

Navigating Title IX Compliance In The NIL Era

By **Andrew Hope and Kellen Carleton** (February 12, 2025)

For the vast majority of the history of college athletics, student-athletes have been denied the opportunity to control or profit from the use of their name, image and likeness, or NIL.[1]

All that changed following a series of class actions, beginning with O'Bannon v. NCAA, filed in 2009 in the U.S. Court of Appeals for the Ninth Circuit, and culminating with the U.S. Supreme Court's 2021 decision in NCAA v. Alston.

In a rare unanimous ruling, the court in Alston held that NCAA restrictions on the type of compensation that could be provided to college athletes violated federal antitrust law. In June 2021, days after the publication of the Alston decision, the NCAA announced its first NIL policy.

However, in the years that followed, college athletes continued to mount legal challenges and eventually three separate lawsuits were consolidated in the U.S. District for the Northern District of California under the caption House v. NCAA.

After the respective classes were certified, the NCAA and Power Five Conferences agreed to resolve the litigation.

Under the proposed settlement in House, \$2.8 billion would be distributed among college athletes who had played since 2016 to compensate them for use of their NIL. In addition, athletic departments would be permitted to share with current athletes up to \$20.5 million annually.[2]

Pending final approval by U.S. District Judge Claudia Wilken in April of this year, the House settlement is anticipated to take effect for NCAA sports beginning in the fall.[3] And athletic departments have already begun making preparations.

In what appears to be a growing trend among Power Conference schools, the University of Colorado athletic department announced in January that it was ending its partnership with third-party booster collective 5430 Alliance.

Colorado joined the University of Alabama and the University of Notre Dame, which terminated partnerships with their university-associated booster collectives late last year.

However, despite this push to move more NIL activity in-house, it remains unclear how the NCAA and its member institutions will square implementation of the House settlement with the requirements imposed by Title IX of the Education Amendments Act of 1972, which guarantees equal opportunities for both sexes in any education program or activity receiving federal financial assistance.

Title IX and Relevant Litigation

Title IX prohibits discrimination on the basis of sex in all federally funded education



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programs and activities, including those operated by universities.[4]

In the context of college athletics, Title IX provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.[5]

In 1979, the U.S. Department of Education issued a policy interpretation featuring a three-part test that the department's Office for Civil Rights uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity.[6]

Since the original legislation and the 1979 policy interpretation, the OCR has issued additional guidance in 1996, 2005, and 2010, further clarifying this three-part test. Under the 2010 guidance, an institution can demonstrate compliance in the following ways:

- By providing participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments;
- In situations where members of one sex have been underrepresented among college athletes, by demonstrating 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
- Where the institution cannot show a history and continuing practice of program expansion, by demonstrating that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[7]

Post-Alston Applications of Title IX

In December 2023, female rowers and beach volleyball players at the University of Oregon filed what is believed to be the first Title IX lawsuit premised on unequal NIL opportunities.[8]

While that case remains pending, just last month, the Department of Education OCR released a fact sheet titled "Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities" that provided insight as to how the department would handle Title IX enforcement as it relates to NIL.[9]

The fact sheet clarified that compensation from a school for use of a student-athlete's NIL qualifies as athletic financial assistance,[10] which under Title IX, must be made available to male and female student-athletes in a manner that is substantially proportionate to the number of students of each sex participating in interscholastic or intercollegiate athletics at that school.[11]

OCR further underscored that compensation provided by a school for the use of a student-athlete's NIL constitutes athletic financial assistance under Title IX because athletic financial assistance includes any financial assistance and other aid provided by the school to a student-athlete that is connected to a student's athletic participation and that athletic financial assistance is not limited to scholarships or grants.[12]

In addition to the guidance on direct revenue-sharing payments from schools, the fact sheet

makes clear that Title IX also applies to "benefits, opportunities, and treatment provided by a school to assist its student-athletes in obtaining and managing NIL agreements."

