL data).

164. Stein, *supra* note 163.

165. *Id.* Others have suggested that Iowa's reason for refusing to disclose NIL data is a pretext to conceal NIL data that may be "inaccurate or potentially embarrassing." *Id.*

166. Associated Press, *'Arms Race': NIL Compensation Now a Potent Recruiting Weapon*, NBC CHI. (Aug. 31, 2022, 12:00 PM), <https://www.nbcchicago.com/news/sports/arms-race-nil-compensation-now-a-potent-recruiting-weapon/2928264> [https://perma.cc/3KXS-38Z2].

designed to ensure gender equity. The EADA supports this view in the financial data that it requires and makes available to the general public.¹⁶⁷ Moreover, the United States Supreme Court has also refused to shield intercollegiate athletics from valid competition in declining the NCAA's request for favorable treatment under federal antitrust laws.¹⁶⁸

In some ways, all publicly available financial information on intercollegiate athletics could provide competitive advantages to rival schools. Yet financial information on intercollegiate athletics programs remains plentiful, and some schools currently disclose NIL data publicly.¹⁶⁹ If all schools are required to disclose NIL data as this Article proposes, the purported advantages and disadvantages of doing so would be more evenly distributed across all schools. At present, the advantages and disadvantages of NIL transparency are absorbed by the few schools that voluntarily choose to disclose.

Lastly, confidentiality clauses in NIL agreements have also been offered as a reason for not disclosing NIL data.¹⁷⁰ Of course, there are very legitimate reasons for individualized contractual details to remain confidential. However, those reasons do not apply to aggregate NIL data that is presented in ways that do not allow individual athletes to be identified. Additionally, confidentiality clauses generally do not apply to government-mandated reporting requirements, which is why the schools are able to have access to their athletes' NIL agreements.¹⁷¹

167. See EADA Cutting Tool, *supra* note 36.

168. NCAA v. Alston, 141 S. Ct. 2141 (2021).

169. See, e.g., *College Football Head Coach Salaries*, USA TODAY (Oct. 12, 2022, 6:28 PM), <https://sports.usatoday.com/ncaa/salaries/football/coach> [<https://perma.cc/M4CF-AECP>] (providing detailed salary information for over 100 NCAA football coaches, including bonuses and buyouts); Smith et al., *supra* note 141 (discussing NIL for Ohio State athletes); Brandon Smith, *WATCH: NIL 'biggest concern,' Yurachek Says*, SENTINEL-RECORD (Mar. 10, 2022, 4:04 AM), <https://www.hotsr.com/news/2022/mar/10/nil-biggest-concern-in-college-sports-u-of-as/> [<https://perma.cc/BQ4Z-3252>] (discussing NIL for University of Arkansas athletes).

170. Wittry, *State, Federal Laws Protect NIL Deals*, *supra* note 75 (Oregon cited FERPA and confidentiality clauses in NIL contracts to block disclosure of NIL details).

171. Employment contracts containing provisions that violate state laws are void, as would be a NIL contract that prohibits legally mandated disclosures. *Mujo v. Jani-King Int'l, Inc.*, 13 F.4th 204, 212 (2d Cir. 2021). State NIL laws typically require that athletes disclose NIL agreements to their schools. See, e.g., CONN. GEN. STAT. § 10a-56(c)(1) (2023) ("Requiring a student athlete to disclose...to his or her institution of higher education . . . each endorsement contract [and] written agreement for employment . . .").

In recognition of the legitimate privacy interests surrounding NIL, this Article recommends a mandatory NIL data disclosure process that balances privacy interests against gender equity and the public's interest in accurate NIL data. To this end, this Part will specify the type of NIL disclosures that should be required and will propose an entity to collect and distribute the disclosures.

A. What Type of NIL Information Should be Publicly Disclosed?

NIL disclosures should provide data that is sufficiently detailed to facilitate gender equity assessments of NIL for each reporting school. Because of privacy concerns, the data should be reported in the aggregate, rather than individually. For example, NIL disclosures could be reported in the aggregate and contain information such as: the total number of athletes that receive NIL by gender, the total dollar amount of NIL received by gender, the total dollar amount of NIL received by sport, and the average dollar amount of NIL received per athlete by sport, along with any other pertinent information. This information should be sufficient to determine whether NIL gender disparities exist and would provide standardized information comparable across schools. Collecting this data would not be unduly burdensome, as many schools already collect NIL data from athletes under state NIL laws.¹⁷²

B. Who Should Collect and Publicly Disclose NIL Data?

There are several entities that could efficiently collect and publicly disclose NIL data. These entities include the NCAA, individual conferences, private third parties, and the ED's Office of Postsecondary Education (OPE). This Article recommends ED's OPE, because it is better situated, compel disclosure of NIL data from the largest number of schools.

Although at first glance, it might appear that the NCAA is the most appropriate entity for collecting NIL data, it is not the ideal choice. In fact, the NCAA had once planned to serve in this role but later abandoned its efforts in favor of a more hands-off approach.¹⁷³ The NCAA's then-proposed NIL database would have been administered by a third party that

172. See, e.g., OHIO REV. CODE ANN. § 3376.06(D)(1) (2023) (requiring NIL reporting by Ohio athletes); Smith et al., *supra* note 141 (discussing NIL for Ohio State athletes).

173. Novy-Williams, *supra* note 67 (noting that the NCAA has abandoned the concept of engaging a "third party administrator" to track deals, educate stakeholders and help enforce regulations.").

also would have been responsible for monitoring NIL transactions for potential NCAA compliance issues.¹⁷⁴

The main reason that the NCAA is not the ideal choice for collecting NIL data is because it cannot require schools to disclose NIL data to it.¹⁷⁵ The organization essentially would have to rely on schools to voluntarily provide NIL data. As explained above, voluntary disclosures are inadequate.¹⁷⁶ Additionally, because not all schools are NCAA members, NIL disclosures made to the NCAA would be incomplete even if every NCAA school complied. For identical reasons, conferences also are not the ideal collectors of NIL data.

NIL data collection by third parties would be similarly incomplete. For example, various NIL exchanges currently collect and report NIL data based on transactions by clients.¹⁷⁷ But much like the NCAA and its conferences, not all schools are members of NIL exchanges. Thus, NIL exchange data is incomplete as well, and they similarly cannot compel disclosure from non-clients. The only entities that can legally require disclosure of NIL data are government entities or their agents.¹⁷⁸ The NCAA, conferences, and NIL exchanges are neither.

The advantages of using the OPE to collect NIL data are many, while the drawbacks are comparatively few. First, the OPE is an ideal choice for collecting NIL data because it already collects related information for its EADA surveys.¹⁷⁹ EADA survey data is made publicly available on the OPE's EADA website.¹⁸⁰ The website provides gender-based data on

174. NCAA, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION REQUEST FOR PROPOSAL NAME IMAGE AND LIKENESS- THIRD-PARTY ADMINISTRATOR (Sept. 4, 2020), https://ncaaorg.s3.amazonaws.com/governance/ncaa/NCAA_NILRFP.pdf [<https://perma.cc/E72U-7ZN5>].

175. See discussion *infra* Part I.

176. *Id.*

177. See, e.g., OPENDORSE, NIL: ONE YEAR, *supra* note 1, at 4.

178. For example, states can require athletes to disclose NIL data to schools. *E.g.*, LA. REV. STAT. § 17:3703(K) (2023). States can require schools to disclose NIL data to the public, absent an applicable exception. *E.g.*, *id.* §§ 44:1(A), 44:31 (providing the right to examine the “public records” of “public bodies” as defined). States can also require disclosures from unwilling parties. *E.g.*, LA. CODE CIV. PROC. art. 1354 (2023) (describing the scope of the state’s subpoena power). Lastly, the federal government can require disclosures as it has with EADA data. *What Is the Equity in Athletics Disclosure Act (EADA) Survey?*, U.S. DEP’T OF EDUC.: OFF. OF POSTSECONDARY EDUC., <https://surveys.ope.ed.gov/athletics/#/> [<https://perma.cc/NAL2-ZKNT>] (last visited Oct. 9, 2022) [hereinafter OPE, *What Is the EADA Survey*].

179. EADA Cutting Tool, *supra* note 36.

180. OPE, *What Is the EADA Survey*, *supra* note 178.

athletics revenues, expenses, and participation by teams, along with aggregate coaching salaries and scholarship expenditures across all teams.¹⁸¹ Because the EADA survey is mandatory for all co-ed schools that participate in federal financial aid programs,¹⁸² using it for data collection will ensure that almost all U.S. colleges and universities will be captured. Penalties for nondisclosure include civil fines of up to \$57,317 per violation and termination from federal financial assistance programs.¹⁸³

Because the EADA survey does not currently include NIL questions, it must be amended to add them. Adding questions to the EADA survey sounds relatively simple but can be difficult to accomplish. Thus, the process for altering the EADA survey is the major disadvantage of using it to collect NIL data. New questions must be approved using the process specified in the Administrative Procedure Act (APA), which could significantly delay implementation.¹⁸⁴ Nevertheless, using the OPE to collect NIL data would be superior to the NCAA, conferences, and other third parties for the reasons stated above.

