

# **Title IX should disrupt the footing of NIL**

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## I. INTRODUCTION

College sports have been monumentally changed by three little letters: NIL. In 2021, the NCAA passed the name, image, and likeness (NIL) policy<sup>1</sup> that enables student-athletes to profit off of their NIL. Prior to this policy, student athletes could not accept endorsements without compromising their amateurism, an eligibility requirement to compete in the NCAA. Despite its concise title, NIL is a complex policy that has extensive, promising, or perhaps grave implications for the future of women's sports. To ensure that NIL's potential propels the growth of women's sports rather than polluting its progress, it is essential that Title IX<sup>2</sup> provides oversight to NIL.

## II. ANALYSIS

### A. The history of paying student athletes

College sports have not always been as lucrative as they are today; yet the sharp debate of whether to pay student athletes is decades old.<sup>3</sup> As the NCAA seeks to limit the extent to which athletes can be compensated, courts mandate the gradual loosening of their regulatory grip. The end to the NCAA's monopoly of TV rights prompted steep network deals; however, the Supreme Court held that "athletes must not be paid."<sup>4</sup> Thirty years later, the Ninth Circuit found that the NCAA's rules prohibiting student-athletes from being paid for their NIL "have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports

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<sup>1</sup> Michelle Brutlag Hosick, *NCAA adopts interim name, image, and likeness policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>

<sup>2</sup> 20 U.S.C. §§ 1681–1688. The Title IX athletics regulation is at 34 C.F.R. § 106.41.

<sup>3</sup> Howard J. Savage, *American College Athletics*, Carnegie Commission (1929), <https://www.thecoia.org/wp-content/uploads/2014/09/Carnegie-Commission-1929-excerpts-1.pdf>

<sup>4</sup> *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 102 (1984)

market.”<sup>5</sup> The court enabled schools to provide scholarships up to the cost of attendance to student-athletes.<sup>6</sup>

In *Alston v. NCAA*<sup>7</sup>, the Supreme Court determined that the NCAA violated §1 of the Sherman Act<sup>8</sup> by limiting education-related compensation to student-athletes.<sup>9</sup> However, the court held that the NCAA’s rules regarding non-education-related compensation “remain in the books,” including “receiving money from endorsement deals and the like.”<sup>10</sup> In his concurring opinion, Justice Kavanaugh raised a question that we now face: “[i]f it turns out that some or all of the NCAA’s remaining compensation rules violate the antitrust laws...[h]ow would any compensation regime comply with Title IX?”<sup>11</sup> Just months after the *Alston* decision, the NCAA passed the Interim NIL Policy that enables student-athletes to be compensated for means beyond their education.<sup>12</sup>

The NIL policy empowers boosters, donors who were previously prohibited (yet often unregulated)<sup>13</sup> from compensating athletes, to fund their desired team through a university-affiliated NIL collective. Millions of dollars annually flow through collectives into the pockets of student-athletes and committed recruits.<sup>14</sup> In February 2024, a court in Tennessee granted a preliminary injunction ordering the NCAA to temporarily stop enforcing rules that prohibit

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<sup>5</sup> *O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015)

<sup>6</sup> *Id.*

<sup>7</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021)

<sup>8</sup> [15 U.S.C.S. § 1](#)

<sup>9</sup> *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021)

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2168.

<sup>12</sup> Michelle Brutlag Hosick, *NCAA adopts interim name, image, and likeness policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>

<sup>13</sup> David A. Fahrenthold and Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, The New York Times (Oct. 22, 2023), <https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>

<sup>14</sup> *Id.*

student-athletes from negotiating with collectives.<sup>15</sup> The court noted that “an apparent attempt to prohibit those inducements, [by] the NCAA issued guidance classifying NIL collectives as ‘boosters’ to prevent them from negotiating with student-athletes during the recruiting and transfer processes.”<sup>16</sup> The saga of regulating student-athlete compensation continues; it is crucial that women’s sports access the benefits made available to men by these proceedings.