In other words, the failure to provide equivalent NIL benefits and opportunities, also potentially violates Title IX.[13] For example, some universities have stepped in to help their student athletes attract external or third-party marketing deals, thereby acting as a "marketing agent" for their student athletes.[14]

These marketing-agent services will now be subject to Title IX and must be made available to both male and female student-athletes in a substantially proportionate manner.

Another issue raised by the fact sheet is the treatment of third-party payments. Boosters, collectives and other entities that do not receive financial assistance from the federal government are beyond the reach of Title IX.

However, OCR has advised that, despite the fact that Title IX does not govern NIL payments from third parties, it is nevertheless "possible that NIL agreements between student-athletes and third parties will create similar disparities and therefore trigger a school's Title IX obligations." [15]

Thus, while the fact sheet does not foreclose potential action from OCR in the context of third-party NIL deals, nor does it provide any real guidance on how schools should ensure compliance.

Considerations and Recommendations

While the OCR fact sheet sheds some light on Title IX's applicability to NIL, there are still many unresolved questions and considerations for universities and athletic departments going forward.

Beyond Title IX considerations, implementation of the House settlement and enforcement of NCAA rules are likely to spawn continued litigation on antitrust and employment law grounds.

This, in addition to an Oct. 29, 2024, program letter from the IRS Tax Exempt and Government Entities division identifying "tax-exempt collectives utilizing Name, Image, and Likeness" as one of its enforcement priorities in 2025, which casts additional uncertainty on the role of third parties in the NIL landscape.

Finally, the House settlement provides that NIL deals must reflect fair market value for individual athletes. For larger athletic departments that wish to compete at the highest level in revenue sports like football and men's basketball, satisfying this standard while maintaining Title IX compliance will prove challenging, if not impossible, under the traditional three-part test.

In assessing their compliance in the context of NIL, institutions should consider the total athletic financial assistance provided to athletes, not just direct NIL or revenue-sharing payments.

They must also ensure that equivalent benefits and opportunities are offered across all aspects of their athletic programs, including support services related to NIL activities.

This includes recognizing the potential Title IX implications of services provided to facilitate

third-party NIL deals. Further, universities should be prepared for potential litigation when revenue-sharing funds are disbursed disproportionately between men's and women's programs, notwithstanding any disparities in the revenues generated by the respective programs.

Given the host of thorny compliance issues, universities would be wise to consider an external auditor, plan administrator or some other consortium of experts to help administer their NIL portfolios.

As universities continue to grapple with these difficult questions, the only certainty is that the way forward is likely to be bumpy and will require creativity, adaptability and cooperation among schools, athletes and boosters alike.

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[1] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

[2] In re: College Athlete NIL Litigation, No. 4:20-CV-03919 (N.D. Cal) "Amended Stipulation and Settlement Agreement."

[3] <https://www.nytimes.com/athletic/5826004/2024/10/07/house-ncaa-settlement-approval-claudia-wilken/>.

[4] 20 U.S.C. § 1681 et seq.

[5] 34 C.F.R. § 106.41(c) / 2010 Dept. of Education Guidance on Title IX.

[6] 44 Fed. Reg. 71413 (1979).

[7] 2010 Dept. of Education Guidance on Title IX.

[8] Schroeder et al v. University of Oregon, No. 6:23-cv-01806-MC (D. Or.).

[9] Dept. of Education Office for Civil Rights Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities.

[10] Dept. of Education Office for Civil Rights Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities.

[11] 34 C.F.R. 106.37(c); see also 1979 Policy Interpretation, 44 Fed. Reg. at 71415.

[12] See 1979 Policy Interpretation, 44 Fed. Reg. at 71415 (noting that athletic financial assistance also includes work-related aid and loans).

[13] Dept. of Education Office for Civil Rights Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities.

[14] In re: College Athlete NIL Litigation, No. 4:20-CV-03919 (N.D. Cal) "Amended Injunctive Relief Settlement", Pages 6,14.

[15] Dept. of Education Office for Civil Rights Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities.