



## POSITION STATEMENT

### **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<sup>1</sup>**

#### **Executive Summary**

The Drake Group identifies the Title IX gender equity obligations of education institutions and the persons and entities they create, control, assist, or benefit from in the areas of promotion, publicity, and recruiting as they directly and indirectly support their athletes in maximizing their marketplace NIL value and compensation. Institutions cannot use third parties as a subterfuge to evade their Title IX legal obligations.

**Specifically, institutions must equally support male and female athletes in publicity, promotion, and recruiting and the provision of assistance with respect to NIL opportunities as follows:**

1. The current NIL marketplace value of male and female athletes reflects the historically under-resourced treatment of women's sports with regard to the institution's promotion, publicity, and recruiting efforts. Colleges and universities must assess whether they are providing an equal percentage of male and female athletes (not teams) with equal publicity and promotion benefits and must undertake equal recruiting efforts. If inequities are identified, the institution should immediately act to remedy these inequities.
2. General education on brand-building, financial literacy, or information related to applicable athletic governance association rules or state/federal regulatory requirements must be equally provided to male and female athletes. Due to historical lack of resources applied to promotion

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<sup>1</sup> Preferred citation: Lopiano, D., Sommer, J., Zimbalist, A., Gill, E., Gurney, G., Hsu, M., Lever, K., Porto, B., Ridpath, D.B., Sack, A., Smith, B., and Thatcher, S. (2021) Position Statement: NILs and Title IX: Education Institutions Must Fix the Promotion, Publicity, and Recruiting Inequities Critical to the NIL Monetization Success of College Female Athletes and Must Not Use or Assist Third Parties to Evade Their Title IX Obligations. Retrieve from: <http://thedrakegroup.org>

and publicity provided to female athletes, education and information designed to build awareness of female athletes and remedy these inequities should also be provided.

3. Male and female athletes must be treated equally if the institution is involved in any way in supporting NIL opportunities including: (a) introducing athletes to prospective third-party NIL sponsors, (b) contributing or receiving any consideration as part of an athlete NIL agreement, (c) entering into co-licensing or group licensing agreements that include athletes, and (d) reviewing, analyzing, advising or discussing an athlete's NIL contract with a third party other than from a strictly regulatory perspective.

**Conferences, national sport governing associations and third-party commercial businesses owned and operated by such entities and third-party commercial businesses operating on behalf of institutions should be held subject to Title IX** in the following ways:

1. For conferences and national governing organizations, their treatment of the institutions' athletes at conference and national championship post-season or other events must not result in sex discrimination under Title IX.

2. Similarly, businesses such as conference- or institution-owned television networks must be subject to Title IX and not discriminate on the basis of sex in the provision of publicity and exposure to male and female athletes.

3. If conferences, national governing organizations, or third parties owned by conferences or national governing organizations, or operating on behalf of institutions contribute any consideration (i.e., use of trademarks, etc.) to athlete NIL agreements or enter into co-licensing or group licensing agreements that include athletes from member institutions, they must treat male and female athletes equally pursuant to Title IX, just as institutions are obligated to treat athletes equally under Title IX.

**Institutions must require third-party representatives of athletics interests that are organized to support, or that in fact support, the recruiting success of their respective institutions by providing NIL compensation or other benefits, to treat male and female athletes equally.** Specifically:

1. Institutions must not assist third parties or otherwise indirectly violate Title IX or its spirit whether through knowing inaction, encouragement, or other active inequitable involvement in areas that will negatively impact women's NIL opportunities.

2. Institutions must educate all athletics employees and fans, boosters, sponsors, or other representatives of athletics interests involved in providing compensation or benefits to prospective or current athletes about any obligations created by state or federal laws or athletics governance entities including the institution's Title IX obligations. Specifically with regard to NIL or other compensation or benefits, such education must include that compensation cannot be inducements to attend (recruiting) or remain at the institution and that services rendered in

return for compensation must be actually performed, and at rates commensurate with fair market value in order to protect their eligibility for athletic competition.

