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## The NIL Glass Ceiling

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# ARTICLES

## THE NIL GLASS CEILING

*Tan Boston* \*

### ABSTRACT

*Name, image, and likeness (“NIL”) produced nearly \$1 billion in earnings for intercollegiate athletes in its inaugural year. Analysts argue that the shockingly high totals result from disproportionate institutional support for revenue-generating sports. Although NIL earnings have soared upwards of eight figures to date, first-year data reveals that significant gender disparities exist. Such disparities raise Title IX concerns, which this Article illustrates using a hypothetical university and NIL collective. As such, this Article reveals how schools can facilitate gender discrimination through NIL collectives, contrary to Title IX.*

*Although plainly applicable to NIL transactions in which schools are involved, Title IX’s current regulatory scheme did not anticipate, nor does it mention NIL. This ongoing omission has produced confusion regarding Title IX’s applicability, especially as it relates to NIL financed by third parties. Accordingly, this Article argues*

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*that Title IX should be modernized to explicitly address NIL and offers several recommendations for doing so.*

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## INTRODUCTION

*“[W]omen athletes were assumed to want and need less of almost everything simply because they were female.”<sup>1</sup>*

Consider the following hypothetical: men’s rugby is the more popular of the two varsity sports offered by State University (“State”), which is in a jurisdiction without a name, image, and likeness (“NIL”) statute. State’s donors form a nonprofit organization called Rugby Cares that offers all sixteen players on the men’s rugby team \$40,000 annually for the use of their names, images and likenesses to support a local charity. The program, dubbed the “Brick Wall,” is the first of its kind to fund NIL for an entire rugby team.<sup>2</sup> One season later, men’s rugby welcomes the best recruiting class in the school’s 150-year-history. As a result, the team is featured heavily in the local news media for its successes on and off the field.

By contrast, State’s fourteen women’s rugby players enter into multiple self-facilitated NIL transactions with dozens of local businesses for annual compensation ranging from \$500 to \$5,000 per player. The women’s team remains competitive throughout the season and over half of the team receives academic honors. While preparing for the conference championship, the team approaches a school official for assistance in securing a Brick Wall analogue. The official is keenly aware of the Brick Wall initiative, as he sits on the executive boards of multiple charitable organizations with Rugby Cares’ co-founders—each of whom has donated millions to the athletics department for decades. Still, the official denies women’s rugby’s request.

Frustrated by the denial, six of the team’s best players enter the transfer portal and immediately leave State for various colleges, whose athletics departments later announce that the players will receive offers to promote one local business for amounts ranging from \$40,000 to \$65,000 per year. One week later, all six incoming

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1. KELLY BELANGER, *INVISIBLE SEASONS: TITLE IX AND THE FIGHT FOR EQUITY IN COLLEGE SPORTS* 12 (2016).

2. The National Collegiate Athletic Association (“NCAA”) describes 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*, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QandA.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf) [https://perma.cc/RF98-KQK3] [hereinafter INTERIM NIL Q & A]. For purposes of this Article, the terms “NIL” and “NIL compensation” are used interchangeably, as appropriate.

women's rugby recruits decommit, suggesting that they too have received five-figure NIL opportunities elsewhere.

This Article addresses two questions generated by the hypothetical. The first question is whether Title IX's current framework offers sufficient guidance to address NIL. The second question is whether Title IX requires the university to secure equivalent NIL for women's rugby.

In the not-so-distant past, the above hypothetical would have been the epitome of a NCAA violation. But that is no longer the case. On July 1, 2021, the NCAA abruptly exited the business of prohibiting athletes from receiving compensation for the use of their NILs.<sup>3</sup> NCAA athletes nationwide owe this policy change to the twelve states that would have, in any event, authorized NIL over the NCAA's objections, and to the unanimous Supreme Court of the United States decision in *NCAA v. Alston*, which laid the foundation for antitrust challenges to NIL restrictions.<sup>4</sup>

According to recent statistics, women's sports receive significantly less NIL than men's sports. NIL collectives ("Collectives"), for example, distribute seventy-five percent of their funds to football alone.<sup>5</sup> Additionally, men's sports receive well over half of the

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3. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (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/HS8B-PH9N]; NAT'L COLLEGIATE ATHLETIC ASS'N, INTERIM NIL POLICY [hereinafter INTERIM NIL POLICY], [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf) [https://perma.cc/D5VX-78GM]. Prior to July 1, 2021, the NCAA enforced amateurism regulations that generally prohibited intercollegiate athletes from receiving compensation for performance or for the use of their NILs. NAT'L COLLEGIATE ATHLETIC ASS'N, NAT'L COLLEGIATE ATHLETIC ASS'N DIVISION I MANUAL arts. 12.01-12.12 (2020) [hereinafter NCAA DI MANUAL].

4. *NCAA v. Alston*, 141 S. Ct. 2141 (2021); Note, *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."); Ben Kercheval and Dennis Dodd, *NCAA Approves Interim Name, Image and Likeness Policy Removing Restrictions for College Athletes to Earn Money*, CBS SPORTS (June 30, 2021, 5:44 PM), <https://www.cbssports.com/college-football/news/ncaa-approves-interim-name-image-and-likeness-policy-removing-restrictions-for-college-athletes-to-earn-money> [https://perma.cc/6T SN-X7AA] (reporting that the NCAA's Interim NIL Policy became effective the day before NIL legislation was to become effective in Alabama, Connecticut, Florida, Georgia, Illinois, Kentucky, Mississippi, New Mexico, Ohio, Oregon, Pennsylvania and Texas).

5. 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/X325-2RK3]; see *infra* Part II.

NIL totals in each of the NCAA's three divisions.<sup>6</sup> Such significant disparities not only imply that women's sports are less important, they also send a broader message that directly conflicts with Title IX's underlying premise of equality.

Because third parties are the main providers of NIL, commentators argue that Title IX concerns are misplaced.<sup>7</sup> These arguments, however, oversimplify how NIL has been implemented. Although commentators correctly note that facially Title IX applies only to educational institutions, whether it applies to third-party NIL ultimately depends on a school's level of involvement with NIL.

The typical NIL transaction falls into one of three categories: self-, school-, or third-party facilitated. This Article excludes the first category from its analysis because self-facilitated NIL is unlikely to trigger Title IX. By contrast, Title IX is triggered with certainty by school-facilitated NIL and is perhaps triggered by third-party NIL. This Article focuses on the hotly debated gray area of third-party NIL. In doing so, it highlights Title IX's lack of guidance with respect to NIL and offers strategies for addressing the topic.

Part I of this Article explains the history of Title IX in intercollegiate athletics and its current regulatory framework. Part II describes what NIL is, how it has been implemented and the resulting impacts to gender equity. Part III argues that if a school is directly or indirectly involved in facilitating NIL for its athletes, it provides benefits that are governed by Title IX. This Article further

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6. *NIL Industry Insights through February 28, 2023*, OPENDORSE, <https://opendorse.com/nil-insights> [<https://perma.cc/C3LB-HUAJ>] [hereinafter *NIL Industry Insights*]; see *infra* Part II. There is no universal NIL clearinghouse that lists all NIL transactions for all athletes. Thus, the data sets provided by leading NIL technology company, Opendorse, are incomplete. 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/PL78-FGR3>].

7. See, e.g., Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. OF SPORTS & ENT. LAW 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."); *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://www.espn.com/college-sports/story/_/id/33160929/male-athletes-lead-way-nil-money-per-data) [<https://perma.cc/G5AJ-SM5C>] ("Title IX . . . does not apply because schools are not striking the deals.") [hereinafter *Male Athletes Lead the Way*].



argues that because Title IX did not originally contemplate NIL, its regulations require updates that specifically address NIL. This Article concludes with proposals for updating Title IX accordingly.

## I. HISTORY OF TITLE IX IN INTERCOLLEGIATE ATHLETICS

*“I know I have to continue to push when things are not how they should be. Women in sports should continue to grow. I want to see little girls do what I do, especially representation-wise.”*

—Trinity Thomas, College Gymnast of the Year, University of Florida<sup>8</sup>

Title IX has been the driving force behind gender equity in U.S. education and athletics for over fifty years. Before Title IX, many U.S. universities either did not admit women at all or had strict enrollment limits. In 1972 when Title IX was passed, men still greatly outnumbered women on college campuses and there were fewer than 30,000 women competing in intercollegiate athletics.<sup>9</sup> Today, women outnumber men by nearly three million students and their athletics participation has soared to over 200,000.<sup>10</sup>

Before Title IX, many sex discrimination cases involving athletics were litigated under 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment.<sup>11</sup> Although the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws,” it does not

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8. Dante Green, *Sports York Gathers Prominent Women Sports Figures for Title IX Celebration*, YORK DISPATCH, <https://www.yorkdispatch.com/story/sports/2022/07/31/sports-york-gathers-prominent-women-sports-figures-title-ix-celebration/10178558002/> [<https://perma.cc/QBD9-HYTC>] (July 31, 2022, 3:33 PM).

9. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT. (2022), [https://nces.ed.gov/programs/digest/d20/tables/dt20\\_303.10.asp](https://nces.ed.gov/programs/digest/d20/tables/dt20_303.10.asp) [<https://perma.cc/5B8C-5FXP>]; WOMEN'S SPORTS FOUND., 50 YEARS OF TITLE IX: WE'RE NOT DONE YET 8 (2022), [https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13\\_Low-Res\\_Title-IX-50-Report.pdf](https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf) [<https://perma.cc/9CC8-7DDX>]. Although a growing number of athletes identify as nonbinary, intercollegiate athletics teams retain traditional sex-separated classifications. This Article is confined to those classifications.

10. *Digest of Education Statistics*, *supra* note 9; NAT'L COLLEGIATE ATHLETIC ASS'N, 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://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf) [<https://perma.cc/6THB-725R>].

11. *E.g.*, *Brenden v. Indep. Sch. Dist.*, 342 F. Supp. 1224, 1228 (D. Minn. 1972); *Gilpin v. Kan. State High Sch. Activities Ass'n.*, 377 F. Supp. 1233, 1236 (D. Kan. 1973); *Reed v. Neb. Sch. Activities Ass'n.*, 341 F. Supp. 258, 259 (D. Neb. 1972); *Bucha v. Ill. High Sch. Ass'n.*, 351 F. Supp. 69, 71 (N.D. Ill. 1972).

protect against sex discrimination by nongovernmental entities.<sup>12</sup> Thus, de facto discrimination against women in education and employment continued virtually unabated until the Civil Rights Era.

Title VI of the Civil Rights Act of 1964, the antecedent to Title IX, prohibits multiple forms of discrimination but did not originally prohibit sex discrimination.<sup>13</sup> Sex discrimination is the focus of Title IX of the Education Amendments of 1972, which states that<sup>14</sup>: “No 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>15</sup>

The statute applies to “education program[s] or activit[ies]” that receive federal funds and if only one department of a school, public or private, receives federal funding, then all departments of that school must comply with Title IX.<sup>16</sup> As such, the athletics departments of virtually every U.S. college and university must comply with Title IX to effectuate its dual goals of preventing the use of federal resources to perpetuate sex discrimination and protecting individuals against such discrimination.<sup>17</sup>

#### A. *Title IX and Intercollegiate Athletics*

The term “athletics” is not mentioned in the original Title IX statute. Still, the 1974 Javits Amendment directed the U.S.

12. U.S. CONST. amend. XIV, § 1; *United States v. Stanley*, 109 U.S. 3, 11 (1883).

13. Civil Rights Acts of 1964, tit. VI, § 601, Pub. L. No. 88-352, 78 Stat. 252 (Codified at 42 U.S.C. § 2000d) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

14. 20 U.S.C. §§ 1681–1688.

15. *Id.* §1681(a).

16. *Id.*; 34 C.F.R. § 106.2(h) (2022); Civil Rights Restoration Act of 1987 § 3(a), Pub. L. 100-259 § 908, 102 Stat. 28 (“For the purposes of this title, 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 . . .”).

17. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (“Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.”).

Department of Health, Education, and Welfare (“HEW”) to include athletics in the regulations for Title IX (“the Regulations”)<sup>18</sup>:

The Secretary [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of [T]itle IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.<sup>19</sup>

Published in 1975 and enforced by the U.S. Department of Education’s Office for Civil Rights (“OCR”), the Regulations include three broad compliance categories: (1) athletic scholarships; (2) benefits and services; and (3) effective accommodation of students’ interests and abilities.<sup>20</sup>

### 1. Athletic Scholarships

The first compliance category pertains to scholarships, which must be proportionately allocated between male and female athletes.<sup>21</sup> Section 106.37 of the Regulations requires that: “To the extent that a [federally assisted education program] awards athletic scholarships or grants-in-aid, it 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>22</sup>

Although “reasonable opportunities” is not defined by the Regulations, proportionate allocation of scholarships can be achieved by

18. Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). In addition to the Regulations, Title IX is further clarified by policy interpretations, the Title IX Athletics Investigator’s Manual, letters of clarification, and case law. (In 1979 the Department of Education was split from HEW and HEW was renamed the Department of Health and Human Services. Title IX regulations are now governed and enforced by the Department of Education. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979)).

19. *Id.*

20. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

21. 34 C.F.R. § 106.37(c) (2022).

22. *Id.* A “recipient” is defined in the Regulations as

[A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit . . . thereof.

*Id.* § 106.2(i) (2022).

awarding roughly equivalent scholarship amounts to each sex.<sup>23</sup> Compliance with this standard is determined by dividing the total scholarship amount for female athletes by the number of female athletes, then repeating that process for male athletes, and comparing the amount per athlete.<sup>24</sup> For example, if the total amount of scholarship funding available for State's fourteen female rugby players is \$1,400 and the total amount of scholarship funding available for its sixteen male rugby players is \$1,600, the amount per athlete, both male and female, is proportionately equal at \$100 each. A disparity is allowed only if it results from legitimate non-discriminatory factors.<sup>25</sup>

## 2. Benefits and Services

The second compliance category addresses “[o]ther athletic benefits and opportunities.”<sup>26</sup> With this category, it is particularly important to note that Title IX explicitly allows schools to operate separate athletics programs for men and women, so long as all aspects of both programs provide equivalent treatment.<sup>27</sup> Relatedly, compliance determinations are made in the aggregate at the men's and women's program level, unless disparities in individual program components are so egregious that they deny equal athletic opportunity or treatment.<sup>28</sup> To this end, section 106.41 of the Regulations states that: “A recipient which operates or sponsors inter-scholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”<sup>29</sup>

Section 106.41 then provides the following open-ended list of equal treatment factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;

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23. *Id.*

24. 1979 Policy Interpretation, *supra* note 20, at 71415.

25. *Id.*

26. *Id.*

27. 34 C.F.R. § 106.41(b)–(c) (2022).

28. 1979 Policy Interpretation, *supra* note 20, at 71417.

29. 34 C.F.R. § 106.41(c) (2022).

- (7) Provision of locker rooms, practice, and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity.<sup>30</sup>

The 1979 Policy Interpretation adds recruiting and other support services to the above equal treatment factors.<sup>31</sup>

Interestingly, compliance with the equal treatment component of the Regulations does not require equal expenditures for men's and women's teams.<sup>32</sup> Instead, OCR measures compliance using a more subjective equivalence test. That is, benefits and services must be equivalent in "kind, quality or availability" for male and female athletes, but need not be identical.<sup>33</sup> For example, using the hypothetical posed above, Title IX is not violated if State's women's rugby team receives a different brand ("kind") of headgear that offers the same durability and safety ("quality"), and that is replaced at similar intervals ("availability"), as that of the corresponding men's team.

### 3. Effective Accommodation

The third compliance category requires schools to effectively accommodate the athletic interests and abilities of both sexes.<sup>34</sup> Essentially, this means that schools must offer legitimate athletics participation opportunities for interested and capable male and female athletes. Courts determine compliance by applying a three-part test, also known as the safe harbor provisions.<sup>35</sup> The safe harbor allows schools to prove compliance by establishing any one of the conditions below:

- (1) Participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex are underrepresented among athletes, the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex; or

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30. *Id.*

31. 1979 Policy Interpretation, *supra* note 20, at 71415.

32. *Id.*

33. *Id.*

34. 34 C.F.R. § 106.41(e)(1) (2022).

35. See *e.g.*, *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Cohen v. Brown Univ. (Cohen II)*, 991 F.2d 888 (1st Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993).

(3) Where the members of one sex are underrepresented among athletes, and the institution cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>36</sup>

Note that schools cannot meet Title IX's requirements by offering proportionate scholarships and equivalent benefits and services to a disproportionately small number of women's teams.<sup>37</sup> Schools must effectively accommodate the interests and abilities of both sexes along with meeting Title IX's scholarships and benefits and services requirements.<sup>38</sup>

### B. *Title IX and NIL*

Most athletics issues tend to fit neatly into one of the above three categories. That said, none of these categories are a precise match for NIL. Although some might argue that NIL is analogous to scholarships and thus could appropriately reside within Title IX's scholarships framework, the compensatory nature of NIL precludes it from being categorized together with scholarships. Specifically, there are no inherent limits on NIL, as there are with scholarships—which are typically confined to specific education-related expenses. Also, at least theoretically, NIL cannot be used to provide pay-for-play or recruiting inducements whereas scholarships explicitly can.<sup>39</sup>

Although none of the current equal treatment factors are singularly sufficient to address NIL, recruiting and publicity provide good starting points. The relationships between NIL and recruiting and publicity will be explored below.<sup>40</sup>

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36. 1979 Policy Interpretation, *supra* note 20, at 71418.

37. *Cohen II*, 991 F.2d at 897.

38. *Id.*

39. NAT'L COLLEGIATE ATHLETIC ASS'N, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL\\_Guidance.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf) [<https://perma.cc/9D3B-TME8>] [hereinafter THIRD-PARTY NIL GUIDANCE]. Although the Regulations do not define athletic scholarships, NCAA regulations indicate that “[a]thletically related financial aid” is provided in exchange for “athletics ability, participation or achievement” to assist in paying educational costs. NCAA DI MANUAL, *supra* note 3, art. 15.02.5.1. See Ellen J. Staurowsky, “A Radical Proposal”: *Title IX Has No Place in College Sport Pay-For-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 591–92 (2012) (noting that scholarships are pay-for-play).

40. See *infra* Part III.

Effective accommodation is the remaining category that perhaps could address NIL. But as the three-part test suggests, this category targets equitable opportunities to play a sport, rather than the requirements or benefits of playing a sport.<sup>41</sup> Effective accommodation's lack of categorical synergy with NIL makes it the least likely category for addressing the topic.

Of the three Title IX compliance categories, benefits and services, as the broadest in scope, holds the most potential for addressing NIL. But even it is not ideal as written. Thus, Part IV suggests alternatives for addressing NIL under Title IX.<sup>42</sup>

## II. A NIL PRIMER

*“Athletes should be entitled to the freedoms that are available to other students at the university in such matters as work opportunities, the right to transfer between schools, and the right to use their name and reputation for financial gain.”*

—Walter Byers, Executive Director of the NCAA (1951–1987)<sup>43</sup>

Before its recent NIL policy changes, the NCAA prohibited athletes from making commercial use of their NILs to endorse products, services and businesses, including their own.<sup>44</sup> Ongoing dissatisfaction with the organization's restrictive NIL stance culminated in the landmark *O'Bannon v. NCAA* and *NCAA v. Alston* antitrust decisions.<sup>45</sup> Guided by federal antitrust laws, the Ninth Circuit in *O'Bannon* struck down restrictions on NCAA athletes' NIL and a unanimous Supreme Court in *Alston* similarly struck down restrictions on athletes' educational benefits—thereby making the NCAA more vulnerable to future antitrust litigation.<sup>46</sup> In the midst of ongoing attempts by the NCAA to maintain the status quo, multiple states enacted NIL statutes that gave intercollegiate athletes the legal right to use their NILs for commercial purposes,

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41. 1979 Policy Interpretation, *supra* note 20, at 71418.

42. *See infra* Part IV.

43. WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 343 (1995).

44. NCAA DI MANUAL, *supra* note 3, art. 12.5.2.1.

45. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

46. *O'Bannon*, 802 F.3d at 1052–53 (invalidating NCAA regulations that prohibit student-athletes from sharing in NIL revenues); *Alston*, 141 S. Ct. at 2158–59 (invalidating NCAA amateurism regulations that limit educational benefits for intercollegiate athletes).

and to license them to third parties.<sup>47</sup> Contemporaneously, the NCAA lobbied Congress for a nationwide solution, including an antitrust exemption.<sup>48</sup> Yet all federal proposals remained pending as of the critical July 1, 2021 date, when several NIL statutes were to become effective.<sup>49</sup> Ultimately, a defeated NCAA suspended its prohibitions on NIL, which resulted in unrestricted NIL rights for intercollegiate athletes.

### A. *What Is NIL?*

The “publicity” or “NIL rights” enjoyed by today’s intercollegiate athletes are considered intellectual property—an umbrella term that encompasses copyrights, patents, trademarks, and rights of publicity. The rights provided for under most intellectual property law regimes seek to encourage investments of time, energy and resources in the creation of intellectual property.<sup>50</sup> Trademark rights, by contrast, seek to protect the public from confusion and deception as to the source or origin of a particular good or service.<sup>51</sup> NIL rights overlap with trademark and publicity rights. Therefore, a brief description of both is provided below.

#### 1. Trademarks

If used in a certain manner, NILs can evolve into federally protected trademarks. A trademark is a “word, name, symbol, or

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47. Ross Dellenger, *‘It’s Going to Be a Clusterf—:’ The New Era of College Sports Is Here. Is Anyone Ready?*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/ncaa-athletes-profit-nil-daily-cover> [<https://perma.cc/9UW9-UCEN>] (detailing the history of NCAA NIL policy changes); *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state> [<https://perma.cc/3LDK-NY9M>] (Feb. 16, 2023) (listing effective dates of NIL laws by state-by-state) [hereinafter *State NIL Tracker*].

48. Ross Dellenger, *Mark Emmert to Ask Senate to Grant NCAA Antitrust Protection in Name, Image, Likeness Hearing*, SPORTS ILLUSTRATED (July 22, 2020), <https://www.si.com/college/2020/07/22/mark-emmert-senate-hearing-antitrust-protection-name-image-likeness> [<https://perma.cc/P3W8-WQ2W>] (“Along with his requests for an antitrust exemption, Emmert will implore Congress, in maybe the most compelling way yet, to create a federal bill to govern athlete compensation.”); Marc Edelman, *Why Congress Would Be Crazy to Grant the NCAA an Antitrust Exemption*, FORBES (May 6, 2020, 9:50 AM), <https://www.forbes.com/sites/marcedelman/2020/05/06/why-congress-would-be-crazy-to-grant-the-ncaa-an-antitrust-exemption> [<https://perma.cc/V5XH-BK5T>].

49. *State NIL Tracker*, *supra* note 47; Kercheval & Dodd, *supra* note 4.

50. PAUL C. WEILER, GARY R. ROBERTS, ROGER I. ABRAMS & STEPHEN F. ROSS, *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* 452 (4th ed. 1993).

51. ANNE GILSON LALONDE, *GILSON ON TRADEMARKS* § 1.03[1] (2022).



device, or any combination thereof” used to distinguish goods and signify their source.<sup>52</sup> Trademarks can include names, drawings, or even phrases, such as “Hook em Horns©.”<sup>53</sup> Trademarks are explicitly protected under the Federal Lanham Act and rights in a mark are established by using it in commerce.<sup>54</sup> Trademark law allows the owner of a mark to prevent others from using it if the use is likely to confuse or deceive consumers about the source, sponsorship or affiliation of the goods.<sup>55</sup> For example, schools’ NIL policies typically prohibit athletes from using trademarks without permission.<sup>56</sup>

## 2. Rights of Publicity

Rights of publicity are inclusive of NIL rights and the terms are often used synonymously. NIL rights are explicitly protected by state law<sup>57</sup> and indirectly protected by the federal Lanham Act.<sup>58</sup> State and federal protection of NIL rights serve two distinguishable, yet related goals. The Lanham Act’s purpose with respect to NIL rights is to prevent consumer confusion.<sup>59</sup> By contrast, state

52. 15 U.S.C. § 1127.

53. See LALONDE, *supra* note 51, at § 2.07; *Trademarks and Copyrights*, UNIV. OF TEX., <https://deanofstudents.utexas.edu/sa/trademarkscopyrights.php> [<https://perma.cc/2SPC-UEPC>] (listing University of Texas trademarks).

54. 15 U.S.C. §§ 1051–1141. The Lanham Act upon which federal trademark law rests is grounded in the Commerce Clause. U.S. CONST., art. I, § 8, cl. 3. The Commerce Clause gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” *Id.* As such, a trademark must be used in interstate commerce before it may be registered under federal law. 15 U.S.C. § 1051(a)(1).

55. See LALONDE, *supra* note 51, at § 12.02.

56. See, e.g., *Student Athlete Name, Image, Likeness, Policy On*, UNIV. OF CONN., <https://policy.uconn.edu/2022/05/06/name-image-likeness> [<https://perma.cc/34FB-A6G4>] (“Student-athletes are prohibited from using or consenting to the use of any University marks when performing any services or activity associated with an endorsement contract or employment activity without prior written permission.”).

57. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977) (holding that an action based on the right of publicity is a state law claim). See e.g., CAL. CIV. CODE § 3344 (2022); FLA. STAT. ANN. § 540.08 (2022); N.Y. CIV. RIGHTS LAW §§ 50-51 (2023); TEX. PROP. CODE ANN. §§ 26.003(1), 26.012(d) (2021); WASH. REV. CODE ANN. § 63.60.

58. See 15 U.S.C. § 1125(a)(1)(A); Mark A Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1174 (2019) (detailing the overlap between trademark principles and the right of publicity). Although the right of publicity is not explicitly protected under the Lanham Act, it has been relied upon successfully for false endorsement claims involving the right of publicity. See *Allen v. Nat’l Video, Inc.* 601 F. Supp. 612, 632 (S.D.N.Y. 1985); see also *Allen v. Men’s World Outlet Inc.*, 679 F. Supp. 360, 370 (S.D.N.Y. 1988).

59. The relevant language in the Lanham Act states:

Any person who, on or in connection with any goods or services, . . . uses in commerce any . . . false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation,

NIL rights, where they exist, protect against unauthorized appropriations of “the commercial value of a person’s identity” where the “person’s name, likeness, or other indicia of identity” are used for “purposes of trade” without consent.<sup>60</sup> Use for purposes of trade generally refers to commercial uses of a person’s identity, such as the use of a person’s NIL to promote products, services or businesses.<sup>61</sup>

For decades, intercollegiate athletes could not monetize their NIL rights without violating NCAA regulations and risking their eligibility. The historical foundation for the NIL rights enjoyed by today’s intercollegiate athletes can be traced back to the *O’Bannon v. NCAA* class action suit.<sup>62</sup> The plaintiffs in *O’Bannon* were among the first to challenge NCAA amateurism regulations prohibiting athletes “from receiving any compensation, beyond the value of their athletic scholarships, for the use of their NILs in videogames, live game telecasts, re-broadcasts, and archival game footage.”<sup>63</sup> Although athletes’ right to monetize their NILs was not the imme-

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connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

60. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). For example, California’s right of publicity law states:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof . . .

CAL. CIV. CODE § 3344(a) (2022).

61. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

62. The Antitrust Declaratory and Injunctive Relief Class generally consists of:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men’s football team and whose images, likenesses and/or names may be, or have been, licensed or sold by Defendants, their co-conspirators, or their licensees after the conclusion of the athlete’s participation in intercollegiate athletics.

Consolidated Amended Class Action Complaint, *In re Student-Athlete Name & Likeness Licensing Litig.*, 2010 U.S. Dist. LEXIS 2189 (N.D. Cal. Mar. 10, 2010) (No. C 09-cv-01967-CW).

63. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015) (holding that the NCAA violated Section 1 of the Sherman Act by limiting student-athletes’ shares of NIL revenues to less than the cost of attendance).

diate outcome of *O'Bannon*, it paved the way for the first NIL statute in 2019 and ultimately the NCAA's deregulation of NIL in 2021.<sup>64</sup>

## B. *How Does NIL Work?*

NIL has evolved quickly since 2021, with transactions typically falling into one of three categories: self-, school-, and third-party facilitated. At first, entrepreneurial athletes sought out NIL arrangements for themselves. A short while later, some schools began to procure NIL arrangements for their athletes. More recently, third-party Collectives, have entered the equation—often providing the most lucrative NIL opportunities.

### 1. Self-Facilitated NIL

The most common NIL facilitators are the athletes themselves. In fact, the main purpose of some state NIL statutes is to “empower[] college athletes to negotiate their own contracts with third parties over the commercial use of their names, images, and likenesses.”<sup>65</sup> To this end, early NIL transactions primarily involved individual athletes and their agents negotiating directly with third parties. Notable transactions included the then-Fresno State Cavinder twins' sponsorship with Boost Mobile and Olivia Dunne of Louisiana State University's sponsorship with the clothing brand, Vuori.<sup>66</sup>

With respect to gender equity, commentators tend to agree that Title IX is not implicated with self-facilitated NIL, where athletes negotiate NIL independently of schools and Athletics Representa-

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64. *NIL Pioneer Ed O'Bannon: 'My Job is Done'*, REUTERS (July 1, 2021, 1:40 PM), <https://www.reuters.com/lifestyle/sports/nil-pioneer-ed-obannon-my-job-is-done-2021-07-01/> [https://perma.cc/H4UK-Z9RP].

65. Michael McCann, *What Will Happen if the California 'Fair Pay to Play Act' Gets Signed Into Law?*, SPORTS ILLUSTRATED (Sept. 10, 2019), <https://www.si.com/college-football/2019/09/10/california-fair-pay-play-act-law-ncaa-pac-12> [https://perma.cc/4LZP-A66G].

66. Ross Dellenger, *Behind the Scenes as the Cavinder Twins Became the Faces of Day 1 of NIL*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/hannahaley-cavinder-twins-nil-deal-basketball-tiktok> [https://perma.cc/BE2V-G4VB]; Kristi Dosh, *LSU Gymnast Olivia Dunne Announces First NIL Brand Deal Is With Activewear Brand Vuori*, FORBES (Sept. 14, 2021, 9:00 AM) <https://www.forbes.com/sites/kristidosh/2021/09/14/lsu-gymnast-olivia-dunne-announces-first-nil-brand-deal-is-with-activewear-brand-vuori> [https://perma.cc/8WM5-VASR].

tives.<sup>67</sup> Although Title IX's gender equity protections do not apply to self-facilitated NIL, athletes' ability to monetize their NILs is nevertheless considered tremendously beneficial to women, who tend to have fewer athletics opportunities after college.<sup>68</sup> Relatedly, athletes' ability to monetize their NILs as students provides greater campus-wide equity in that non-athlete students have always been able to do so. The major disadvantage of self-facilitated NIL, if there is one, is that it is perhaps inefficient for sponsors, who often must negotiate team-wide deals with individual athletes.<sup>69</sup> Group- or school-facilitated NIL allows sponsors to negotiate NIL with entire teams in one transaction.

## 2. School-Facilitated NIL

Schools are also involved in facilitating NIL transactions for athletes—although state laws vary as to the legitimacy of this practice.<sup>70</sup> Some states' NIL statutes explicitly prohibit school involvement in NIL, while other states allow it.<sup>71</sup> State laws also differ as to whether they allow school involvement in NIL opportunities for prospective, as opposed to currently-enrolled, athletes.<sup>72</sup>

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67. See, e.g., Nick Bromberg, *SEC Commissioner 'Concerned' Women's Sports Could Lose Funding if Prominent Male Athletes Generate Significant Endorsements*, YAHOO SPORTS (July 1, 2020, 1:16 PM), <https://sports.yahoo.com/sec-commissioner-concerned-womens-sports-could-lose-funding-if-prominent-male-athletes-generate-significant-endorsements-171623674.html> [<https://perma.cc/JNP9-TDHY>] ("Title IX of course does not apply at all to Name, Image and Likeness deals that are provided by third parties . . . . [But] if colleges get involved . . . then we'd have a . . . direct Title IX problem"). Schools are responsible for ensuring that representatives of an "institution's athletics interests" ("Athletics Representatives") maintain compliance with applicable NCAA policies and regulations. NCAA CONST. art. 4.A.

68. See Daron K. Roberts, *Paying College Athletes Is a Huge Win for Women*, CNN BUS., <https://www.cnn.com/2019/10/08/perspectives/female-athletes-fair-pay-to-play/index.html> [<https://perma.cc/2693-4SZR>] (Oct. 29, 2019, 4:11 AM) (arguing that "[f]emale athletes, who lack viable professional playing options, stand to benefit the most" from NIL).

69. Lawrence R. (Bubba) Cunningham & Malaika Underwood, *The Best First Step for NIL: Group Licensing*, UNIV. OF N.C. AT CHAPEL HILL ATHLETICS (May 24, 2021), <https://gohheels.com/news/2021/5/24/general-the-best-first-step-for-nil-group-licensing.aspx> [<https://perma.cc/D8EV-JYSU>] ("This is a necessary level of efficiency if we're to see college student athletes in video games, on trading cards, and their name and number featured on jerseys. A third party is essential in ensuring athletes receive their true value.").

70. Darren Heitner, *The New Race by States to Remove NIL Restrictions on College Athletes*, ABOVE THE LAW (Apr. 27, 2022, 10:48 AM), <https://abovethelaw.com/2022/04/the-new-race-by-states-to-remove-nil-restrictions-on-college-athletes/> [<https://perma.cc/55RG-FN5A>].

71. *Id.*

72. *Id.* (noting that the state of Alabama completely repealed its NIL law to prevent recruiting disadvantages for the state's schools).

The NCAA takes the position that schools should not facilitate NIL transactions for prospective athletes.<sup>73</sup> However some states, such as Utah, have taken a different position by allowing schools to become directly involved in NIL, regardless of an athlete's enrollment status.<sup>74</sup> For example, Brigham Young University's ("BYU") athletic department brokered the first team-wide collegiate NIL deal, which provides NIL opportunities for the entire BYU football team, including walk-ons.<sup>75</sup> In return, the team must wear the sponsor's branding on practice helmets and make promotional appearances, among other activities.<sup>76</sup> The innovative deal reportedly prompted a review by the NCAA, which has become increasingly concerned that NIL is being used to provide prohibited recruiting inducements and pay-for-play.<sup>77</sup>

Besides recruiting concerns, there are also Title IX implications to school involvement in NIL. Because Title IX requires schools to provide comparable benefits and services to male and female athletes, commentators generally agree that if a school facilitates NIL, Title IX applies.<sup>78</sup> In reality, most schools do not directly facilitate those deals, which is where third parties enter the equation.

### 3. Third-Party-Facilitated NIL

Early NIL legislation envisioned that brands would negotiate NIL arrangements directly with athletes, without school involvement.<sup>79</sup> Ideally, an interested brand would approach an athlete

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73. THIRD-PARTY NIL GUIDANCE, *supra* note 39 (emphasizing that schools may not facilitate NIL transactions for prospective student-athletes).

74. See 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://www.espn.com/college-football/story/_/id/33229931/schools-brokering-name-image-likeness-deals-adds-layer-college-conundrum) [https://perma.cc/4KXQ-TU2V].

75. Casey Lundquist, *'Built Brands' to Pay Tuition for All BYU Football Walk-Ons*, SPORTS ILLUSTRATED (Aug. 12, 2021, 12:34 PM), <https://www.si.com/college/byu/news/built-brands-to-pay-tuition-for-all-byu-football-walk-ons> [https://perma.cc/7TQE-WQKN].

76. *Id.*

77. Paul Steinbach, *NCAA Investigating NIL Deals at Brigham Young, Miami*, ATHLETIC BUS. (Dec. 13, 2021), <https://www.athleticbusiness.com/operations/governing-bodies/article/15286305/ncaa-investigating-nil-deals-at-byu-miami> [https://perma.cc/FH9E-679H]; THIRD-PARTY NIL GUIDANCE, *supra* note 39.

78. See Jessop & Sabin, *supra* note 7, at 271–72 (“[I]f the athletics department secured greater endorsement compensation for one gender's athletes over the other gender's athletes, a violation of Title IX's equal athletic benefits and opportunities standard could be triggered.”); Bromberg, *supra* note 67 (quoting Professor Koller's statement that “if colleges get involved . . . , then we'd have a Title IX problem—a direct Title IX problem”).

79. See McCann, *supra* note 65.

directly, or vice versa, to negotiate NIL. The lack of school involvement was once desirable to schools. In retrospect, it was also desirable to third parties because it created opportunities for them to seize early dominance in the NIL marketplace. As detailed below, hands-off NIL policies and legislation created limitless opportunities for technology platforms, talent agencies and Collectives to fill NIL's operational void.

#### 4. Technology Companies and Other Third-Party Service Providers

How exactly do athletes connect with potential sponsors when their schools are hands off? The answer partially lies in technology companies. Leading technology companies, such as Opendorse and INFLCR, developed portals to streamline the operational aspects of NIL.<sup>80</sup> Although initially focused on providing education on the topic, Opendorse and INFLCR, now assist athletes and businesses with identifying, executing, and documenting NIL transactions.<sup>81</sup> As part of their services, portals can also track and report NIL transactions to schools.<sup>82</sup> NIL portals typically are not affiliated with one particular school. INFLCR, for example, lists multiple schools as clients.<sup>83</sup> Athletes set up profiles on the portals to be accessed by sponsors.<sup>84</sup> The portals typically charge a fee to institutional users, based on the level of services.<sup>85</sup>

In addition to using technology platforms, athletes may also retain professional service providers to help facilitate NIL opportunities.<sup>86</sup> This can include talent agents, tax advisors, marketing

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80. Justin Birnbaum, *College Athletes Are Ready To Reap the Rewards of a Billion-Dollar NIL Market. Opendorse Is Here to Help*, FORBES (June 24, 2021, 8:00 AM), <https://www.forbes.com/sites/oliviaevans/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/XPV8-GTKC] (describing Opendorse and INFLCR's technology platforms).

81. *Id.*

82. Tim Casey, *INFLCR App Adds Features to Help College Athletes Prepare for Potential Revenue Opportunities*, FORBES (Apr. 20, 2021, 8:00 AM), <https://www.forbes.com/sites/timcasey/2021/04/20/inflcr-app-adds-features-to-help-college-athletes-prepare-for-potential-revenue-opportunities/?sh=16e34b5e3ac0> [https://perma.cc/49DE-5TLN].

83. *Id.* ("Today, the company's clients include numerous major programs, including Duke, UCLA, Syracuse and North Carolina.")

84. *Id.*

85. *Id.*; Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?*, SPORTS ILLUSTRATED (July 12, 2022), <https://www.si.com/college/2022/07/12/nil-nam-e-image-likeness-collectives-one-year> [https://perma.cc/H5HE-8GKP].

86. INTERIM NIL POLICY, *supra* note 3; S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019) (codified at CAL. EDUC. CODE § 67456 (West 2023)).

consultants, attorneys and brand management companies. Yet because the average NIL transaction is \$3,700 on the high end, it may not be economically feasible for all athletes to engage professional service providers.<sup>87</sup>

Neutral third-party service providers, such as unaffiliated portals, lawyers and talent agencies, seldom invoke the same Title IX issues that arise when schools participate in facilitating NIL. That said, not all third parties involved in NIL are neutral. Some have long-standing affiliations with schools, such that they are considered boosters or Athletics Representatives.

Athletics Representatives are more likely to raise Title IX issues, so they will be described separately below. Collectives, which are specialized booster organizations, will also be explored below.

## 5. Boosters

Booster organizations are well known for generously supporting schools and their athletics departments. Historically, the term booster described early-American pioneers that aggressively promoted new communities to attract settlers and investments.<sup>88</sup> Seen as sources of stability, colleges and universities quickly became a focus of boosters seeking to enhance a community's value and credibility.<sup>89</sup> Eventually, this focus was expanded to include intercollegiate athletics programs.<sup>90</sup>

Boosters have become integral to successful intercollegiate athletics programs largely because institutional and state funding often cannot support programs that aspire to compete at the highest levels.<sup>91</sup> The NCAA and its members have long acknowledged the integral role that boosters play in "support[ing] teams and athletics departments through donations of time and financial resources."<sup>92</sup> As such, NCAA regulations give boosters the special

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87. *NIL Industry Insights*, *supra* note 6.

88. DANIEL J. BOORSTEIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 49, 119 (1965); Hadley Meares, 'Sunkist Skies of Glory', *CURBED LA* (May 24, 2018, 9:30 AM), <https://la.curbed.com/2018/5/24/17350622/los-angeles-history-promoted-boosters-ads> [https://perma.cc/J9NE-4JJM].

89. BOORSTEIN, *supra* note 88, at 157.

90. James H. Frey, *Boosterism, Scarce Resources and Institutional Control: The Future of American Intercollegiate Athletics*, 17 *INT'L REV. OF SPORT SOC.* 53, 55 (1982).

91. *Id.*

92. *Role of Boosters*, *NAT'L COLLEGIATE ATHLETIC ASS'N*, <https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx> [https://perma.cc/X84M-H75R].

status of “representative[s] of [an] institution’s athletics interests.”<sup>93</sup>

According to the NCAA’s principle of institutional control and responsibility, schools are ultimately responsible for ensuring that Athletics Representatives and certain other independent organizations maintain compliance with applicable policies and regulations.<sup>94</sup> The school’s responsibility extends both to activities that are encouraged by the school and to those conducted independently by Athletics Representatives.<sup>95</sup> Holding schools accountable for Athletics Representatives’ actions ensures that schools will be unable to outsource the consequences of activities that they may have been directly or indirectly involved in.

## 6. Collectives

A Collective is a private organization that pools resources from fans, alumni and donors to superfund NIL opportunities for athletes at a particular school.<sup>96</sup> Collectives establish partnerships with businesses or charities and then leverage those partnerships to create NIL opportunities for interested athletes.<sup>97</sup> The Rugby Cares organization in this Article’s introductory hypothetical is an example of a Collective. In essence, a Collective is a booster organization whose main purpose is to fund NIL opportunities. Even so, booster organizations and Collectives differ in that Collectives pro-

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93. NCAA DI MANUAL, *supra* note 3, arts. 8.4.2, 13.01.2, 13.02.15; NCAA CONST. arts. 1.E, 4.A (2021), *reprinted in* NCAA DI MANUAL. Once an individual or organization is classified as an Athletics Representative, it remains so indefinitely. NCAA DI MANUAL, *supra* note 3, art. 13.02.15.1.

94. NCAA CONST. art. 4.A (2021).

95. NCAA DI MANUAL, *supra* note 3, arts 8.4.1, 8.4.2.

96. 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), <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/WZ4K-PFUA>].

97. *See, e.g., Frequently Asked Questions*, GARNET TRUST, <https://garnettrust.com/faq> [<https://perma.cc/5GSJ-HLKQ>] (describing how the Garnett Trust Collective provides NIL opportunities for University of South Carolina student-athletes); *Our Mission*, HORNS WITH HEART, <https://hornswithheart.org/#real-mission> [<https://perma.cc/GJH9-7R8M>] (describing the Collective’s charitable mission). Collectives also introduce athletes to potential employers. Sydney Large, *Inside NIL Collectives with Russell White from Oncoor Marketing*, OPENDORSE (May 26, 2022), <https://biz.opendorse.com/blog/inside-nil-collectives-with-russell-white-from-oncoor-marketing> [<https://perma.cc/87PR-BZMC>] (describing how Collectives also connect athletes with potential employers).



vide funds directly to a school's athletes, instead of to its athletics department.

The first known Collective was conceived by a University of Florida alumnus in 2021.<sup>98</sup> Since then, over one hundred Collectives have been created, primarily at Power Five schools.<sup>99</sup> Collectives fund NIL opportunities for athletes using various methods. Some crowdfund through membership fees or merchandise sales, while others collect funds through various tiers of donations.<sup>100</sup> The funds received by Collectives are used to compensate participating athletes in exchange for promoting local businesses or charities.<sup>101</sup> And while differing in their capitalization and operational methodologies, Collectives are similar in that they support athletes at one particular school.

At first, it was anticipated that NIL would improve gender equity.<sup>102</sup> But as Figures 1, 2 and 3 reveal, male athletes currently outearn female athletes in NIL by a ratio of nearly three to one in each of the NCAA's three divisions.<sup>103</sup> Collectives play a role in these dynamics due to their massive funding capabilities and cur-

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98. J. Brady McCollough, *Q&A: In Year Two of NIL, Expect Boosters and Schools to Clash On 'Collective' Efforts*, L.A. TIMES, <https://www.latimes.com/sports/story/2022-06-27/nil-what-is-next-name-likeness-image-college-high-school> [<https://perma.cc/QG3U-WSTD>] (June 27, 2022, 9:32 AM) ("On July 1, 2021, Florida donor Eddie Rojas reached out to [Darren Heitner, a sports attorney] about helping to start the first known booster fund, which they named the 'Gator Collective.'").

99. *Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS, <https://businescollegesports.com/tracker-university-specific-nil-collectives> [<https://perma.cc/P5QB-8HJT>]; *NIL Collectives*, ON3, <https://www.on3.com/nil/collectives/> [<https://perma.cc/HH97-DVJU>]. Power Five (also known as Autonomy) schools consist of members of the Atlantic Coast (ACC), Big Ten, Big 12, Pac-12 and Southeastern ("SEC") conferences. Michelle Brutlag Hosick, *Board Adopts New Division I Structure*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 7, 2014, 11:49 AM), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure> [<https://perma.cc/RJ5Y-FLMD>]. Power Five conference members may change rules for themselves in a specified list of areas. *Id.*

100. Eric Prisbell, *The On3 Guide to NIL Collectives Around the Nation*, ON3 (Aug. 25, 2022), <https://www.on3.com/nil/news/on3-guide-to-nil-collectives-around-the-nation/> [<https://perma.cc/9X5F-AJCR>].

101. *Id.*

102. See, e.g., Steve Gorman, *Women's Sports May Reap Big Gains from California Law on College Endorsement Deals*, REUTERS (Oct. 2, 2019, 1:09 AM), <https://www.reuters.com/article/us-sport-california-education/womens-sports-may-reap-big-gains-from-california-law-on-college-endorsement-deals-idUSKBN1WH0C2> [<https://perma.cc/MZ3J-PYPL>]. But see, e.g., Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1215 (2016) (arguing that NIL will exacerbate gender inequities).

103. See Jessop & Sabin, *supra* note 7, at 272; Thilo Kunkel, Bradley J. Baker, Thomas A. Baker III & Jason P. Doyle, *There is No Nil in NIL: Examining the Social Media Value of Student-Athletes' Names, Images, and Likeness*, 24 SPORT MGMT. REV. 839, 853 (2021); *NIL Industry Insights*, *supra* note 6.

rent focus on male athletes.<sup>104</sup> Another potential contributor to the ever-increasing NIL gender disparities is the lack of clarity surrounding Title IX’s applicability to Collectives.

Figure 1: NCAA Division I Total NIL Compensation<sup>105</sup>

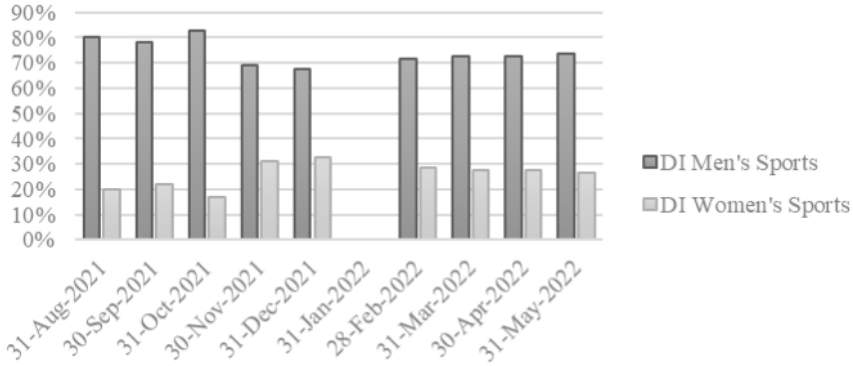
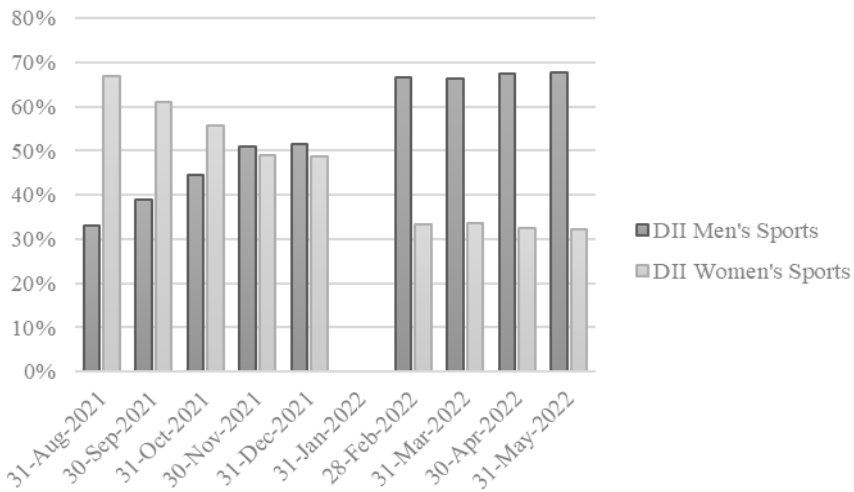


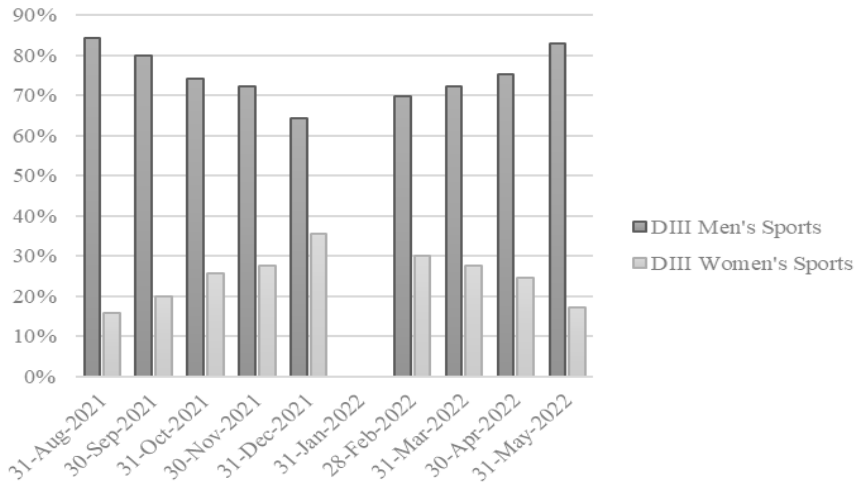
Figure 2: NCAA Division II Total NIL Compensation<sup>106</sup>



104. Akabas, *supra* note 5 (citing NIL statistics provided by Opendorse CEO Blake Lawrence). While many Collectives’ primary focus is on football and men’s basketball, there are no known Collectives that focus primarily on women’s sports. *See, e.g., NIL Collectives, supra* note 99.