### **B. NIL poses a threat to Title IX**

Passed in 1972, Title IX provides that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”<sup>17</sup> As the nation recently celebrated the 50th anniversary of Title IX, athletes, coaches, and fans both reflected on the progress made in the industry and recognized the need for further growth and compliance. NIL is capable of bolstering women's sports in the NCAA, but if schools maintain current practices with NIL collectives, the gender equity gap in sports could widen, favoring men.

### **C. Title IX should provide oversight to NIL collectives despite their obscure positioning**

Student-athletes can partner with a fan, brand, or business and be compensated for providing a service, including an autograph or promotional social media post. When a student-athlete facilitates a partnership independent of any action by their school or an NIL collective, the deal is not subject to Title IX regulations because the third-party is not a federally funded

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<sup>15</sup> *State of Tennessee and Commonwealth of Virginia v. National Collegiate Athletic Association*, U.S. District Court, Eastern District of Tennessee, No. 3:24-CV-00033-DCLC-DCP (2022)

<sup>16</sup> *Id.*

<sup>17</sup> [34 C.F.R. § 106.41](#)

institution. Similarly, the NCAA does not receive federal financial assistance, so it is not required to reform the NIL policy to be Title IX compliant.

Student-athletes may also monetize their NIL through a collective. By acting as a third party, NIL collectives dodge NCAA rules that prohibit student athletes from being paid to play. Many NIL collectives are nonprofit organizations that employ student athletes to do community service or promote a charity for an outrageous rate.<sup>18</sup> However, NIL collectives are often closely affiliated with universities; football coaches and university press releases promote their respective NIL collective to generate support for their teams.<sup>19</sup> Therefore, NIL collectives operate in a gray area; it is unclear whether they are third parties, free from the standards of Title IX, or if they are extensions of the school, subject to Title IX.

Title IX provides factors to consider when determining if a federally funded school provides equal opportunities to members of both sexes.<sup>20</sup> In 1979, the Secretary of the Department of Health, Education, and Welfare provided a three-part test to “clarif[y] the meaning of ‘equal opportunity’ in collegiate athletics.”<sup>21</sup> NIL collectives threaten these elements on many fronts; specifically, in regard to donations, recruiting, and publicity. The Drake Group wrote a ten-page letter to the Office of Civil Rights (OCR) requesting guidance on how to apply Title IX oversight to NIL collectives.<sup>22</sup> The letter pointed to collectives only providing support to select teams, often raising funds exclusively for football and men’s basketball players.<sup>23</sup> Meanwhile, the NCCA has provided “no guidance as to how the schools might satisfy Title IX

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<sup>18</sup> David A. Fahrenthold and Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, The New York Times (Oct. 22, 2023), <https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>

<sup>19</sup> Letter from The Drake Group to the United States Department of Education Office for Civil Rights (Jan.10,2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/01/FINAL-Drake-Letter-to-OCR-1-10-23-1.pdf>

<sup>20</sup> 20 U.S.C. §§ 1681–1688. The Title IX athletics regulation is at 34 C.F.R. § 106.41.

<sup>21</sup> 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979)

<sup>22</sup> Letter from The Drake Group to the United States Department of Education Office for Civil Rights (Jan.10,2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/01/FINAL-Drake-Letter-to-OCR-1-10-23-1.pdf>

<sup>23</sup> *Id.* at 3

and there is virtually no evidence that the schools are even bothering to encourage the third parties to provide equal benefits to women.”<sup>24</sup> A month after the Drake Group’s request, OCR released the “Title IX and Athletic Opportunities in Colleges and Universities” resource to aid students, coaches, athletic directors, and school communities in evaluating a school’s Title IX compliance.<sup>25</sup> Although the report fails to explicitly mention NIL, it provides insight to how collectives may be considered subject to Title IX.

1. Title IX should regulate NIL collective “donations”

The OCR resource explains that if a booster donation is only for a men’s team, then it is the school’s responsibility to “ensure that women’s teams receive equivalent benefits, opportunities, and treatment.”<sup>26</sup> The NCAA defines boosters as “any third-party entity that promotes an athletics program, assists with recruiting or assists with providing benefits to recruits, enrolled student athletes or their family members,” including NIL collectives.<sup>27</sup> The OCR resource also states that the failure to provide equivalent benefits, opportunities, and treatment “may indicate a possible Title IX violation.”<sup>28</sup> Title IX does not require an equal dollar amount to be spent on men’s and women’s sports; instead, it only requires that benefits, opportunities, and treatment are equitable.<sup>29</sup> Schools and collectives have failed to display an attempt.