3. Institutions must require third parties composed of boosters, fans or sponsors or other representatives of institutional interests to treat female and male athletes equally. There should be a presumption that any third party formed to operate to serve a single institution's athletes in any way related to NIL deals must comply with Title IX and, if they do not, the institution will be held to violate Title IX. More specifically, permitting institutions that have knowledge of, or whose employees directly or indirectly encourage the operation of, third-party entities organized by alumni or fans, boosters, sponsors, or other representatives of athletics interests for the purpose of providing direct NIL or other support limited to prospective or current athletes at a specific institution in a manner that discriminates on the basis of sex, effectively permits the institution to violate the letter and spirit of Title IX, which requires equal recruiting treatment and benefits. Accordingly, institutions must educate and require such third parties not to engage in sex discrimination. If the entity does not respond appropriately, the institution should be expected to completely sever ties (i.e., not provide benefits associated with the athletic program or institution such as attendance at athletic or other special athletic department events, etc.). Failure to remove institutional assistance (benefits) to members/contributors to the NIL entity organization enabling the institution to avoid its recruiting equal treatment mandate should result in a presumption that the institution knowingly violated its Title IX obligations. A similar requirement applies to the involvement by conferences and national governing organizations with third parties.

**There is a distinction between the *valuation* of media rights or NIL agreements that are dictated by the marketplace and not controlled by the institution and the institution's effort to provide equal publicity, promotion, recruiting, and exposure.** The institution's Title IX obligation is to demonstrably seek equal television exposure at fair market value and provide equal promotion, publicity, and recruiting support for its male and female athletes. Similarly, institutions must make the same effort to support NIL opportunities for male and female athletes rather than generating the same compensation.

**The Drake Group urges all collegiate athletic programs to think deeply about ways to make this new arena — the monetization of NILs — a game changer with regard to gender equity.**

## I. Purpose and Scope

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Newly enacted laws give college athletes a chance to earn substantial incomes by monetizing their names, images, and likenesses (NILs) through product endorsements, appearances for local businesses, provision of lessons, or clinics for developing athletes, and more. But the realities of past and continuing less favorable treatment of female athletes in areas that significantly affect individual brand building – promotion and publicity (especially television and other media platforms) and recruiting – will have a profound impact on NIL opportunities for female athletes if they remain unaddressed. As institutions begin developing NILs as the newest “coin” in the recruiting arms race, namely, directly or indirectly, assisting in creation of the most lucrative NIL opportunities for its prospective and current college athletes, it is likely that female athletes will continue to take a backseat to men’s football and men’s basketball unless athletic departments change their ways and, even then, change will come only gradually.<sup>2</sup>

This paper identifies the Title IX gender equity obligations of education institutions and the persons and entities they control and assist in the areas of promotion, publicity, and recruiting as they directly and indirectly support their athletes in maximizing their marketplace NIL value and compensation. The central premise is that educational institutions and any third-party entity they create, control, or assist are subject to Title IX’s nondiscrimination mandate. Such third parties cannot be used as subterfuge to evade an educational institution’s Title IX legal obligations.

This paper further examines Title IX and the intersection of the institution and the external NIL marketplace. The NIL commercial space for college athletes did not exist prior to July 1, 2021, when various state NIL laws took effect and the NCAA withdrew its detailed, proposed NIL-related guardrails, rules and enforcement requirements<sup>3</sup> in the aftermath of the United States Supreme Court decision in *Alston v NCAA et al.*<sup>4</sup>. That decision limited the NCAA’s ability to impose rules restricting the amount institutions could provide athletes in educationally-related benefits and imposed limits on educationally related cash awards. Concerned that its extensive proposed NIL rules might face similar antitrust scrutiny, the NCAA imposed only two

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<sup>2</sup> While female athletes with large social media followings, like similarly situated male athletes, will benefit from the internet NIL marketplace, headlines such as “Female College Athletes Could Make Big Gains with NIL Laws,” (*Miami Herald*, June 26, 2021, <https://www.miamiherald.com/acc/article252381953>) and “UConn’s Paige Bueckers Could Make \$1 Million Per Year—In College,” (*Wall Street Journal*, August 4, 2021), [wsj.com/articles/uconn-paigebueckers-college-basketball-ncaa-11628078726](https://www.wsj.com/articles/uconn-paigebueckers-college-basketball-ncaa-11628078726)) should not obscure the reality of continuing institutional favoritism toward recruiting and marketing of men’s revenue-producing sports.