105. *See NIL Industry Insights, supra* note 6.

106. *Id.*

Figure 3: NCAA Division III Total NIL Compensation<sup>107</sup>

Title IX's applicability is clear when schools provide NIL opportunities to athletes directly. For example, if in the introductory hypothetical, State was to provide annual NIL of \$40,000 to the men's rugby team, but only up to \$5,000 to the women's team, this clearly would raise Title IX issues.<sup>108</sup> By contrast, the Title IX issues in the actual hypothetical are less clear because the Rugby Cares Collective, rather than the school, provides \$40,000 to the men's team, while the women's team earns up to \$5,000 from multiple other sources.

On its face, Title IX applies only to educational institutions that receive federal funds. Therefore, commentators would argue that Title IX does not apply to NIL provided by Collectives, as they are neither educational institutions, nor do they receive federal

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107. *Id.*

108. This hypothetical assumes that State University receives federal funding.

funding.<sup>109</sup> Part III of this Article explains the flaws in such arguments and introduces this Article's thesis.<sup>110</sup>

### III. APPLYING TITLE IX TO COLLECTIVES

*"You've got these schools who are very outward with their collectives, all of a sudden they start enforcing the rules, there's going to be some nervous people."*

—Lincoln Riley, Head Football Coach, University of Southern California<sup>111</sup>

Opportunities for intercollegiate athletes to monetize their have expanded dramatically since July 2021. NIL opportunities have advanced from simple endorsements and appearances to cryptocurrency and non-fungible tokens ("NFTs").<sup>112</sup> As NIL opportunities have advanced, so too has NIL infrastructure. Almost overnight, NIL opportunities have gone from self-facilitated to third-party-facilitated, with compensation ranging from free products and services to seven-figure contracts for elite athletes.<sup>113</sup>

109. See, e.g., Yasser & Fox, *supra* note 7, at 199; Jessop & Sabin, *supra* note 7, at 271; *Male Athletes Lead the Way*, *supra* note 7. Similarly, the NCAA has, thus far, been able to avoid the direct applicability of Title IX because it too is not a recipient of federal funding. *NCAA v. Smith*, 525 U.S. 459, 462 (1999) (holding that collecting dues from member schools that receive federal funds does not subject the NCAA to Title IX). Consequently, the NCAA could not be held legally responsible under Title IX for the dramatic weight-room disparities revealed during the 2021 NCAA Basketball Tournament. Cecelia Townes, *Where Is Title IX in the NCAA Weight Rooms?* FORBES (Mar. 19, 2021, 10:46 AM), <https://www.forbes.com/sites/ceceliatownes/2021/03/19/where-is-title-ix-in-the-ncaa-weight-rooms/?sh=7b4a826e7007> [<https://perma.cc/Q53A-U3TA>]. However, a viable argument can be made that the NCAA acts on member schools' behalves in providing athletes with benefits and services in the form of championships, which arguably is sufficient to trigger Title IX. Maggie Mertens, *The Title IX Loophole That Hurts NCAA Women's Teams*, ATLANTIC (Apr. 1, 2021), <https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483> [<https://perma.cc/VX8P-BJRB>].

110. See *infra* Part III.

111. Ian Miller, *Lincoln Riley Talks USC's Big Ten Move, Finances and Recruiting for New Conference*, OUTKICK, <https://www.outkick.com/lincoln-riley-talks-uscs-big-10-move-finances-and-recruiting-for-a-new-conference/> [<https://perma.cc/R2P5-C8L3>] (July 31, 2022, 9:34 AM).

112. Eddie Timanus, *Florida State Football Players Offered NIL Deal from Crypto Company*, USA TODAY (Aug. 17, 2021, 2:21 PM), <https://www.usatoday.com/story/sports/ncaa/ac/2021/08/17/florida-state-football-nil-endorsement-deal-yummy-crypto/8167778002/> [<https://perma.cc/UZ2S-AYRT>]; Mike McAllister, *Syracuse Becomes First School to Create NFT for Student-Athletes*, SPORTS ILLUSTRATED (June 20, 2022, 8:14 PM), <https://www.si.com/college/syracuse/recruiting/syracuse-first-school-nft-student-athletes-nil-deal> [<https://perma.cc/7QLQ-75UC>].

113. Craig Harris, *The Cavinder Twins, 'Queens' of College Sports Endorsements, Poised to Make \$1 Million*, USA TODAY, <https://www.usatoday.com/story/money/2022/01/26/haley->

Yet not all aspects of NIL have flourished proportionately. To date, male athletes outearn female athletes by a substantial margin, even though it was initially thought that NIL might be an equalizer. For example, Professor Thilo Kunkel's 2021 NIL study found that "there was no significant difference [between male and] female athletes" for social media monetization and when the medians were compared "female student-athletes actually ranked higher than male athletes."<sup>114</sup> The discrepancy between Professor Kunkel's research findings and current NIL market realities could very well be explained away by chance or other factors. But the more likely explanation is that NIL markets for intercollegiate athletes reflect the historical gender discrimination that Title IX was enacted to remedy.

This leads to the question of whether there is anything that can be done to address the NIL gender disparity. Some analysts would say nothing can be done because NIL is a free market ecosystem.<sup>115</sup> Moreover, because schools are not distributing NIL payments, Title IX's gender equity requirements simply do not apply.<sup>116</sup> However, these sorts of arguments ignore the context in which most NIL payments occur. This Article takes a more optimistic position on what can be done to address the NIL gender disparity. Just as accomplices, accessories, aiders and abettors can be held account-

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hanna-cavinder-sport-ncaa-athletes/6518831001 [https://perma.cc/V43K-BKRH] (Jan. 28, 2022, 4:09 PM); Scooby Axson, *Report: 2023 Five-Star Recruit Signs NIL Collective That Could Net More Than \$8 Million*, USA TODAY, <https://www.usatoday.com/story/sports/ncaaf/2022/03/12/five-star-recruit-signs-8-million-nil-deal-largest/7014601001> [https://perma.cc/K6YY-9QFJ] (Mar. 13, 2022, 11:22 AM).

114. Steve Orbanek, *New Study Shows NIL Law Could Level Playing Field For All Student-Athletes*, TEMPLE UNIV. (Feb. 16, 2021), <https://sthm.temple.edu/faculty/new-study-shows-nil-law-could-level-playing-field-for-all-student-athletes> [https://perma.cc/4BMM-SGES] (quoting Professor Kunkel); see generally Kunkel et al., *supra* note 103.

115. Marc Edelman, *When It Comes to Paying College Athletes, Title IX is Just a Red Herring*, FORBES (Feb. 4, 2014, 9:30 AM), <https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/> [https://perma.cc/9EKR-XBK2]; Lindsay Gibbs, *Ending the Sham of NCAA Amateurism Will Not End Title IX*, THINK PROGRESS (Mar. 30, 2018, 8:00 AM), <https://archive.thinkprogress.org/title-ix-amateurism-1398c640714f> [https://perma.cc/3JQA-GJAD] (arguing that Title IX does not require male and female athletes to be paid equally); *Male Athletes Lead the Way*, *supra* note 7 ("Title IX . . . does not apply because schools are not striking the deals.").

116. See Yasser & Fox, *supra* note 7, at 199; Jessop & Sabin, *supra* note 7, at 271; *Male Athletes Lead the Way*, *supra* note 7. But see Tan Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 50 (2021) ("Thus, while on the surface third-party NIL compensation appears to present fewer Title IX and financial concerns, in reality, Title IX likely will apply to third-party NIL compensation.").

able for their indirect involvement in crimes, so too can schools be held accountable for their involvement in Title IX violations. Thus, this Article argues that if a school is involved in facilitating NIL, either directly or through a third party, the school provides a benefit that is governed by Title IX and, as such, can be held accountable for resulting Title IX violations.<sup>117</sup>

### A. *Equal Treatment Applies to NIL*

Athletic scholarships are the sole form of intercollegiate athlete compensation contemplated by Title IX.<sup>118</sup> As stated above, the scholarship compliance category is not an appropriate fit for NIL.<sup>119</sup> Of the existing compliance categories, benefits and services, with its open-ended list of equal treatment factors, is the most appropriate, albeit imperfect, category to address NIL. This is because NIL is captured by at least two equal treatment factors to be analyzed below.

#### 1. NIL Benefits Recruiting

NIL produces tangible benefits in recruiting more than any other equal treatment factor. Although the NCAA's Third-Party NIL Guidance prohibits schools from using NIL as a recruiting inducement, it is nevertheless a fairly common practice among Power Five schools.<sup>120</sup> "Obviously it has a lot to do with where these players go, and it should," remarked University of Mississippi's head football coach, Lane Kiffin.<sup>121</sup> University of Louisville's interim

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117. Arthur Bryant & Cary Joshi, *College Sports NIL Is Headed For A Collision With Title IX*, SPORTICO (Nov. 10, 2021 8:55 AM), <https://www.sportico.com/law/analysis/2021/college-sports-nil-title-ix-1234645328> [<https://perma.cc/3GV4-JQWA>] ("As soon as a university, its employees, or its booster clubs play any role in helping athletes earn money or make deals, the school is necessarily providing a benefit to them.").

118. See 34 C.F.R. § 106.37(c) (2022).

119. See *supra* Part I.

120. THIRD-PARTY NIL GUIDANCE, *supra* note 39. The NCAA defines "recruiting" 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 DI MANUAL, *supra* note 3, art. 13.02.14; Eric Prisbell, 'Every Single Power 5, Within a Few Months, Is Going to Have a Collective', ON3 (Jan. 28, 2022), <https://www.on3.com/news/every-single-power-5-within-a-few-months-is-going-to-have-a-collective> [<https://perma.cc/S8R2-VFAD>].

121. 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), <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/Q3QZ-MN38>]; see OPENDORSE, NIL: ONE

athletic director, Josh Heird, acknowledged NIL as “[t]he No. 1 priority for us.”<sup>122</sup> He continued, “we have to put ourselves in the best position possible to attract the best talent [and a] lot of that is going to hinge on . . . Name, Image, and Likeness.”<sup>123</sup>

Indeed, it is difficult to imagine a scenario where NIL would not factor into an athlete’s decision to attend a particular school. “You see some of these kids making thousands of dollars in some of these programs. In my program, we have Nike in our backyard, so that’s a huge NIL deal there just waiting,” noted University of Oregon defensive lineman, Sir Mells.<sup>124</sup> Even parents are asking “[w]hat does the NIL look like? How much money can they make?” according to high school basketball coach, Jeff Kaufman.<sup>125</sup> An anonymous Pac-12 staffer speculated that the number of recruits whose school selection process centers around NIL is “probably around [fifty percent].”<sup>126</sup> By contrast, some athletes have minimized the role of NIL in school selection, instead suggesting that they give NIL the same weight as other considerations, such as playing time, player development, and coaching style.<sup>127</sup> At any rate, at least

YEAR OF NAME, IMAGE AND LIKENESS 25 (June 30, 2022), [https://opendorse.com/wp-content/uploads/2022/07/NIL\\_Full\\_063022\\_3.pdf](https://opendorse.com/wp-content/uploads/2022/07/NIL_Full_063022_3.pdf) [<https://perma.cc/S4XB-V8BH>] (explaining that “[i]t did not take long for coaches to recognize the recruiting advantage of having a dedicated collective supporting the student-athletes of their respective school.”).

122. Tim Sullivan, *Louisville’s Interim AD Josh Heird Plans New Department Devoted to Getting Athletes Paid*, COURIER J., <https://www.courier-journal.com/story/sports/college/louisville/2022/01/21/louisville-athletics-make-standalone-nil-department-help-recruit/6608187001> [<https://perma.cc/2KKZ-WAFF>] (Jan. 21, 2022, 4:34 PM).

123. *Id.*

124. Mark Anderson, *UNLV, Other Schools Navigate Uncertain NIL Rules*, LAS VEGAS REV. J., <https://www.reviewjournal.com/sports/unlv-other-schools-navigating-uncertain-nil-rules-2551277> [<https://perma.cc/5M84-RYSD>] (Mar. 25, 2022, 11:00 AM).

125. *Id.*

126. 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/DJ48-B7NL>].

127. Stewart Mandel, *Mandel: Third-Party NIL Collectives Luring Recruits Are Legal (We Think) and Here to Stay. Embrace It Or Get Left Behind*, ATHLETIC (Feb. 15, 2022), <https://theathletic.com/3130795/2022/02/15/mandel-third-party-nil-collectives-luring-recruits-are-legal-we-think-and-here-to-stay-embrace-it-or-get-left-behind> [<https://perma.cc/VN98-EDLA>]; Myron Medcalf, *‘It Was The Best Decision For Me’: Men’s College Basketball Players On Why They Transferred*, ESPN (June 21, 2022), [https://www.espn.com/mens-college-basketball/story/\\_/id/34121049/it-was-best-decision-men-college-basketball-players-why-transferred](https://www.espn.com/mens-college-basketball/story/_/id/34121049/it-was-best-decision-men-college-basketball-players-why-transferred) [<https://perma.cc/ZY2G-P2T7>] (“I mean, obviously, being one of the top players, NIL is going to be brought up. But I was looking more for the fit[.]” says guard Malachi Smith who has transferred from Wright State University to the University of Tennessee at Chattanooga to Gonzaga University); see, e.g., Dan Lyons, *Haley And Hanna Cavinder Announce Transfer To Miami*, SPORTS ILLUSTRATED (Apr. 22, 2022), <https://www.si.com/college/2022/04/22/cavinder-twins-haley-hanna-transfer-portal-miami->

anecdotally, it appears that NIL influences both when and where athletes attend school, with some choosing to leave their current schools prematurely to capitalize on NIL opportunities elsewhere.<sup>128</sup>

According to Opendorse, Collectives—funded by fans, alumni, and donors—can increase NIL by multiples of five to ten.<sup>129</sup> Thus, it is no surprise that they are particularly effective in luring talent. Almost every Power Five school has a Collective, with insiders speculating that typical NIL deals from Collectives range in value from \$20,000 to \$200,000 annually.<sup>130</sup> Although those figures may be more typical, a high school football recruit broke barriers recently when he was reportedly offered a multi-year NIL package valued in excess of \$8 million.<sup>131</sup>

The NCAA likely did not envision \$8 million NIL deals for high school football recruits when drafting its Interim NIL Policy in 2021. The Interim NIL Policy explicitly prohibits pay-for-play and recruiting inducements but does not prohibit boosters from offering NIL.<sup>132</sup> Consequently, Collectives have made it possible for a broader range of schools to attract elite recruits at both the high school and college level. Collectives have been so effective at recruiting that University of Alabama’s Nick Saban has accused his peers of “buy[ing] players.”<sup>133</sup>

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nil-social-media-tiktok [<https://perma.cc/RL7C-E56R>] (explaining that NIL did not impact the Cavinder twins’ decision to transfer to University of Miami).

128. See, e.g., James Kratch, *Rutgers and Money Lure Gavin Wimsatt to Campus Early: How Much Will His NIL Deal Be Worth? How Long Until He Plays?*, NJ.COM, <https://www.nj.com/rutgersfootball/2021/09/the-latest-on-gavin-wimsatts-rutgers-arrival-emotional-farewell-nil-impact-on-scarlet-knights.html> [<https://perma.cc/34NT-J49X>] (Sept. 04, 2021, 1:40 PM); Dean Straka, *USC Trojans QB Caleb Williams inks NIL deal with Beats by Dr. Dre*, 247 SPORTS (Feb. 5, 2022), <https://247sports.com/Article/USC-Trojans-QB-Caleb-Williams-inks-NIL-deal-with-Beats-by-Dr-Dre-182312492> [<https://perma.cc/29FS-5ZBJ>]; Crabtree, *supra* note 126.

129. Akabas, *supra* note 5 (quoting Opendorse CEO, Blake Lawrence).

130. *Id.*; Stewart Mandel, *Five-Star Recruit in Class of 2023 Signs Agreement With Collective That Could Pay Him More Than \$8 Million*, ATHLETIC (Mar 11, 2022), <https://theathletic.com/3178558/2022/03/11/five-star-recruit-in-class-of-2023-signs-agreement-with-collective-that-could-pay-him-more-than-8-million> [<https://perma.cc/P4ED-JZ55>].