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<sup>24</sup> *Id.* at 5

<sup>25</sup> *Title IX and Athletic Opportunities in Colleges and Universities*, U.S. Department of Education Office for Civil Rights (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>

<sup>26</sup> *Id.* at 6

<sup>27</sup> Michelle Brutlag Hosick, *D1 Board of Directors issues name, image and likeness guidance to schools*, NCAA (May 9, 2022, 5:21 PM), <https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx>

<sup>28</sup> *Title IX and Athletic Opportunities in Colleges and Universities*, U.S. Department of Education Office for Civil Rights (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>

<sup>29</sup> *Id.* at 6

2. Title IX should regulate NIL collective funds used as a means to recruit

Schools are banned from directly paying student-athletes to play; however, NIL collectives serve as a loophole, bypassing this rule and Title IX obligations. Under Title IX, scholarships must be disbursed in proportion to each sport's participation rates.<sup>30</sup> Deals with NIL collectives supplement scholarship offers by incentivizing recruits to commit to school and current players to not transfer. Although NIL collectives are prohibited from creating deals with prospective recruits, it is widely unregulated.<sup>31</sup> Collective funds function as scholarships unless their prohibited communication with recruits becomes enforced. OCR requires "recruitment for men and women athletes [to be] funded in a way that is equivalently adequate to meet the needs of each men's and women's athletic program."<sup>32</sup> Since NIL collectives fail to provide comparable recruiting resources to women's teams, this serves as evidence as a Title IX violation.

3. Title IX should regulate NIL collective deals that are promotional

Protecting equitable publicity is perhaps the most important reason for NIL collectives to be held to Title IX because of its impact visibility has on the future of women's sports. According to the latest SFAI data, the "participation rate for girls is the highest since 2013."<sup>33</sup> Meanwhile, NCAA women's championship sports experienced a 5% increase in participation in

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<sup>30</sup> [34 C.F.R. § 106.41](https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrm.html); see also Dear Colleague Letter on Funding of Athletic Scholarships (1998), available at <https://www2.ed.gov/about/offices/list/ocr/docs/bowlgrm.html>

<sup>31</sup> David A. Fahrenthold and Billy Witz, *How Rich Donors and Loose Rules Are Transforming College Sports*, The New York Times (Oct. 22, 2023), <https://www.nytimes.com/2023/10/21/us/college-athletes-donor-collectives.html>

<sup>32</sup> *Title IX and Athletic Opportunities in Colleges and Universities*, U.S. Department of Education Office for Civil Rights (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>

<sup>33</sup> *State of Play 2023: Participation Trends*, Project Play, <https://projectplay.org/state-of-play-2023/participation#:~:text=2.2022%2C%20according%20to%20SFAI%20data;referencing> 2022 U.S. Trends in Team Sports Report, SFAI (2022), <https://sfia.users.membersuite.com/shop/store/f147b189-00ce-cf0b-573d-0b44ce0da534/detail>

2021-22; this is the largest increase in participation since 2000-01.<sup>34</sup> In 2023, the NCAA women's basketball championship game viewership increased by 103% and the WBA draft viewership increased by 89% from the following year.<sup>35</sup> These patterns reinforce each other: by improving the visibility of women's sports, young girls are exposed to strong, athletic role models who inspire them to play and seek opportunities to play at the next level, motivating the next generation.

