

Legal Issues in

COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

Navigating the Intersection of NIL and Title IX

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Since 2021 student-athletes profiting from their name, image, and likeness (NIL), one of the clearest areas of risk has become the intersection of NIL and Title IX of federal civil rights law. While the NIL landscape remains an ever-evolving metamorphosis of all sorts of rules from all sorts of directions, including the NCAA's most recent clarification of its own NIL rules, universities must continue to meet Title IX's requirement of treating men and women equally.

However, that may sound simple in practice, but in reality, there can be a fine line involving NIL opportunities and universities' (and their collectives') roles in them. If a university lands on the wrong side of that line, it is liable for Title IX violations, warnings (verbal or written), loss of employment, restitution, and loss of scholarships.

UNDERSTANDING TITLE IX AND NIL-RELATED VIOLATIONS

Passed 50 years ago, Title IX of the Education Amendments Act requires that schools receiving federal funding provide equal opportunities for members of both sexes. Of the three basic areas of Title IX compliance, NIL intersects with Title IX in athletic benefits and opportunities.

The NCAA NIL rules are silent on Title IX and how the two are supposed to work together in harmony. Nearly all colleges and universities have explicit instructions to treat both male and female student-athletes equally,

and before NIL, that comprised of making sure there was equal access to accommodations, practice facilities, equipment, training, academic resources, and travel. Now in the world of NIL, that also applies to publicity, media, social media, and all things marketing.

Title IX applies and requires male and female athletes to be treated equitably. If the institution approves deals,

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then there must be equal standards for both male and female athletes. Below are common examples of infractions.

A university trained its female student-athletes on how to maximize their brand and online presence but failed to provide the same training and resources to its men's teams. Another example is a university or college allowing a football player to use its trademark logo in an ad for a sports apparel brand but not extending that same opportunity to use the logo to a female student-athlete.

There are also more nuanced examples. Let's say a university is trying to hire a marketing representative for the women's tennis team for 12 to 18 months. As a result of the position being unfilled, there hasn't been anyone proactively marketing and promoting the women's tennis team. Even though it is unintentional, the tennis team is not receiving as much exposure, resulting in a much smaller pool of NIL opportunities for the women's tennis team.

NIL COLLECTIVES

Even further, it is important to be mindful that Title IX may apply to donors and boosters who have formed collectives. NIL collectives are often founded by alumni and influential supporters to pool funds from a wide variety of donors to help create, facilitate, and provide NIL opportunities for student-athletes.

While collectives are typically independent of any educational institution and operated and controlled by boosters, the more closely aligned the collective is with the institution, the greater the potential for risk under Title IX. For example, a collective that makes decisions that have been influenced by a university employee (i.e. coach, athletic director, etc.) and does not provide equal opportunities for male and female student athletes may be exposing the university to Title IX liability. Therefore, interactions between collectives and university employees should be delicately treated.

Colleges and universities that get

involved in the approval of NIL deals should also be mindful of potential Title IX violations. Any approval process or standard must be administered consistently. If it's not, there could certainly be a risk of Title IX non-compliance. If an institution is more strict – or lenient – in scrutinizing the substance or the structure of an NIL deal for a male student-athlete as compared to a female student-athlete, that could potentially pose a problem.

CONCLUSION

As colleges and universities dive deeper into the world of NIL, they must take the necessary precautions to avoid Title IX violations. Across the board, it is really important for institutions to be clear and consistent in their messaging and communications. Having equal policies and procedures is a critical first step, but it is not the only step. Institutions and their staff should also equally implement and enforce their policies and procedures.

The intersection of Title IX and NIL should even the playing field for male and female athletes to make money off NIL. The bottom line is navigating



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the interplay between Title IX and NIL rules can feel like navigating a minefield. So stay apprised of areas of risks to avoid pitfalls.



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