131. *Id.*

132. INTERIM NIL POLICY, *supra* note 3; INTERIM NIL Q & A, *supra* note 2 (“Can individuals enter into NIL agreements with boosters? Yes, provided the activity is in accordance with state laws and school policy, is not an impermissible inducement and it does not constitute pay-for-play.”).

133. 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/>



Reported recruiting inducements prompted the NCAA to issue additional guidelines in May 2022 signifying that Collectives could be considered boosters.<sup>134</sup> The guidance also restated longstanding NCAA rules prohibiting boosters from participating in the recruiting process: “NCAA rules preclude boosters from engaging in recruiting activities, including recruiting conversations, on behalf of a school. Further, NCAA recruiting rules preclude boosters from providing benefits to [prospective student-athletes (“PSAs”)] and preclude institutional staff members from being involved, directly or indirectly, with the provision of benefits to a PSA.”<sup>135</sup>

Yet, the NCAA’s guidance has had little to no impact on Collectives, whose financiers continue to aggressively compete with one another.<sup>136</sup> One month after the NCAA issued its Third-Party NIL Guidance targeting boosters, a Collective offered a high school football recruit the largest publicly known NIL deal at \$11 million.<sup>137</sup> The maximum publicly known NIL earnings for female athletes pales in comparison at \$2 million.<sup>138</sup>

Male athletes receive a disproportionate share of total NIL in comparison to female athletes. Collectives, for example, distribute seventy-five percent of their funds to football players and another eleven percent to men’s basketball players, with the remainder going to players in multiple sports.<sup>139</sup> Relatedly, men’s sports receive 73.5%, 67.9%, and 82.9% of total NIL in Divisions I, II, and III,

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2022/04/13/nick-saban-nil-rules-system-you-can-basically-buy-players [https://perma.cc/S7NU-KLJT].

134. THIRD-PARTY NIL GUIDANCE, *supra* note 39.

135. *Id.*

136. Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?*, SPORTS ILLUSTRATED (July 12, 2022), <https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year> [https://perma.cc/6TBT-LLCD] (quoting an SEC staffer stating that the financiers of Collectives are “poking their chests out to each other [like] . . . millionaires trying to show other millionaires who has the biggest d—”).

137. Graham Hall, *Accusations Fly Regarding QB Jaden Rashada, NIL and His Commitment to Miami over Florida*, GATOR SPORTS, <https://www.gatorsports.com/story/football/2022/06/27/florida-gators-football-recruiting-reports-nil-jaden-rashada-social-media-inducement-accusations/7746637001/> [https://perma.cc/Z5AV-GE4U] (July 28, 2022, 6:41 PM) (reporting that Jaden Rashada declined an alleged \$11 million NIL deal from the Gator Collective for a deal at the University of Miami worth an alleged \$9.5 million).

138. Brett Knight, *Cavinder Twins, Stars On TikTok And Basketball Court, Are Nearing \$2 Million In NIL Deals, with More Ahead*, FORBES (July 1, 2022, 6:30 AM), <https://www.forbes.com/sites/brettknight/2022/07/01/haley-hanna-cavinder-twins-ncaa-nil> [https://perma.cc/Y9DG-FSML].

139. Akabas, *supra* note 5.

respectively.<sup>140</sup> Unsurprisingly, football leads in total NIL, followed by men's basketball.<sup>141</sup>

Commentators are quick to highlight that, when football is excluded, women receive more NIL than men.<sup>142</sup> However, Title IX's equal treatment requirements do not exclude football, a sport which has historically received a disproportionate amount of recruiting resources. If, for the sake of argument, football were to be excluded from Title IX, female athletes would fictionally have better outcomes in almost all Title IX program areas. But the reality, as illustrated in this Article's introductory hypothetical, is that historical gender disparities in intercollegiate athletics are perpetuated through NIL and this includes the recruiting benefits that NIL provides.<sup>143</sup>

## 2. Publicity Benefits NIL

Another equal treatment factor with close ties to NIL is publicity. Publicity is a reciprocal benefit with respect to NIL in that it provides market exposure for athletes that can be used to generate even more NIL opportunities.<sup>144</sup> Female athletes receive less than one-third of NIL overall and less than one-fifth of total NIL provided by Collectives.<sup>145</sup> The large disparity between men's and wo-

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140. *NIL Industry Insights*, *supra* note 6.

141. *Id.*

142. *How College Athletes' Name, Image and Likeness Changed the Game*, WPTV (June 28, 2022, 1:02 PM), <https://www.wptv.com/news/national/how-college-athletes-name-image-and-likeness-changed-the-game> [<https://perma.cc/3UY3-98E7>] (quoting Blake Lawrence'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"); Melanie Anzidei, *Women & Sport: Female College Athletes Are Early Winners in First Year of NIL*, NORTHJERSEY.COM (July 8, 2022, 4:15 AM), <https://www.northjersey.com/story/sports/2022/07/08/women-sports-athletes-winners-endorsements-nil/65364979007/> [<https://perma.cc/27KW-C3JG>] (noting that "when you take football out of the NIL equation, women's sports athletes made up 52.8% of total NIL activities.").

143. See Andy Berg, *Iowa Star Clark Talks Gender Inequality in NIL Profits*, ATHLETIC BUS. (Mar. 11, 2022), <https://www.athleticbusiness.com/operations/marketing/article/15289579/iowa-star-clark-talks-gender-inequality-in-nil-profits> [<https://perma.cc/J7ET-UWGZ>]; see also Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 995 (1995).

144. See Maggie Mertens, *The Title IX Loophole That Hurts NCAA Women's Teams*, ATLANTIC (Apr. 1, 2021), <https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483> [<https://perma.cc/2Q5A-Y7Q6>].

145. *NIL Industry Insights*, *supra* note 6; Akabas, *Football and Social*, *supra* note 5.

men's NIL is at least partially explained by historical gender disparities in publicity for women's sports.<sup>146</sup>

Commentators argue that female athletes will continue to receive disparate NIL until publicity for women's sports improves significantly.<sup>147</sup> This argument has some credence. Less than two years into the NIL era, it has become apparent that athletes whose sports receive more publicity, also tend to receive exponentially more NIL. This is not only true for football and men's basketball, but also for women's basketball.<sup>148</sup> The 2021 NCAA basketball championships provide an example of the transformative aspects of publicity.

During the 2021 NCAA Division I Women's Basketball Tournament, University of Oregon forward, Sedona Prince, posted a TikTok video comparing the minimalist stack of hand weights at the women's tournament to the elaborate, state-of-the-art weight room at the men's tournament.<sup>149</sup> The video went viral immediately, along with other shocking men's and women's tournament comparisons. As a result, the NCAA commissioned an external gender equity audit of its basketball championships, which revealed significant gender disparities in multiple areas, including publicity.<sup>150</sup> The audit revealed disparities in the coverage of the athletes and their families, streaming, fan festivals, concerts, branding, signage and corporate sponsorships.<sup>151</sup>

By contrast, one major area of parity between the 2021 men's and women's tournaments was that all games from both tournaments were televised—for the first time ever.<sup>152</sup> As a result, many

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146. See KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE I 70 (2021), <https://kaplanhecker.app.box.com/s/6fpd51gxk9ki78f8vbhqcqh0b0o95oxq> [<https://perma.cc/5TFZ-9GXB>] [hereinafter PHASE I GENDER EQUITY REVIEW]; *NIL Industry Insights*, *supra* note 6.

147. Anzidei, *supra* note 141 (noting that “the broken systems across NCAA sports that have kept female athletes from receiving equal exposure or investment will likely keep those athletes from reaching their full NIL potential.”)

148. *NIL Industry Insights*, *supra* note 6 (revealing that women's basketball is a close third behind men's basketball for NIL compensation). NIL-enhancing publicity can include television coverage, online streaming, custom mobile apps, social media promotions, signage, corporate partnership programs, intra-sport cross promotions, and representation at fundraising events.

149. PHASE I GENDER EQUITY REVIEW, *supra* note 146, at 1.

150. *Id.* at 7. Although Title IX does not directly apply to the NCAA, it applies to the schools that participate in the tournament. *NCAA v. Smith*, 525 U.S. 459 (1999); 20 U.S.C. §1681(a).

151. PHASE I GENDER EQUITY REVIEW, *supra* note 146, at 7, 9.

152. *Id.* at 2.

Division I women's basketball players dramatically increased their social media followings, which directly translated into lucrative NIL opportunities several months later.<sup>153</sup> In fact, several players from the 2021 women's basketball tournament are among the highest-paid NIL earners in intercollegiate athletics.<sup>154</sup> The NCAA women's basketball tournament demonstrates how institutionally supported publicity can influence the visibility, popularity and marketability of a sport.

Although women's basketball has made great strides in publicity, other women's sports have not fared as well. Women's sports generally lag significantly behind men's in publicity, which is largely because of the prioritization of men's sports over women's.<sup>155</sup> As stated above, disparate publicity results in disparate NIL. The few women's sports that receive greater publicity than the men's have surpassed their male counterparts in NIL.<sup>156</sup> For example, women's volleyball and gymnastics receive at least double the amount of NIL as the male versions of those sports.<sup>157</sup>

### B. *Title IX Applies to Collectives' Activities Because . . .*

NIL was originally envisioned as an equalizer for intercollegiate athletics. Yet men substantially outearn women, especially as it relates to NIL disbursed by Collectives.<sup>158</sup> Although Collectives may publicly state that they support all sports and genders, NIL

153. Prior to her video, Sedona was relatively unknown. Today, she has a social media following of almost 3 million on TikTok, 215,000 on Instagram, and 42,000 on Twitter. Sedona Prince (@sedonerrr), TIKTOK, <https://tiktok.com/@sedonerrr> [<https://perma.cc/AR4Q-56WR>]; Sedona Prince (@sedona\_), INSTAGRAM, [https://instagram.com/sedona\\_](https://instagram.com/sedona_) [<https://perma.cc/R8Y9-HZXM>]; Sedona Prince (@sedonaprince\_), TWITTER, [https://twitter.com/sedonaprince\\_](https://twitter.com/sedonaprince_) [<https://perma.cc/9C5K-YTEM>]. PHASE I GENDER EQUITY REVIEW, *supra* note 146, at 2 (noting an increase in social media followers for the Cavinder twins, Sedona Prince, and Paige Bueckers after the 2021 NCAA Women's Basketball Tournament).

154. See, e.g., Knight, *supra* note 138; Anderson, *supra* note 124 (highlighting Paige Bueckers and other female athletes' NIL deals); Carly Wanna, *Which Final Four Basketball Players Have Greatest Earnings Potential? It's the Women*, BLOOMBERG (March 31, 2022, 8:00 AM), <https://www.bloomberg.com/news/features/2022-03-31/female-ncaa-athletes-brand-deals-after-march-madness-may-smash-the-pay-gap> [<https://perma.cc/8QEJ-57CD>] ("The most marketable women's players had higher earnings potential than the men.")

155. KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW: PHASE II, 7 (Oct. 25, 2021), <https://kaplanhecker.app.box.com/s/y17pvxpap8lotzqajjan9vyye6z8tmz> [<https://perma.cc/7P4C-BDSC>] [hereinafter PHASE II GENDER EQUITY REVIEW].

156. The Division I women's volleyball and gymnastics teams receive more publicity for their championships than their male counterparts. PHASE II GENDER EQUITY REVIEW, *supra* note 152, at 88, 92–93; *NIL Industry Insights*, *supra* note 6.

157. *NIL Industry Insights*, *supra* note 6.

158. Akabas, *supra* note 5.

statistics show that Collectives overwhelmingly support men's sports over women's by a ratio of over 5:1.<sup>159</sup> This enormous NIL disparity sends female athletes conflicting messages about the state of gender equity, not only in intercollegiate athletics, but also in the economic sectors from which Collectives draw their donors.

If Collectives were a department within a school, such disparities would raise serious gender equity concerns. Yet due to Collectives third-party status, commentators would argue that Title IX does not apply.<sup>160</sup> This argument is straightforward and stems directly from the text of the thirty-nine-word statute.<sup>161</sup> That said, the argument suffers from several flaws—the first of which is that schools have been held accountable by multiple regulatory bodies for both unethical and illegal actions by third parties. In fact, several examples are included below.

#### 1. . . . The NCAA Has Held Schools Responsible for the Actions of Third Parties

The rapid rise and fall of Southern Methodist University's ("SMU") football program in the 1970s and 1980s serves as the most memorable example of the NCAA holding a school accountable for the actions of third parties. After discovering that SMU and its Athletics Representatives had engaged in an ongoing pattern of offering cash and other recruiting inducements, the NCAA imposed the so-called "death penalty" against the program.<sup>162</sup> The unprecedented penalty resulted in the cancellation of SMU's 1987 football season, along with a reduction in scholarships, coaching staff and recruiting activities.<sup>163</sup> The NCAA imposed such harsh sanctions to divest the troubled program of the competitive advantage that it had obtained "through deliberate and flagrant

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159. *Id.*

160. See, e.g., Yasser & Fox, *supra* note 7, at 199; Jessop & Sabin, *supra* note 7, at 271; *Male Athletes Lead Way*, *supra* note 7.

161. 20 U.S.C. §1681(a).

162. Dennis Dodd, *30 Years Later: The Legacy of SMU's Death Penalty and Six Teams Nearly Hit With One*, CBS SPORTS (Feb. 22, 2017, 12:26 PM), <https://www.cbssports.com/college-football/news/30-years-later-the-legacy-of-smus-death-penalty-and-six-teams-nearly-hit-with-one/> [<https://perma.cc/RAH9-KA97>].

163. NAT'L COLLEGIATE ATHLETIC ASS'N, SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT (1987), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=101734> [<https://perma.cc/7H44-B5RA>].

violations of fundamental NCAA rules that were designed to maintain equal and fair competition.”<sup>164</sup>

## 2. . . . The FBI Has Held Schools Responsible for the Actions of Third Parties

The more recent men’s basketball scandal is another example where schools have been held to account for the actions of the third parties.<sup>165</sup> In 2017, the Federal Bureau of Investigation (“FBI”) arrested almost a dozen individuals for their roles in bribery, corruption and wire fraud conspiracies involving some of the nation’s top basketball programs.<sup>166</sup> In these schemes, Division I coaches and other university personnel were accused of promoting a “pay-to-play” culture, contrary to NCAA rules.<sup>167</sup> As the case primarily involved violations of private NCAA regulations, the FBI could have simply declined to pursue the matter.<sup>168</sup> Yet in pursuing the case to conviction, the FBI sent a clear message of its intent to pursue accountability for all parties involved, which included complicit coaches.

The FBI’s multi-year investigation revealed, among other things, that former Adidas executive, James Gatto and others, conspired to flout NCAA regulations by funneling substantial funds to the families of elite basketball recruits.<sup>169</sup> The funds were intended to influence the recruits to commit to Adidas-sponsored schools. For example, University of Miami coaches directed a \$150,000 payout to a recruit and his family.<sup>170</sup> Similarly, the University of Louisville used an installment plan totaling \$100,000 to induce a recruit to attend the school.<sup>171</sup> Accepting these payments, regardless

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164. *Id.*

165. Mark Schlabach, *Court Upholds Convictions Against James Gatto, Merl Code, Christian Dawkins In NCAA Hoop Scandal*, ESPN (Jan. 15, 2021), [https://www.espn.com/mens-college-basketball/story/\\_/id/30717983/federal-appeals-court-upholds-convictions-college-hoop-scandal](https://www.espn.com/mens-college-basketball/story/_/id/30717983/federal-appeals-court-upholds-convictions-college-hoop-scandal) [https://perma.cc/8NRA-NZ5A].

166. U.S. Att’y’s Off. for the S.D.N.Y., *U.S. Attorney Announces the Arrest of 10 Individuals, Including Four Division I Coaches, For College Basketball Fraud And Corruption Schemes*, U.S. DEPT OF JUST. (Sept. 26, 2017), <https://www.justice.gov/usao-sdny/pr/us-a-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college> [https://perma.cc/D925-UALT].

167. *Id.*

168. Schlabach, *supra* note 165.

169. *United States v. Gatto*, 295 F. Supp. 3d 336, 340 (S.D.N.Y. 2018).

170. *Id.*

171. *Id.*

of the amount, violated NCAA regulations and therefore made the recruits ineligible to play for the target institutions.<sup>172</sup>

Ironically, at least some of Adidas' former recruiting violations might now be permissible under current NCAA policies. Today's intercollegiate athletes are able to legitimately receive cash payments from Athletic Representatives, such as Adidas, so long as such payments are provided in exchange for NIL services.<sup>173</sup>

### 3. . . . The OCR Has Held Schools Responsible for the Actions of Third Parties

Although some former NCAA recruiting violations might be permissible today, Title IX violations remain illegal. Title IX may not directly regulate the activities of non-educational institutions, but it remains applicable nonetheless, where gender disparities arise from third-party activities.<sup>174</sup> Specifically, Title IX requires schools to “assure that any benefits and services provided to one gender from outside sources d[o] not result in unequal benefits and services to the other gender.”<sup>175</sup> So, for example, where school district boosters provided boys' teams with almost double the amount of resources provided to the girls' teams, the OCR prospectively required the district to provide “off-setting benefits” for the girls.<sup>176</sup> Otherwise, the OCR reasoned that, otherwise, schools could subvert Title IX's equivalence requirements by allowing third-party benefactors to fund unequal benefits and services.<sup>177</sup>

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172. *Id.* at 339–40; NCAA DI MANUAL, *supra* note 3, art.12.1.2.

173. INTERIM NIL POLICY, *supra* note 3; Elizabeth Swinton, *Adidas Announces Creation of Wide-Reaching NIL Network*, SPORTS ILLUSTRATED (Mar. 23, 2022), <https://www.si.com/college/2022/03/23/adidas-name-image-likeness-network> [<https://perma.cc/AQ9P-VK52>].

174. *See e.g.*, Letter from John E. Palomino, Reg'l C.R. Dir., U.S. Dep't of Educ., Off. for C.R., to Karen Gilyard, Esq., Atkinson, Andelson, Loya, Ruud & Romo (Feb. 7, 1995), <https://www2.ed.gov/about/offices/list/ocr/letters/Jurupa.html> [<https://perma.cc/2NJP-NPSA>] [hereinafter OCR Letter to Gilyard].

175. *Id.*

176. *Id.*; *see, e.g.*, David A. Grenardo, *The Blue Devil's In the Details: How a Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 252 (2019) (describing how Title IX offsets can be implemented).

177. OCR Letter to Gilyard, *supra* note 174.

#### 4. . . . School Involvement with Collectives Triggers Title IX

Title IX's plain language leaves no doubt that it directly applies to schools.<sup>178</sup> Therefore, schools' involvement with Collectives is the fourth reason why Collectives' activities likely will be subject to Title IX. As stated above, the NCAA and various government agencies, including OCR, have held schools primarily responsible for third-party failures in athletics in various scenarios. So too have the courts. For instance, in *Daniels v. School Board of Brevard County* the court noted that even if schools are merely "acquiesc[ing]" to funding models that result in disparate treatment of women's sports, they will be required to take "responsib[ility] for the consequences of that approach."<sup>179</sup> Therefore, it stands to reason that schools will be held responsible for gender inequities resulting from Collectives' NIL activities.

Collectives have quickly become a seemingly endless source of NIL. Despite NCAA prohibitions on the use of NIL for recruiting purposes in general and by boosters and in particular, Collectives continue to use NIL to recruit.<sup>180</sup> NCAA regulations allow schools to outsource the financing of NIL, but they do not allow schools to wholly outsource their recruiting responsibilities to third parties.<sup>181</sup> According to NCAA regulations, schools necessarily must be involved in recruiting activities, which might include Collectives' activities.<sup>182</sup> Involvement with Collectives is therefore unavoidable for schools that acknowledge Collectives' understated purpose. For this reason, some high-level athletics administrators have recently shared that they would like to become more involved in NIL.<sup>183</sup> For example, Gene Smith, athletic director at Ohio State University, suggested that a solution to the recruiting issues presented by Collectives "might be institutions having more involvement."<sup>184</sup>

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178. 20 U.S.C. § 1681(a).

179. 985 F. Supp. 1458, 1462 (M.D. Fla. 1997).

180. THIRD-PARTY NIL GUIDANCE, *supra* note 39; *see, e.g.*, Hall, *supra* note 137.

181. THIRD-PARTY NIL GUIDANCE, *supra* note 39.

182. *Id.*

183. *E.g.*, Dennis Dodd, *Ohio State AD Gene Smith: Schools Being Involved With NIL Deals Could Help Crack Down On Inducements*, CBS SPORTS (June 27, 2022, 12:02 PM), <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/BQV6-VAQR>].

184. *Id.*



When state laws permit it, some schools are already involved. This involvement ranges from compliance activities to facilitating NIL deals. Examples of the latter include BYU's football partnership with Built Brands and Ohio State's innovative "Edge Team," which provides internal NIL consultants for each of the school's thirty-six varsity sports teams.<sup>185</sup> The University of Florida took facilitation a step further when it officially partnered with the Gator Collective.<sup>186</sup> According to a report by *Sports Illustrated*, it is not uncommon for "Collectives and their schools . . . [to be] . . . in constant communication, some even operating as a separate fundraising arm."<sup>187</sup> "We're funneling everything previously under-the-table over the table," according to an anonymous SEC staffer.<sup>188</sup>

Advocates for increased school involvement with NIL primarily focus on NCAA prohibitions on recruiting inducements and pay-for-play; however, increased school involvement also has Title IX implications. The more a school involves itself in NIL, the more likely it is that a school will be subject to Title IX's equal treatment requirements.<sup>189</sup> Title IX attorney Arthur Bryant noted that "[i]f schools are not at all involved, and private actors are treating men way better than women, there's no liability under Title IX."<sup>190</sup> Bryant continued, "[b]ut the schools are almost always involved, in one way or another."<sup>191</sup> Schools' necessary and discretionary involve-

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185. Casey Lundquist, 'Built Brands' to Pay Tuition for All BYU Football Walk-Ons, SPORTS ILLUSTRATED (Aug. 12, 2021, 12:34 PM), <https://www.si.com/college/byu/news/built-brands-to-pay-tuition-for-all-byu-football-walk-ons> [https://perma.cc/455Q-P92U]; Nathan Baird, *Ohio State Athletes Have Made \$2.98 Million in Endorsements Since July; 'Edge Team' Formed to Pursue More Opportunities*, CLEVELAND.COM, <https://www.cleveland.com/osu/2022/01/ohio-state-shifts-name-image-and-likeness-strategy-with-edge-team.html> [https://perma.cc/K9BW-PXH9] (Jan. 26, 2022, 1:43 PM).

186. Sophie Goodwin, *Gator Collective Partners with UF*, WRUF – AM 850 (Feb. 3, 2022), <https://www.wruf.com/headlines/2022/02/03/gator-collective-partners-with-uf/> [https://perma.cc/CU2E-QTKN]. Florida athletes and coaches promote the Collective, just as they do other sponsors. *Id.*

187. Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create 'Chaotic' NIL Market*, SPORTS ILLUSTRATED (May 2, 2022), <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting> [https://perma.cc/T6AC-FMVF].

188. *Id.*

189. See Mike Jensen, *Do Title IX and NIL Play Well Together? Some Urge Caution*, PHILA. INQUIRER (June 21, 2022), <https://www.inquirer.com/college-sports/villanova/nil-title-ix-villanova-maddy-siegrist-20220621.html> [https://perma.cc/WKW3-Z2XD] (discussing the application of Title IX to various NIL scenarios).

190. *Id.*

191. *Id.*

ment with Collectives is the main reason why Title IX will likely apply to their activities.

5. . . . Failure to Hold Schools Responsible for NIL Gender Discrimination by Collectives Would Frustrate Title IX's Purpose

A fifth reason why Title IX likely applies to Collectives' activities is pragmatic. Simply put, allowing schools to escape Title IX's equal treatment requirements through third parties would frustrate Title IX's purpose. Title IX was enacted in 1972 to end the perpetuation of historical gender discrimination in educational settings.<sup>192</sup> With respect to athletics funding, the OCR noted that "although neutral in principle," third-party financial support of athletics programs is "likely to be subject to the same historical patterns that Title IX was enacted to address."<sup>193</sup> Several decades later, Collectives' wildly disproportionate funding of NIL opportunities for male athletes have confirmed this to be the true. The OCR has not in the past, and likely will not in the future allow schools to avoid Title IX requirements by using third parties to finance disparate treatment.

Having concluded that Title IX likely applies to NIL provided by third-party Collectives, this Article will next discuss how to amend the Regulations to specify Title IX's applicability to NIL.

#### IV. UPDATING TITLE IX

*"[I]t's nearly impossible to underestimate the importance that Title IX has had from our culture to our laws to our policies to our full economic security for women in this country."*

—Fatima Goss Graves, President and CEO of the National Women's Law Center<sup>194</sup>

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192. Cannon v. Univ. of Chicago, 441 U.S. 677, 704 (1979) ("Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").

193. OCR Letter to Gilyard, *supra* note 174.

194. Lauren Camera, *Title IX Marks 50 Years of Gains and Goals for Gender Equity in Education*, U.S. NEWS & WORLD REP. (June 22, 2022, 5:01 PM), <https://www.usnews.com/news/education-news/articles/2022-06-22/title-ix-marks-50-years-of-gains-and-goals-for-gender-equity-in-education> [<https://perma.cc/A24N-BF5T>].

Before July 1, 2021, the thought that there would be massive gender disparities in NIL was merely hypothetical. Optimistically, it was speculated that female athletes might even achieve better outcomes with NIL than male athletes.<sup>195</sup> Yet so far, this has not occurred; female NIL lags significantly behind that of male athletes.<sup>196</sup>

As a recent innovation to intercollegiate athletics, NIL was not contemplated by Title IX's drafters. Before NIL, Title IX explicitly addressed almost every major athletics scenario that could raise questions of gender equity. For example, it addresses scholarships, a wide range of athletics benefits and services, and accommodation of students' athletic interests and abilities.<sup>197</sup> Whereas, most athletics issues tend to fit neatly into one of these categories, NIL does not.<sup>198</sup>

Working within Title IX's existing regulatory structure, NIL reasonably could be considered under the benefits and services category—most plausibly as a component of recruiting.<sup>199</sup> Yet even recruiting does not adequately capture the intricacies of NIL. NIL has other equal treatment inputs, as it is both a factor and a product in publicity.<sup>200</sup> Relatedly, both publicity and NIL are factors in recruiting. But NIL is much broader than either recruiting or publicity due to its compensatory nature. Thus, this Article recommends updating the Regulations to explicitly address NIL and proposes three alternative options for doing so. These options include: (1) leaving the text of the Regulations as-is; or adding NIL as either (2) a new equal treatment factor; or (3) a new Title IX compliance category. Although a new compliance category under this third option would likely be the most difficult to draft and implement, this option provides the most flexibility to realize Title IX's purpose.

Of course, any amendments to the Regulations should, at minimum, include to what and to whom they apply, along with the

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195. See, e.g., Kunkel et al., *supra* note 106, at 855; Steve Gorman, *Women's Sports May Reap Big Gains from California Law on College Endorsement Deals*, REUTERS (Oct. 2, 2019, 1:09 AM), <https://www.reuters.com/article/us-sport-california-education/womens-sports-may-reap-big-gains-from-california-law-on-college-endorsement-deals-idUSKBN1WH0C2> [<https://perma.cc/6Z2P-N82R>].

196. *NIL Industry Insights*, *supra* note 6 (listing total NIL compensation by sport).

197. 1979 Policy Interpretation, *supra* note 20, at 71413.

198. See *supra* Part I.

199. See *supra* Part II.

200. See *supra* Part II.

standard for compliance.<sup>201</sup> Therefore, each of these considerations will be explored below for each of the above-stated proposed options.

### A. *Leave the Regulations As-Is*

The most streamlined method that OCR could use to address the Title IX implications of NIL would be a Dear Colleague Letter (“DCL”).<sup>202</sup> DCLs are typically issued in response to requests for further guidance on specific topics. Past Title IX DCLs have addressed topics ranging from booster funding to scholarships. DCL guidance assists schools with understanding the requirements to comply with Title IX.<sup>203</sup>

Substantive OCR rules that are properly issued can have the force of law.<sup>204</sup> By contrast, improperly issued rules can simply be ignored.<sup>205</sup> Thus, one major caveat of using the DCL approach is that DCLs are not appropriate for use in creating or altering substantive rules.<sup>206</sup> For this reason, DCLs should be interpretative, rather than substantive, which can be difficult to discern.<sup>207</sup>

#### 1. School Involvement Subjects Third-Party NIL to Title IX

Previous DCLs have addressed Title IX’s applicability to third-party funding, stating that schools cannot avoid Title IX’s requirements by using booster clubs to fund gender inequities.<sup>208</sup> This interpretation has been affirmed by several courts.<sup>209</sup>

In less than two years, NIL has completely transformed the recruiting landscape in intercollegiate athletics. The subject of NIL now comes up routinely in recruiting meetings and, for some

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201. Reporting requirements, which are beyond the scope of this Article, should be addressed as well.

202. A DCL is a letter issued by a government agency to provide insight into that agency’s interpretation or application of a particular statute, regulation, or rule. *E.g.*, OCR Letter to Gilyard, *supra* note 174.

203. *E.g., id.*

204. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

205. *Id.* at 301–02.

206. *Id.*

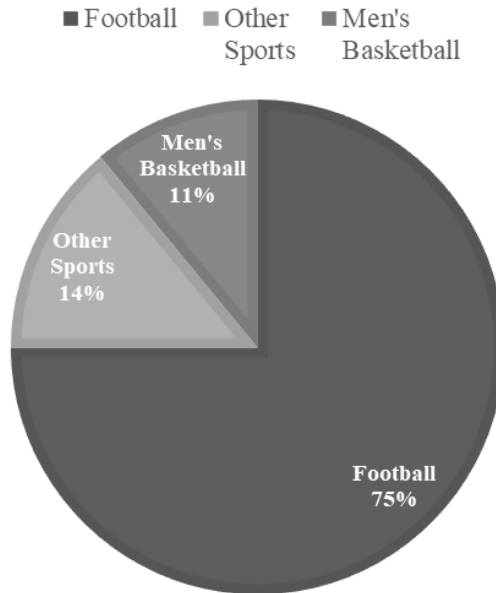
207. *Id.*

208. OCR Letter to Gilyard, *supra* note 174.

209. *See, e.g., Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048 (8th Cir. 2002); *Daniels v. Sch. Bd. of Brevard Cnty., Fla.* 985 F. Supp. 1458, 1462 (M.D. Fla. 1997).

athletes, it can be outcome determinative.<sup>210</sup> Collectives with their massive spending budgets add another layer of competition for elite talent and another layer of complexity for Title IX. Collectives have reportedly offered five- to seven-figure NIL opportunities to athletes choosing to attend a particular school.<sup>211</sup> And as Figure 4 reveals, male athletes receive the vast majority of Collectives' distributed funds.<sup>212</sup>

Figure 4: NIL Collectives: Where Does the Money Go?<sup>213</sup>



On the surface, it might appear that the prior DCLs would apply to Collectives funding of NIL opportunities based on the typical Collective's booster status; however, there is one crucial difference between traditional boosters and Collectives.<sup>214</sup> Whereas traditional boosters provide funds directly to schools, Collectives distribute their funds directly to athletes. This presents a significant obstacle to applying Title IX to third-party NIL.

210. Crabtree, *supra* note 126.

211. Dellenger, *supra* note 187.

212. Akabas, *supra* note 5.

213. See Akabas, *supra* note 5.

214. THIRD-PARTY NIL GUIDANCE, *supra* note 39.

On its face, Title IX applies only to schools that receive federal financial assistance.<sup>215</sup> But Collectives are neither schools, nor do they receive federal funding. Therefore, attempts to apply Title IX to the activities of completely independent Collectives likely would likely fail. For OCR to comprehensively address NIL, such that it applies broadly to include Collectives, it must first address how Regulations that facially apply only to schools are able to extend to third-party activities. The answer is simple: school involvement. The Regulations must clarify the level of school involvement required to trigger Title IX's applicability in a NIL context.

School involvement with Collectives is likely unavoidable. According to NCAA regulations, schools cannot outsource recruiting functions to third parties.<sup>216</sup> This means that if a school has Collective-funded athletes on its roster, it is likely involved with the Collective's activities in some way.<sup>217</sup> Given the large amount of funding involved, it is highly unlikely that Collectives are making such high value NIL offers to high school teenagers without any input from the target school.<sup>218</sup> Yet even if target schools are not directly involved in athlete negotiations with Collectives (or other third parties), they likely are associated with athletes' NIL in other ways that would trigger Title IX.

School involvement requires further explanation and could be defined to include activities other than those conducted for reporting or compliance purposes.<sup>219</sup> For example, if a school maintains a ledger of its athletes NIL transactions to facilitate compliance with state or federal law, this activity would not trigger Title IX. Similarly, interactions between schools and Collectives regarding suspected NCAA or legal violations would also not trigger Title IX. But if a school allows athletes to use its tangible or intellectual property, provides complimentary access to NIL exchanges or talent agencies, arranges athlete meetings with third parties, refers

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215. 20 U.S.C. §1681(a).