<sup>3</sup> National Collegiate Athletic Association. (June 30, 2021) NCAA Adopts Interim Name, Image and Likeness Policy. Retrieve from: <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>

<sup>4</sup> *National Collegiate Athletic Assn. v. Alston*, 594 U. S. 1 (2021)

broad requirements: schools are prohibited from using NILs (1) to induce athletes to attend their school and (2) as pay for play. Accordingly, on July 1, 2021, certain state laws<sup>5</sup> that went into effect gave college athletes rights to monetize their NILs without losing their eligibility for collegiate athletics. The NCAA stated that schools in states with no laws could develop their own rules subject to the two requirements above.

We begin by explaining the complex NIL chaos currently occurring in the absence of national rules by the Congress or sufficient NCAA guardrails and scrutiny. Then we examine three general spaces in which Title IX applies:

- ***Institutions’ obligations*** to provide equal publicity, promotional benefits and treatment, recruiting efforts, and NIL assistance (education, use of marks/logos, etc.) to male and female athletes.
- **Obligations of conferences, national governing organizations and third-party commercial businesses formed to operate on behalf of institutions** to provide equal publicity, promotion, recruiting, and related NIL assistance benefits to male and female athletes.
- **Obligations of institutions** to require equal benefits and treatment to male and female athletes by **third-party individuals or entities comprised of fans, boosters, sponsors, or other representatives of athletic interests** that seek to benefit an institution’s athletics program.

Throughout, we seek to identify those aspects of the marketplace not under the control of the institution to which Title IX’s equal treatment mandate does not apply.

## **II. BACKGROUND: The Chaotic World of NIL Agreements: Open Invitations for Workarounds of Rules Prohibiting Inducements to Recruit or Retain College Athletes and Institutions Continuing to Display Male Athlete Favoritism?**

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**The Wild West or A Brave New World:** As of October 1, 2021, 28 states had given college athletes the right to monetize their NILs without such employment negatively impacting their collegiate athletics eligibility (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas) with varying effective dates. Twenty-one of

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<sup>5</sup> The Drake Group. (2021) State-by-State Legislation on College Athlete Name/Image/Likeness: A Drake Database. Retrieve from: <https://www.thedrakegroup.org/wp-content/uploads/2021/09/10-2-21-Update-State-Legislative-DB.pdf>

these states' laws went into effect by October 1, 2021. Six other states have introduced bills in 2001. The current and proposed state laws are a patchwork with little consistency among them.<sup>6</sup> The remaining states have not yet acted and the NCAA has given their members in these states the option to create their own NIL rules as long as they are published on their respective web sites. Given the freedom created by the absence of federal NIL legislation, the NCAA's pullback from developing and enforcing any comprehensive and meaningful NIL guidance on the application of its current rules prohibiting boosters from offering NIL inducements to prospective or current athletes, with two new rules generally prohibiting inducements and pay for play, and the differences among the 28 state NIL laws, "wild west" an apt description of the current reality.

**The Clear New Message from the Institution to Its Supporters:** Two months into this "wild west" or "brave new world" of NIL opportunities, coaches and athletic directors began sending both thinly veiled and starkly clear messages to their supporters explaining a new need to contribute to athletic program recruiting and retention success by making sure prospects and current athletes have NIL deals. Athletic directors and coaches are informing recruits individually or collectively and high school coaches how much their players are earning from NIL deals at their respective schools. For example, at a high school coaches' convention, Alabama head football coach Nick Saban announced that his starting quarterback would be earning almost \$1 million in endorsements.<sup>7</sup> Indeed, some schools, like USC, have announced partnerships with local studios<sup>8</sup> to provide NIL branding pitches for its athletes.