Caitlin Clark, a star guard for the Iowa women's basketball team, is a prime example of this trend. Clark has played a historic season by becoming the NCAA women's basketball all-time leading scorer.<sup>36</sup> Coupled with her athletic achievements, Clark leverages her personal brand through NIL deals with brands including Gatorade, State Farm, and Nike.<sup>37</sup> Clark was provided none of her NIL opportunities through Iowa's collective, Swarm.<sup>38</sup> Young girls eagerly wait in the cold before Iowa games with posters declaring that Clark inspired them to try out for their school's basketball team or that their birthday gift was to watch Clark play.<sup>39</sup> The impact of Clark's NIL cannot be overlooked. It is a shame that collectives fail to see the value of women's sports from the perspective of Clark's fans.

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<sup>34</sup> Corbin McGuire, *A look at trends for women in college sports*, NCAA (March 1, 2023, 10:22 AM), <https://www.ncaa.org/news/2023/3/1/media-center-a-look-at-trends-for-women-in-college-sports.aspx#:~:text=226%2C212%20%E2%80%94%20The%20number%20of%20student,for%20women%20since%202000%2D01>.

<sup>35</sup> *Women's sports viewership on the rise*, Nielsen (July 2023), <https://www.nielsen.com/insights/2023/womens-sports-viewership-on-the-rise/>

<sup>36</sup> Rachel Bachman, *Caitlin Clark Has Scored 3,569 Points – and Taken \$0 From Boosters*, The Wall Street Journal (Feb. 16, 2024, 5:30 AM), <https://www.wsj.com/sports/basketball/caitlin-clark-record-nil-wnba-salary-5be8e910>

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Clare Duffy and Allison Morrow, *Caitlin Clark-onomics and the new era of profitability in women's sports*, CNN Business (Feb. 16, 2024, 2:00 PM), <https://www.cnn.com/2024/02/16/business/caitlin-clark-marketing-licensing-womens-sports/index.html>



Brands seek partnerships with Clark given her record-breaking seasons and substantial following.<sup>40</sup> Male athletes need neither collegiate success nor an Instagram account to score lucrative collective deals.<sup>41</sup> NIL collectives only pursue women as profitable investments once they have demonstrated their value, which is challenging given disparities in marketing, game times, and accessibility to NCAA women's sports. While these factors are often Title IX compliant, as they align with participation and revenue generation, they create obstacles for women seeking recognition in the NIL space.

#### **D. Pending University of Oregon Title IX Lawsuit addresses NIL**

In December 2023, thirty-two University of Oregon (UO) female student-athletes filed a Title IX lawsuit against the university.<sup>42</sup> Among other allegations, the complaint asserts that NIL opportunities are distributed inequitably to male athletes in violation of Title IX.<sup>43</sup> This may be the first time that a court considers NIL within the Title IX context.

Division Street is a collective co-founded by Phil Knight to assist UO student-athletes in monetizing their NIL.<sup>44</sup> Although Division Street is a leading collective in the NCAA, the complaint alleges that greater NIL training, opportunities, and income are provided to the male athletes.<sup>45</sup> To illustrate this, the complaint points to three UO football players being named among the nation's top NIL recipients.<sup>46</sup> Since the complaint was filed, two UO football commits

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<sup>40</sup> *Id.*

<sup>41</sup> MacKeigan, Lauren, *An Equity Analysis on the Collegiate Name, Image, and Likeness (NIL) Market* (August 28, 2023). Available at SSRN: <https://ssrn.com/abstract=4554235>

<sup>42</sup> Comp. *Schroeder, et al. v. Univ. of Oregon* 5, 6:23-cv-1806, Dec. 1, 2023

<sup>43</sup> *Id.* at 7

<sup>44</sup> *Id.* at 95

<sup>45</sup> *Id.*

<sup>46</sup> *On3NIL 100*, On3NIL (February 28, 2024, 12:00 AM), <https://www.on3.com/nil/rankings/player/nil-100/>

have been added to the list; they have yet to play a season for the Ducks.<sup>47</sup> UO female athletes remain absent from the list.<sup>48</sup>

The complaint alleges that “[t]o the extent that schools are involved in helping student-athletes develop, identify, arrange, or receive NIL-related training, opportunities, or income, Title IX’s equal treatment and benefits requirements apply to those activities, opportunities, and income, too.”<sup>49</sup> The complaint also claims that the men on the UO football team, who make up one-third of the total male athletes at UO, receive “nearly unlimited publicity, including to advance their name, image, and likeness (NIL) opportunities and income,” and “unbelievably better treatment than it gives to any of its female student-athletes.”<sup>50</sup> The holding of this case should mandate that NIL collectives are regulated by Title IX.