Although publicly disclosing NIL data is promising for gender equity purposes, some might argue that disclosure will result in unintended consequences. But schools and athletes already disclose NIL data.¹⁸⁵ The solutions proposed by this Article simply would ensure that all schools are similarly situated in making NIL disclosures.

181. EADA Cutting Tool, *supra* note 36.

182. OPE, *What Is the EADA Survey*, *supra* note 178.

183. U.S. DEP'T OF EDUC.: OFF. OF POSTSECONDARY EDUC., USER'S GUIDE FOR THE EQUITY IN ATHLETICS DISCLOSURE ACT WEB-BASED DATA COLLECTION (2019), https://surveys.ope.ed.gov/athletics2k20/wwwroot/documents/2019_EADA_Users_Guide.pdf [<https://perma.cc/HQM2-V6T5>].

184. The APA requires that agencies provide a notice-and-comment period before finalizing amendments to regulations. 5 U.S.C. § 553(b), (d). The Department of Education uses negotiated rulemaking for this process. *See The Negotiated Rulemaking Process for Title IV Regulations - Frequently Asked Questions*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/highered/reg/hea_rulemaking/hea08/neg-reg-faq.html [<https://perma.cc/9ES7-MK9Q>] (last visited Oct. 20, 2022).

185. *See, e.g.*, Smith et al., *supra* note 141 (discussing NIL for Ohio State athletes).

CONCLUSION

In 1972, Congress enacted Title IX to eliminate widespread gender disparities in education and athletics.¹⁸⁶ Decades later, Congress enacted the EADA in response to NCAA findings that gender disparities had continued unabated in many intercollegiate athletics programs.¹⁸⁷ Because of the EADA, gender-based data on intercollegiate athletics programs' finances and staffing and participation rates is publicly available and searchable.¹⁸⁸ The EADA ushered in an era of financial transparency in intercollegiate athletics, and, as a result, comprehensive financial data can be found on multiple non-EADA websites.¹⁸⁹

Limited data from third-party sources suggests that there is an increasing NIL gender disparity. Yet there is no comprehensive means of confirming it. While schools have expressed an interest in NIL data transparency on the one hand, they have refused to reveal their own NIL data on the other. With only limited information publicly available, NIL is an outlier in intercollegiate athletics. The current culture of concealment that surrounds NIL not only creates obstacles to identifying NIL gender disparities, but it also creates a host of other compliance issues.

Some state NIL laws require athletes to report NIL data directly to their schools, but schools are not required by state or federal laws to further report NIL data.¹⁹⁰ In fact, just the opposite occurs. When media outlets have sought NIL data under public records laws, many schools have refused to provide it, citing FERPA as the reason.¹⁹¹ While student privacy is a valid concern when releasing individualized NIL data for public consumption, it most certainly is not a valid reason for refusing to disclose aggregate or carefully anonymized data. Thus, in a sense, intercollegiate

186. See Johnson, *supra* note 117 (noting that Title IX author Sen. Birch Bayh, D-Ind., “was as just as concerned about women not having the opportunity to play sports as he was about not being able to get into medical school or law school.”).

187. 20 U.S.C. § 1092(g). The NCAA’s study culminated in EADA legislation, which requires schools that receive federal financial aid funds to submit annual gender-based reports on intercollegiate athletics participation rates, revenues, expenses, financial aid, salaries, and other pertinent information. *Id.*

188. EADA Cutting Tool, *supra* note 36.

189. See, e.g., *Knight-Newhouse College Athletics Database*, KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS, <https://knightnewhousedata.org> [<https://perma.cc/P3L6-WULD>] (last visited Oct. 1, 2022); *NCAA Finances: Revenue and Expenses by School*, USA TODAY (last updated Oct. 13, 2022, 2:43 PM ET), <https://sports.usatoday.com/ncaa/finances> [<https://perma.cc/NE82-VKY7>].

190. See, e.g., OHIO REV. CODE ANN. § 3376.06(D)(1) (2023).

191. See, e.g., Lavigne & Murphy, *supra* note 37.

athletics is experiencing a collective-action problem with respect to NIL data transparency. And it is a problem that neither schools, conferences, the NCAA, nor private third parties have the ability to effectively solve alone. It is one that can only be effectively and comprehensively solved at the federal level, given NIL's current culture of concealment.

While repeated attempts to enact comprehensive federal NIL legislation have failed, the EADA, as an existing federal law, is the ideal vehicle for addressing NIL data transparency from a gender equity perspective. Using the EADA's infrastructure to collect and make NIL data publicly available could provide the transparency necessary to identify and remediate NIL gender disparities, without the difficulties of passing an entirely new federal NIL law. Additionally, this approach could provide the added benefit of assisting with overall NIL market transparency and NCAA compliance concerns.