**Schools Participating Directly and Indirectly in NIL Deals:** Athletic departments are entering into co-licensing (schools granting athletes permission to use their logos/marks/color schemes, etc. for third-party agreements), group licensing (schools and groups of athletes entering into respective agreements with the same sponsor to promote the same product such as video games, bobbleheads or trading cards using both the school's logos/marks/color schemes, and athlete's names and images with both schools and athletes separately profiting from their respective agreements), and other imaginative sponsorship agreements. Although some of these initiatives may appear to be gender neutral, in reality, most are designed to support men's revenue-producing sports, primarily football or basketball programs.

Examples of the emphasis on NIL support for male revenue-producing sport athletes are numerous. The Brandr Group has been on a spree doing group licensing deals with college

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<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> University of Southern California Athletic Department. (October 29, 2020) USC Football and JIS Launch 'BLVD Studios': Innovative In-house Creative Lab Will Enhance Student-Athlete Brands and Educate on NIL Opportunities. Retrieve from: <https://usctrojans.com/news/2020/10/29/usc-trojans-football-j1s-launch-blvd-studios-name-image-likeness.aspx>

football teams. For example, the UNC-Brandr group licensing agreement<sup>9</sup> grants Brandr the right to use the UNC name/logo in conjunction with any UNC/athlete NIL sponsorship proposal. Similarly, UNC athletes and UNC get royalties from co-branded programs such as sale of jerseys with athletes' names on the back. Michigan State, Texas, Indiana, Alabama, Ohio State, Appalachian State, Florida, LSU, Nebraska, Miami, Texas Tech, and Oklahoma State quickly followed suit with Brandr deals.<sup>10</sup>

**Institutions Entering into Deals with Commercial Third Parties to Deliver Athlete Education Programs:** While some schools are working with faculties at their own institutions to provide NIL education programming required by many state laws, others are hiring third-party consultants<sup>11</sup> to perform such functions. Some of these commercial third parties are also intertwined with entities involved in establishing group licensing programs. For example, Brandr, the marketing and licensing agency discussed above, has partnered with Altius Sports Partners as its official group licensing education provider, supplying Brandr Group clients with in-person education programs. "While Altius is not directly involved in any aspect of NIL deal-making, the partnership will give the consultancy access to a number of new athletic departments and conversely connect The Brandr Group to Altius' own 13-school clientele..."<sup>12</sup>

**Football Team and Male Athlete Support Preference.** There are many examples of entire teams of football and men's basketball players entering into deals with local sponsors. Significantly, Opendorse reports that, based on an analysis of the first two months of available agreements, 60 percent of total compensation is going to football players and 79.8 percent of total compensation is going to male athletes.<sup>13</sup> For example, at Michigan State University the men's basketball and football teams—numbering 133 athletes—will receive \$500 monthly for promoting United Wholesale Mortgage, a company owned by a former MSU basketball player. At the University of Miami, everyone on the football team will receive \$500 a month for promoting a mixed martial arts gym and every basketball player will receive \$500 a month from

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<sup>9</sup> University of North Carolina Athletics. (July 20, 2021) UNC and the Brandr Launch Group Licensing Program for Current Student-Athletes. *GoHeels.com*. Retrieve from: <https://goheels.com/news/2021/7/20/general-unc-and-the-brandr-launch-group-licensing-program-for-current-student-athletes.aspx>

<sup>10</sup> The Brandr Group Partners and Affiliates. Retrieve from: <https://www.thebrandrgroup.com/>

<sup>11</sup> For example, Team Altemus and the Anomaly Sports Group (<https://anomalysportsgroup.com/>), Athliance (<https://athliance.co/>), Business of College Sports (<https://businessofcollegesports.com/name-image-likeness-services/>), FanWord (<https://www.google.com/search?client=firefox-b-1-d&q=FanWord>), etc.