#### **E. UO is not the only school experiencing gender disparities in the NIL space**

UO is certainly not the only school with an affiliated collective that prioritizes male athletics. 76.9% of the share of buyer segment NIL compensation comes from donors and football and men’s basketball student-athletes receive 60.8% and 22.0% of total NIL compensation respectively.<sup>51</sup> Meanwhile, only 34% of collectives provide opportunities to women’s sports and 3.3% of NIL deals with female athletes come from donors.<sup>52</sup> Truly, collectives have the power to determine where most NIL compensation goes, and collectives almost exclusively choose men’s sports.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Comp. *Schroeder, et al. v. Univ. of Oregon* 55, 6:23-cv-1806, Dec. 1, 2023

<sup>50</sup> *Id.* at 63

<sup>51</sup> *Id.*

<sup>52</sup> *Cashing In: Women’s Sports and NIL Success*, Opendorse (Jan. 4, 2023), <https://biz.opendorse.com/wp-content/uploads/2023/01/NIL-and-Women-in-Sports.pdf>

Despite NIL collectives' failure to value women's sports, this has not stopped female athletes from profiting off of their NIL.<sup>53</sup> For example, LSU gymnast Livvy Dunn has found promoting brands on social media to be incredibly profitable; she ranks third on the nation's ranking for NIL earnings.<sup>54</sup> Recognizing the lack of NIL collective funds and opportunities provided to women, Dunn created her own collective, the Livvy Fund, to promote other female athletes at LSU.<sup>55</sup> Nevertheless, like Clark, Dunn is an NIL rarity. She leverages her NIL by hosting a powerful social media following that brands are eager to reach.

#### **F. Title IX provides no discretion to the timing of NIL collectives' pursuit of equity**

Title IX is usually satisfied if a school is moving towards compliance by "expanding its athletic program to respond to the interests and abilities of women."<sup>56</sup> Title IX provides grace to existing policies; is not a proper defense for NIL collectives considering their novelty. It is grotesque that collectives actively lead schools astray from the purpose of Title IX. If collectives are found to violate Title IX, they must promptly correct their disbursement of funds.

### **III. CONCLUSION**

The Equity in Athletics Disclosure Act (EADA)<sup>57</sup> is a federal law that seeks to ensure that Title IX is satisfied by equitable opportunities provided to male and female college athletes. EADA requires federally funded schools to disclose data regarding their athlete's participation, coach's salaries, scholarship offers, and recruiting expenses. To hold NIL collectives accountable, this data should also include aid provided by university-affiliated collectives to

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<sup>53</sup> *Id.* at 10

<sup>54</sup> *On3NIL 100*, On3NIL (February 28, 2024, 12:00 AM), <https://www.on3.com/nil/rankings/player/nil-100/>

<sup>55</sup> *The Livvy Fund*, Bayou Traditions, <https://www.bayoutraditionscollective.com/livvyfund>

<sup>56</sup> *Title IX and Athletic Opportunities in Colleges and Universities*, U.S. Department of Education Office for Civil Rights (Feb. 2023), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-higher-ed-athletic-resource-202302.pdf>

<sup>57</sup> *Equity in Athletics Disclosure Act Report*, The University of Alabama in Huntsville, [https://www.uah.edu/images/administrative/legal/pdf\\_files/Equity%20in%20Athletics%20Disclosure%20Act%20Report.pdf](https://www.uah.edu/images/administrative/legal/pdf_files/Equity%20in%20Athletics%20Disclosure%20Act%20Report.pdf)

student-athletes. Women's sports are not only inspiring but also entertaining, marketable, and profitable. Nike gets it. Little girls get it. It remains a mystery why schools, the only body of the three mandated by federal law to be equitable, fail to meet the mark. While holding NIL to Title IX standards will not rectify all gender inequities in sport, it represents a paramount step in the pursuit of equity.