216. THIRD-PARTY NIL GUIDANCE, *supra* note 39.

217. Dellenger, *supra* note 187 (noting that schools communicate extensively with their Collectives).

218. *See id.*

219. THE DRAKE GROUP, NILS AND TITLE IX: EDUCATIONAL INSTITUTIONS MUST FIX THEIR PROMOTION, PUBLICITY, AND RECRUITING INEQUITIES CRITICAL TO THE NIL MONETIZATION SUCCESS OF COLLEGE FEMALE ATHLETES AND MUST NOT USE THIRD PARTIES TO EVADE THEIR TITLE IX OBLIGATIONS 15 (2021), <https://www.thedrakegroup.org/2021/10/12/nils-and-title-ix-educational-institutions-must-fix-their-promotion-publicity-and-recruiting-inequities-critical-to-the-nil-monetization-success-of-college-female-athletes-and-must-not-use-third> [https://perma.cc/6ZX6-SBCY].

athletes to third parties, or negotiates athletes' NIL transactions, those sorts of activities would trigger Title IX. In any event, to trigger Title IX's applicability to third-party NIL transactions, a school must be involved in the transaction per the OCR's definition of the term.

## 2. NIL as a Component of Recruiting

NIL has synergies with at least two equal treatment factors currently addressed by the Title IX: recruiting and publicity. To avoid making textual changes to the Regulations, a DCL could bundle its treatment of NIL with either of those two factors. That said, recruiting is most affected by NIL and would be the preferred option of the two. As such, the DCL should include NIL as a consideration for determining equal treatment in recruiting.

One of the advantages of issuing a DCL is its expediency. A DCL can be used to quickly address Title IX's requirements because fewer procedural steps are required to issue it, in comparison to other methods described below.<sup>220</sup> The price of this streamlined approach, however, is that a DCL must interpret existing rules.<sup>221</sup> Analyzing NIL as a component of recruiting is one, albeit limiting, way to accomplish this.

## 3. Recruiting Efforts Must Be Equal or Equal in Effect

Assuming that NIL is analyzed as a component of recruiting, the next item to clarify is the standard for compliance. Restated, how could a school determine whether it has provided equal treatment in recruiting, where NIL is a consideration?

The 1979 Policy Interpretation provides an existing framework for determining whether recruiting efforts are equitable. Specifically, it requires recruiting efforts that are "equivalent in kind, quality or availability."<sup>222</sup> In determining Title IX compliance when participation opportunities are unequal, the OCR considers the following three recruiting factors: (1) whether coaches for both genders are provided with "substantially equal opportunities to

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220. *C.C. v. Paradise High Sch.*, No. 2:16-cv-02210-KJM-DMC, 2019 U.S. Dist. LEXIS 200827, at \*10–15 (E.D. Cal. Nov. 18, 2019) (describing the lack of procedural rigor in the issuance of a DCL).

221. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979).

222. 1979 Policy Interpretation, *supra* note 20, at 71415.

recruit”; (2) whether financial and other resources for recruiting are “equivalently adequate”; and (3) whether differences in treatment of prospective athletes have a “disproportionately limiting effect on recruiting.”<sup>223</sup> Disparities in just one equal treatment factor can result in a Title IX violation if it is sufficiently substantial.<sup>224</sup> To illustrate, a DCL could apply the equal treatment requirements for recruiting to the facts of this Article’s introductory hypothetical.<sup>225</sup>

#### 4. Applying the DCL

As a practical matter, State’s interactions with the Rugby Cares organization are highly likely to involve much more than regulatory compliance. As stated above, non-regulatory school involvement is required to trigger Title IX. If State’s only interaction with Rugby Cares is for compliance reporting purposes, then Title IX likely does not apply. However, Rugby Cares’ founders are long-time athletic department donors who serve on charitable boards alongside the athletics department staff. Therefore, the more likely scenario is that State’s NIL-related involvement with Rugby Cares will be sufficient to trigger Title IX’s equal treatment requirements.

Analyzing the facts in the hypothetical under the three proposed equitable recruiting factors listed above, State likely did not provide equal treatment to the women’s rugby team, given that NIL is increasingly becoming such a critical factor in recruiting. Given the substantial disparity between the men’s and women’s NIL, it is likely that the OCR would find that (1) women’s rugby did not receive substantially equal opportunities to recruit. Better NIL opportunities, among other things, tend to attract better players, and there is a \$30,000 plus difference between the men’s and women’s rugby teams’ annual NIL earnings. That both incoming recruits and current players have all received five-figure NIL opportunities at other schools also suggests that there is a market NIL rate for women’s rugby players, and that State’s well-below-market NIL rate is insufficient to recruit a competitive team. Thus, the OCR

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223. *Id.* at 71417.

224. *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 279, 293 (2d Cir. 2004).

225. Title IX compliance determinations are made at the program level and not sport-by-sport. 1979 Policy Interpretation, *supra* note 20, at 71417. For simplicity, this hypothetical assumes that men’s and women’s rugby are the only two varsity sports that State sponsors.



likely will not consider the women's NIL opportunities equivalent in kind, quality, or availability in comparison to the men's, whose NIL opportunities attracted a historic recruiting class.

The comparative NIL disparity and loss of recruits also suggests that the (2) women's rugby coach was not provided with equivalently adequate financial resources, which (3) likely had a disproportionately limiting effect on recruiting. In summary, all three recruiting factors weigh heavily against a finding of equal treatment in recruiting for women's rugby.

Still, to determine whether State has committed an actual Title IX violation, additional information is necessary. Title IX compliance determinations are made in the aggregate at the men's and women's program level.<sup>226</sup> Therefore, State potentially could avoid a Title IX violation by providing offsetting benefits to women's rugby in another program area, such as travel and per diem.<sup>227</sup> If offsetting benefits are not provided, then it is more likely that State violated Title IX by failing to make any effort at all to assist the women's rugby team with NIL opportunities.<sup>228</sup>

The proposed DCL, although creative, is a flawed solution. It is vulnerable to litigation on both procedural and substantive grounds. In fact, the strongest argument against the DCL is procedural. The Administrative Procedure Act ("APA") requires that agencies provide a notice-and-comment period for a specified period before finalizing amendments to regulations.<sup>229</sup> The purpose of the requirement is two-fold. First, it provides an opportunity for those affected by the amendments to become informed, raise concerns, and to take additional action to protect their interest, if necessary. Second, agencies that follow the APA's procedural requirements provide the judiciary with grounds for deferring to their regulations.<sup>230</sup>

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226. *Id.*

227. OCR Letter to Gilyard, *supra* note 174.

228. For simplicity, this hypothetical assumes that there are only two sports offered by State: men's and women's rugby. Because Title IX compliance determinations are made at the program level, and not sport-by-sport, the outcome could be different if there was an equal proportion of female athletes in other sports that received offsetting benefits equal in effect to that of the Brick Wall initiative.

229. 5 U.S.C. § 553 (b), (d).

230. *See, e.g.,* *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring) (noting that under the current practice of deference to agency interpretations of their own regulations, "[i]nterpretive rules that command deference do have the force of law.>").

Opponents of the DCL could argue that it engages in rulemaking that goes beyond interpretation or general guidance and, as such, required notice and comment.<sup>231</sup> As stated above, there are crucial differences between Collectives and the traditional boosters to which prior DCLs apply. Because the effect of this DCL could obligate schools to offset multimillion-dollar NIL benefits provided by Collectives, this procedural argument might prevail. Consequently, the typical judicial deference given to an agency's interpretation of its own regulations may not apply.

Additionally, the DCL is vulnerable to at least three substantive arguments. The first argument is statutory. Opponents of the DCL could argue that the plain text of Title IX states that it applies only to schools and therefore the DCL cannot apply to NIL provided by third parties. Even so, this argument is likely to fail because the DCL requires school involvement before third-party activities would become subject to Title IX's equal treatment requirements.<sup>232</sup> Furthermore, the OCR has already ruled that schools can be held responsible for gender inequities created by third parties.<sup>233</sup>

The two remaining arguments are based on the Regulations. Opponents of the DCL's interpretation could make the argument that Title IX does not require men's and women's recruiting benefits to be the same, and that the difference in NIL is attributable to market preferences for men's rugby.<sup>234</sup> However, this argument is fatally flawed. Although Title IX does not require "identical" recruiting efforts or by extension identical NIL, it does require that both are, at a minimum, "equal in effect."<sup>235</sup> In the hypothetical, the women's rugby coach was neither able to attract new recruits nor maintain her current roster, whereas the men's coach secured "the best recruiting class in the school's 150-year history."<sup>236</sup> The recruiting efforts clearly were not equal in effect, given the disparate recruiting outcomes. Additionally, the OCR has noted that third-party funding in athletics is "likely to be subject to the same his-

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231. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979).

232. See *supra* Section IV.A.

233. OCR Letter to Gilyard, *supra* note 174.

234. See 1979 Policy Interpretation, *supra* note 20, at 71417.

235. *Id.* at 71415.

236. See *supra* Introduction.

torical patterns that Title IX was enacted to address.”<sup>237</sup> Market preferences based on historical discrimination are not legitimate grounds that can be used as a justification for unequal treatment.<sup>238</sup>

Lastly, opponents of the DCL could argue that including NIL as an aspect of equitable recruiting is not a reasonable interpretation of the Regulations.<sup>239</sup> That is, because the Regulations do not address NIL, NIL should not be considered an aspect of recruiting, or any of the current equal treatment factors. Instead, the Regulations should be amended to include NIL as its own equal treatment factor because the current list of factors is open-ended.<sup>240</sup> This argument has merit and will be explored in further detail below.

### B. *Add NIL as a New Equal Treatment Factor*

As revealed above, the DCL approach to addressing NIL obligations under Title IX is vulnerable to potentially successful litigation on both procedural and substantive grounds. Even worse, it could lead to outcomes that protect the inequitable status quo. A DCL, therefore, is not an ideal long-term approach. A slightly better approach would be to add NIL to the Regulations’ list of equal treatment factors, and issue subsequent DCLs or policy interpretations based on questions or complaints.

#### 1. Title IX’s Equal Treatment Factors Are Open-Ended

The list of equal treatment factors is open-ended.<sup>241</sup> Therefore, it is not necessary to bundle NIL with any of the existing equal treatment factors. It was advisable to bundle NIL with recruiting for the DCL to avoid straying too far from the limited interpretative purposes of DCLs. However, adding NIL to the list of equal treatment factors is a better option because it provides considerably more flexibility.

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237. OCR Letter to Gilyard, *supra* note 174. Title IX was enacted to prevent pervasive sex discrimination from continuing to occur in educational settings. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

238. OCR Letter to Gilyard, *supra* note 174.

239. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979).

240. *See* 1979 Policy Interpretation, *supra* note 20, at 71415.

241. *See id.*

This add-on approach has multiple advantages over the DCL. First, it is more transparent and therefore less subject to procedural attacks. It must comply with the APA's notice-and-comment requirement, which would inform interested parties of the proposed changes. Transparency also will be aided by NIL's integration into the official Regulations, rather than burying it in a DCL. Yet the most valuable benefit is that NIL does not have to be retrofitted (for the sake of interpretation) into existing equal treatment factor frameworks—some of which may be ill-suited for NIL.

Because an appropriate framework for NIL does not exist, an explanation of how to determine whether NIL is “equal or equal in effect” must be included as well. So far, all of the equal treatment factors include a list of multiple considerations to assist with compliance determinations.<sup>242</sup> If NIL were to follow this pattern, compliance with equal treatment in NIL could be assessed based on the following proposed considerations: (1) whether substantially equal assistance for NIL opportunities was provided; (2) whether substantial disparities in NIL opportunities exist; and (3) whether the disparities in NIL opportunities are justified. A disparity in NIL alone, if sufficiently substantial, can violate Title IX.<sup>243</sup> To illustrate, the proposed NIL factors will be applied to the facts of this Article's introductory hypothetical. Because Title IX applies to schools, the school involvement requirement discussed above for the DCL would be equally applicable here.

## 2. Applying the NIL Factors

As stated above in the DCL analysis, State's NIL-related involvement with Rugby Cares likely will constitute school involvement sufficient to trigger Title IX's equal treatment requirements. Analyzing the facts in the hypothetical under the NIL factors proposed above, State likely did not provide equal treatment to the women's rugby team. Specifically, State did not provide substantially equal assistance to women's rugby because it did not make any efforts at all to assist the team's members with NIL opportunities. By contrast, the men's rugby team received its NIL opportunities from a donor that has had a long-term on- and off-campus relationship with athletics department officials, who likely facili-

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242. See, e.g., 1979 Policy Interpretation, *supra* note 20, at 71417 (“Such examinations will review the following factors: . . .”).

243. *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 293 (2d Cir. 2004).

tated the Brick Wall initiative. Although it is likely that any obscured NIL assistance provided to women's rugby also was not substantially equal to that of men's rugby, this is not a particularly clear from the facts. It is clear, however, that there were substantial disparities in the NIL opportunities. Specifically, the women's team received NIL opportunities that were worth, at best, slightly more than ten percent of the men's. Additionally, the opportunities that the women received were self-facilitated rather than school- or third-party-facilitated. Lastly, the disparities likely were not justified because both incoming recruits and the players that transferred all received NIL opportunities at other schools similar to those of men's rugby. This indicates the existence of a NIL market rate for women's rugby players that is roughly equal to that of men's rugby. Yet, State's women's rugby team received NIL opportunities that were worth, at best, twelve percent of the men's. As a result, the OCR likely will not consider the women's NIL opportunities equivalent in kind, quality or availability in comparison to the men's.

In summary, two of the three NIL factors weigh heavily against a finding of equal treatment for women's rugby. Still, determining whether State has committed an actual Title IX violation once again requires additional information regarding any offsetting benefits that may have been provided to women's rugby.<sup>244</sup> If offsetting benefits are not provided, State likely violated Title IX by failing to make an effort to assist the women's rugby team with NIL opportunities.<sup>245</sup>

Whether equal treatment exists often depends on the standards used to measure equality. The NCAA, for example, measures equal treatment by considering whether "participants in both the men's and women's sports programs would accept as fair and equitable the overall" treatment provided to the other gender.<sup>246</sup> If the answer is no, then participants likely have not received equal treatment.

Another way to frame the question would be to ask athletes from the historically-advantaged gender whether they would be willing to trade places with the historically-disadvantaged gender's

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244. OCR Letter to Gilyard, *supra* note 174.

245. See *supra* text accompanying note 228.

246. *Gender Equity and Title IX*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://www.ncaa.org/sports/2016/3/2/gender-equity-and-title-ix.aspx> [<https://perma.cc/4UUD-J3XF>].

athletes in an area of specific concern. For example, would the male rugby players in the hypothetical be willing to trade places with their female counterparts for purposes of NIL? Even by the NCAA's standard the answer is likely no.

Although measurement methodologies may vary, to truly determine equivalence, NIL must be analyzed separately from other equal treatment factors, i.e., recruiting—and added to the current list. However, before this change would be able to occur, OCR must provide a notice-and-comment period.<sup>247</sup> It is during this time that opponents might offer arguments similar to those typically made against DCLs. But provided that OCR follows the APA's requirements for amendments, the procedural arguments are likely to fail.<sup>248</sup> Also, because the 1979 Policy Interpretation explicitly provides for adding new equal treatment factors, any arguments based on the lack of authority to add NIL as a new factor would also fail.<sup>249</sup>

Based on the outcome in the hypothetical, another substantive argument could be that Title IX does not require identical NIL. This is true.<sup>250</sup> Yet the wide disparity in amounts for the men's and women's teams suggests that this argument is likely to fail as well. A substantial disparity in just one program area is sufficient to violate Title IX.<sup>251</sup>

Yet there is one challenge to adding NIL as a separate equal treatment factor that could very well prevail. Because the standards used above to measure equal treatment are all inherently subjective, opponents may be able to successfully argue against the number, nature, content or weight of the considerations that comprise the NIL equal treatment inquiry.

The subjectivity built into the above assessments of equal treatment can provide opportunities for successful challenges, or even worse, it could lead to outcomes that protect the inequitable status quo for NIL. Thus, the optimal solution for incorporating NIL into the Regulations is to designate it as its own separate compliance category. This approach would provide a blank canvas for

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247. 5 U.S.C. § 553(b), (d).

248. *See id.*

249. 1979 Policy Interpretation, *supra* note 20, at 71415.

250. *Id.*

251. *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 293 (2d Cir. 2004).

assessing equal treatment in ways that are more objectively consistent with Title IX's gender equity goals.

### C. Add a Fourth Category to Title IX

Most athletics issues tend to fit neatly into one of the Title IX's three existing categories, which currently consist of: (1) effective accommodation; (2) athletic scholarships; and (3) benefits and services. Although all of the categories are suboptimal for NIL, benefits and services with its equal treatment factors is the best fit for NIL in the short term.<sup>252</sup> The main reason that the benefits and services category is not ideal for NIL in the long term is because its equal treatment frameworks allow disparate treatment, so long as any disparities are "equal in effect"<sup>253</sup> or are based on the "unique aspects of particular sports," such as football.<sup>254</sup> Even if certain exceptions to equal treatment are justified based on a sport's so-called "unique aspects,"<sup>255</sup> these exceptions are not appropriate for NIL. "Equal in effect" or unique sports exceptions, coupled with subjective standards for measuring equality and uniqueness will more than likely perpetuate the status quo.<sup>256</sup> That is, such exceptions could be used to justify any number of gender disparities, including disproportionate funding of male athletes by Collectives.<sup>257</sup> A NIL-specific category with more objective standards for compliance could guard against such outcomes as explained in further detail below.

#### 1. A Separate NIL Category Is Ideal

Unlike the previous proposals, a new compliance category could be tailored specifically to NIL without impacting or being limited by other program areas. For instance, bundling NIL with an existing equal treatment factor does not provide sufficient flexibility for measuring equality in ways that solely apply to NIL. Relatedly,

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252. See *supra* Part I.

253. 1979 Policy Interpretation, *supra* note 20, at 71415.

254. For example, the "unique aspects of particular sports," such as football can be used to justify gender disparities. *Id.*

255. *Id.*

256. *Id.*

257. See *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1383 (Wash. 1987) (en banc) (noting that exceptions for football "[c]ould prevent sex equity from ever being achieved since men would always be guaranteed many more participation opportunities than women.").

adding NIL to Title IX's existing equal treatment factors will bind it to subjective legacy frameworks that accommodate gender disparities, so long as they are "equal in effect" or based on the "unique aspects of particular sports."<sup>258</sup>

NIL and its exponentially increasing disparities have yet to be addressed by Title IX. To narrow these disparities, Title IX must be amended in a way that has sufficient flexibility to address NIL as it evolves. NIL progressed from an endeavor that was self-facilitated by the athletes themselves to its current state where Collectives facilitate multimillion-dollar deals primarily for football and basketball players.

Because Title IX applies to schools, school involvement is required for Title IX to reach Collectives' activities. Thus, the school involvement requirement detailed in the two prior proposals is just as applicable to a separate NIL category. Yet because it is at least theoretically possible for schools to have no involvement in NIL at all, NIL opportunities lacking school involvement must be excluded from any amounts used to determine Title IX compliance under this and the above proposals. With that said, the next issue to be addressed for the proposed NIL category is the standard for compliance.

NIL, like scholarships, is a direct benefit to athletes that can be measured in hard currency.<sup>259</sup> This characteristic distinguishes it from some of the other athletics benefits captured by the equal treatment factors. Although NIL is analogous to scholarships in terms of financial measurability, the two differ in some crucial respects. For example, scholarships are essentially permissible pay-for-play, whereas NIL is not.<sup>260</sup> Scholarships also differ from NIL in that published tuition rates may not reflect the actual benefit to the athlete, as athletes may be too occupied with their sports to benefit from the full range of academic experiences offered by their schools.<sup>261</sup> By contrast, NIL more directly reflects the benefits to

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258. 1979 Policy Interpretation, *supra* note 20, at 71415.

259. Note that some NIL compensation is in-kind. However, a value can still be assigned based on market prices of the goods or services.

260. NCAA regulations indicate that "athletically related financial aid" is provided in exchange for "athletics ability, participation or achievement" to assist in paying educational costs. NCAA DI MANUAL, *supra* note 3, art. 15.02.5.1; THIRD-PARTY NIL GUIDANCE, *supra* note 39 (prohibiting pay-for-play with respect to NIL).

261. See William W. Berry III, *Amending Amateurism*, 68 ALA. L. REV. 551, 563–65 (2016) (noting that the academic experiences of athletes can be less robust due to participating in athletics).



the athletes—which makes it measurable in ways that benefits and services and scholarships are not. These crucial distinctions make it possible for the proposed NIL category to measure Title IX compliance with more transparency and objectivity.

## 2. What Does Gender Equity in NIL Mean?

Title IX's current three categories each use different standards to measure compliance. This makes sense because each category addresses different topics and the use of a single standard would not be the best way to measure compliance across all categories. As the NIL category does not currently exist, OCR would have to create a standard by which to measure Title IX compliance. To this end, this Article analyzes absolute equality, equal access, and proportionate equality, and recommends a proportionate equality standard for NIL.

The simplest way to measure Title IX compliance for NIL would be to use an absolute equality standard. This standard simply requires an equal allocation of NIL funding for men's and women's sports. Once again, gender equity under Title IX is determined at the men's and women's program level and not sport-by-sport.<sup>262</sup> To illustrate the absolute equality standard using the introductory hypothetical, \$1 million in total NIL funding would be equally allocated among State's men's and women's programs (which currently consists of only men's and women's rugby), without regard to the number of athletes in each program. For example, State's men's program with sixteen athletes and one sport would receive the same \$500,000 allocation as the women's program with its fourteen athletes and one sport. Therefore, this standard could produce substantially higher per capita funding levels for the program of the gender with fewer participants. Although this standard potentially could produce the best financial outcomes for women's sports, it may not be palatable in the current economic and political climate. Additionally, this standard could be considered inequitable for the gender that receives fewer NIL funds per capita.

Another alternative for measuring Title IX compliance for NIL would be to use an equal access standard. This standard would require that both male and female athletes receive equal access to NIL opportunities. For example, so long as all athletes could

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262. 1979 Policy Interpretation, *supra* note 20, at 71415.

pursue NIL opportunities under exactly the same terms, a school would comply with Title IX, even if NIL totaled \$900,000 for the men's program and only \$100,000 for the women's. This approach does not require equality in financially measurable terms. Instead, it requires passive nondiscrimination, or the absence of gendered barriers to pursuing NIL opportunities.<sup>263</sup> In this way, the equal access standard requires the least amount of effort by schools and would essentially continue the status quo. This standard, however, departs from longstanding Title IX administration and jurisprudence, which acknowledges the effect of historical discrimination, and requires that schools take measures to offset it when necessary.<sup>264</sup>

Lastly, the proportionate equality standard that is currently used for scholarships is also an option for NIL. For example, if the total annual amount of scholarship funding at State is \$1 million and its total of fourteen female athletes constitute forty-seven percent of all of the school's athletes, then the female athletes should receive \$470,000 in scholarship funds. NIL must be reported to schools in most states. Therefore, a similar calculation could be made if the total annual amount of NIL funding is \$1 million. As such, State's fourteen female athletes should receive forty-seven percent of the NIL funds, or \$470,000.

The OCR has stated that proportionate equality is an appropriate standard "where the benefit or opportunity under review, like a scholarship, is itself financial in nature."<sup>265</sup> Proportionate equality is appropriate for NIL because, like scholarships, it is "financial in nature."<sup>266</sup> This standard is also the best fit for NIL because it is more objective than the factor-based approach used in benefits and service, and, as such would be more transparent and easier to administer. To illustrate, the proportionate equality standard will also be applied to the facts of this Article's introductory hypothetical.

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263. See Michele S. Moses, *Race, Affirmative Action, and Equality of Educational Opportunity in a So-Called "Post-Racial" America*, 20 KAN. J.L. & PUB. POL'Y 413, 424 (2011) ("This argument stems from a belief that formal equality, that is, the absence of formal and legal barriers to opportunities, is sufficient for an equitable society.")

264. OCR Letter to Gilyard, *supra* note 174.

265. 1979 Policy Interpretation, *supra* note 20, at 71415 ("The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature.")

266. *Id.*

### 3. Applying Proportionate Equality

As noted above in prior analyses, State's NIL-related involvement with Rugby Cares likely will constitute school involvement sufficient to trigger Title IX. In analyzing the hypothetical's facts under the proposed NIL category, State did not meet the proportionate equality standard. In order to determine whether there was a Title IX violation using the proportionate equality standard, we must be able to account for all NIL in which the school was involved. Record-keeping by schools, if they are either directly or indirectly involved, should be fairly straightforward, and athletes also must report NIL. In the hypothetical, the men's team had sixteen athletes and the women's team had fourteen, for a total of thirty. According to the hypothetical, each male athlete received \$40,000 annually and each female athlete received a maximum of \$5,000 annually. If it is very generously (and counterfactually) assumed that each female athlete received the maximum for their team or \$5,000 annually, the grand total NIL for all athletes would be \$710,000. Because women are forty-seven percent of all athletes, they should receive forty-seven percent of that amount or \$347,800 to distribute among the team as appropriate. Yet even if each female athlete earned the \$5,000 maximum (which did not occur), the team's total is only \$70,000. The men who each received \$40,000 would have a team total of \$640,000. Clearly, the proportionate equality standard is not met where the women have effectively received ten percent of total NIL when the proportionate equality standard as applied here dictates that they receive forty-seven percent. State has violated Title IX based on numbers alone.

After examining the above three standards for measuring NIL Title IX compliance, this Article recommends the proportionate equality standard because it is more equitable than the absolute equality standard and will not perpetuate market discrimination as the equal access standard does.

#### D. *Limitations*

Despite Title IX's gender equity requirements for educational settings, opponents may choose to stand firm in their arguments against equitable NIL for intercollegiate athletes. The arguments for maintaining the status quo are plentiful and are typically based

on budgetary constraints and free-market advocacy. These arguments are equally unpersuasive for all three proposals above.

One popular argument is that Title IX should not apply to third-party NIL because it is not economically feasible. However, courts in multiple jurisdictions have held that financial constraints are not a viable defense to Title IX violations.<sup>267</sup> Schools with financial constraints have the ultimate flexibility to determine how they will comply with Title IX, but financial constraints cannot be used to justify noncompliance.<sup>268</sup> The same ingenuity and creativity that schools and their Collectives have used to generate millions of dollars in NIL for a disproportionate number of promising male athletes can be used to generate gender-equitable NIL for female athletes.

Opponents of equitable NIL also might argue that it will lead to corresponding reductions in NIL for athletes in primarily male, revenue-generating sports.<sup>269</sup> Yet this argument is easily refuted by analogy to the 2022 NCAA men's and women's basketball tournaments. The infamous 2021 Sedona Prince weight room video dramatically increased publicity for inequities in women's basketball.<sup>270</sup> As a result there were unprecedented institutional efforts to provide equitable treatment at the 2022 women's tournament.<sup>271</sup> The outcome of those efforts was a surge in sponsorships and sponsor spending for the men's and women's tournaments, which both produced record-setting revenues.<sup>272</sup> The 2022 NCAA basketball

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267. See, e.g., *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 583 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993); *Cohen v. Brown Univ. (Cohen IV)*, 101 F.3d 155, 188 (1st Cir. 1996).

268. See *Cohen IV*, 101 F.3d 185–86.

269. See, e.g., J. Brady McCollough, *Women Respond to Pac-12 Assertion That New California Law Would Hurt Female Athletes*, L.A. TIMES (Oct. 1, 2019, 7:08 PM), <https://www.latimes.com/sports/story/2019-10-01/college-athletics-reform-ncaa-women-olympics> [<https://perma.cc/J9LH-DSMQ>] (“[T]here is an assumption held among college sports’ power brokers that . . . boosters would aim their money at players in order to secure their commitments to their school instead of making donations to the athletic department.”).

270. PHASE I GENDER EQUITY REVIEW, *supra* note 146, at 1.

271. PHASE II GENDER EQUITY REVIEW, *supra* note 155.

272. Michael Smith, *NCAAs Feature 100% Sponsor Activation at Men's, Women's Final Four for First Time*, SPORTS BUS. J. (Apr. 11, 2022), <https://www.sportsbusinessjournal.com/Journal/Issues/2022/04/11/Upfront/College-Basketball.aspx> [<https://perma.cc/P9F8-LFGB>] (quoting NCAA director of championships, Ellen Lucey, who remarked that “[w]e’ve always had a pretty healthy number of partners at the women’s Final Four . . . [b]ut I will say that they really stepped it up even more this year.”); Mike Reynolds, *‘Earliest’ March Madness Sellout Will Yield Record Ad Revenues for CBS, Turner*, S&P GLOBAL (Mar. 9, 2022), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headline/earliest-march-madness-sellout-will-yield-record-ad-revenues-for-cbs-turner-69297724> [<https://perma.cc/2WQ8-D9YP>] (“We’ve written more ad revenue in this tournament than

tournaments demonstrate that institutionally supported gender equity initiatives are more likely to create a larger revenue pie, rather than redistribute slices of historical revenue from male to female athletes.

One final argument against applying Title IX to third-party NIL asserts that the free market determines the athletes' rates of NIL, and, as such, schools are not responsible for disparate outcomes.<sup>273</sup> This argument fails for several reasons. First, this same argument was considered and rejected decades ago by OCR, which ruled that market preferences do not exempt schools from their Title IX obligations.<sup>274</sup> OCR has declined to create a Title IX exception for market preferences in the past and is unlikely to create one in the future.

NIL is a new Title IX paradigm that repeats old patterns of gender discrimination to maintain the status quo. The status quo has historically provided disproportionate support for male athletes in revenue-generating sports—a practice which predictably has been extended to NIL.<sup>275</sup> Thus, the second reason that free market arguments fail is because schools are both directly and indirectly involved with NIL in ways that generally favor male athletes.<sup>276</sup> In this way, NIL does not take place in an authentically, unregulated free market that determines prevailing NIL rates based exclusively on fluctuations in supply and demand for certain sports and positions. Schools and the Collectives that support them help bolster the market values male athletes. Title IX requires that they do the same on behalf of female athletes.<sup>277</sup>

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we ever have before,” remarked John Bogusz, CBS executive vice president of sales and marketing).

273. See, e.g., NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA BOARD OF GOVERNORS FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 24 (Apr. 17, 2020), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf) [<https://perma.cc/DY8L-J82G>] (noting that market-driven NIL compensation opportunities “may not be made available in a gender-equal manner.”).

274. OCR Letter to Gilyard, *supra* note 174.

275. Akabas, *supra* note 5 (quoting assistant professor of sports management at Arkansas State, Neal Ternes', statement 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.”).

276. *Id.* (quoting Opendorse CEO Blake Lawrence that it was not foreseeable “that there'd be student athletes with low level of national recognition or even local market-ability who are being compensated at a degree that outpaces some professional athletes in their sport.”).

277. See *infra* Section III.A.

## CONCLUSION

“Would Title IX apply to a professional team? Until asked, the answer remains uncertain but it likely would be ‘no.’”

—*Ellen J. Staurowsky*, sports media professor, Ithaca College<sup>278</sup>

Male athletes have greatly surpassed female athletes in high-value NIL opportunities, most of which are provided by third parties. Specifically, male athletes currently receive over seventy percent of total NIL generally and over eighty percent of NIL provided by Collectives.<sup>279</sup> The current NIL gender disparities are sadly reminiscent of pre-Title IX funding models for women’s sports—making NIL both a step forward and a step backward.<sup>280</sup>

In addition to the providing fewer NIL (and therefore educational) opportunities for women, sizeable disparities in privately financed NIL send women discouraging messages about the state of gender equity, not only in intercollegiate athletics, but also in the workplace, where women face similar glass ceilings. Are institutions of higher education the appropriate experiential medium for delivering these types of messages? According to Title IX, the answer is no.

Although Collectives present as independent third parties, synergies between NIL, recruiting, and publicity require Collectives to have ongoing relationships with the schools that they support. Despite Title IX typically not applying to the activities of third parties, schools’ involvement with Collectives could serve as the basis for applying Title IX to Collectives’ NIL activities. Yet neither Title IX, nor the Regulations, mention NIL (or any other form of non-scholarship athlete compensation). At this time, it is unclear if, when, or how Title IX applies in a NIL context. Fortunately, there are multiple ways to remedy this, either through Title IX’s current

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278. Ellen J. Staurowsky, *College Athletes as Employees and the Politics of Title IX*, in *SPORT AND THE NEOLIBERAL UNIVERSITY: PROFIT, POLITICS, AND PEDAGOGY* 116 (Ryan King-White ed., 2018).

279. Akabas, *supra* note 5; *NIL Industry Insights*, *supra* note 6.

280. See, e.g., Bil Gilbert & Nancy Williamson, *Sport is Unfair to Women*, *SPORTS ILLUSTRATED*, May 28, 1973, at 88, 91, <https://vault.si.com/vault/1973/05/28/43184#&gid=ci0258c074f00a26ef&pid=43184--094--image> [<https://perma.cc/HL2X-RAMV>] (“At the University of Washington, 41.4% of the 26,464 undergraduates . . . are women . . . . The women’s intercollegiate budget is \$18,000 a year, while the men have \$1.3 million to spend over and above the income-producing sports of football and basketball.”).

equal treatment framework, or better yet through a new Title IX category specifically tailored to NIL.

Still, arguments for maintaining the status quo are plentiful, and they are typically based on financial considerations. Yet these arguments perpetuate the same historical gender discrimination that Title IX was enacted to address—over fifty years ago. Since then, the courts and OCR have uniformly agreed that Title IX makes no exceptions for budget deficits, undervaluation of assets or market-based preferences. So long as the primary purpose of colleges and universities remains education and intercollegiate athletes remain students, Title IX will continue to protect against gender discrimination in “education program[s]” and activities—whether such discrimination is perpetuated by athletics departments or their third-party funding sources.<sup>281</sup>

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281. 20 U.S.C. §1681(a).