<sup>12</sup> Caron, E. (September 13, 2021) The Brandr Group Brings Altius on Board as Group Licensing Grows. *Yahoo.com*. Retrieve from: <https://www.yahoo.com/now/brandr-group-brings-altius-board-140057938.html>

<sup>13</sup> Opendorse. (September, 2021) NIL Industry Insights: Compensation and activity trends from two months of name, image and likeness monetization in college sports. *Opendorse.com*. Retrieve from: <https://opendorse.com/nil-insights/> Opendorse CEO Blake Lawrence estimates the college athlete NIL market will generate \$1 billion per year (see September 30, 2021 Sports Business Radio interview at <https://www.youtube.com/watch?v=ct5sRllyyCY>).

Yummy Crypto, a new cryptocurrency company for promoting its product through social media and personal appearance. And, not to be outdone by its ACC conference rivals, every Florida State football player will receive \$500 during the first month of the season, with possible extensions, from Yummy Crypto for similar promotions and every Georgia Tech football player will receive silk pajamas, yellow jackets, prepaid debit cards worth \$404, and a streaming device from TiVo in exchange for promoting TiVo on social media. In some of these cases, the institution is receiving a direct benefit from the third party with which the athletes have entered into NIL deals. For example, at the same time as the Georgia Tech players received the items with the TiVo logo, TiVo provided the university with an upgrade to its audio/visual equipment, worth reportedly \$100,000.

**And these deals are not limited to Division I schools, albeit Division II and III deals are likely to be much smaller.** Whittier College became the first NCAA Division III program to announce an NIL deal. On September 16, 2021, the Whittier Poets Football Assistant Coach and Recruiting Coordinator, Tony Caljean, announced a September 16, 2021 NIL deal, revealing that in exchange for sponsored tweets featuring a local restaurant on the Poets football Twitter Account and player and coach social media accounts, Whittier football (a program of the institution) will receive catered food and football players will be receiving free meals. The extent of institutional involvement was vague, with Caljean explaining, “This is all through football, and has nothing to do with athletics or Whittier at all. They were specifically targeting the football team and we’re just using all of the social media accounts of our football players and our football coaches.”<sup>14</sup>

**Birth of “NIL Collectives”.** A clear consequence of the lack of NCAA guidance and enforcement of institutions’ involvement in athletes’ NIL arrangements involves the NCAA’s longstanding current rule that prohibits institutions’ or their boosters, fans, sponsors, and other “representatives of athletics interest”<sup>15</sup> from offering inducements to athletes to intend or

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<sup>14</sup> Jenkins, S. (September 17, 2021) Whittier College Becomes First Division-III Program to Sign NIL Deal. *GMTM.com*. Retrieve from: [https://gmtm.com/articles/whittier-college-becomes-first-division-iii-program-to-sign-nil-deal?utm\\_source=D3Playbook&utm\\_campaign=d5ac66016b-EMAIL\\_CAMPAIGN\\_2021\\_09\\_23\\_09\\_44&utm\\_medium=email&utm\\_term=0\\_f4649c1bfa-d5ac66016b-419592581](https://gmtm.com/articles/whittier-college-becomes-first-division-iii-program-to-sign-nil-deal?utm_source=D3Playbook&utm_campaign=d5ac66016b-EMAIL_CAMPAIGN_2021_09_23_09_44&utm_medium=email&utm_term=0_f4649c1bfa-d5ac66016b-419592581)

<sup>15</sup> National Collegiate Athletic Association. (August 1, 2021). 2021-22 NCAA Division I Manual. *NCAA.*, p. 98 **13.02.15 Representative of Athletics Interests.** A "representative of the institution's athletics interests" is an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to: (a) Have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program; (b) Have made financial contributions to the athletics department or to an athletics booster organization of that institution; (c) Be assisting or to have been requested (by the athletics department staff) to assist in the recruitment of prospective student-athletes; (d) Be assisting or to have assisted in providing benefits to enrolled student-athletes or their family members; or (e) Have been involved otherwise in promoting the institution's athletics program.

remain at the institution, by providing extra benefits or impermissible outside employment.<sup>16</sup> No activity has raised more doubts in this space than the birth of “NIL collectives.” Instead of traditional booster clubs that raise money to donate to the athletic department (which the institution is obligated by Title IX to spend in ways that treat male and female athletes equally), similar third-party entities are being created by the institution’s boosters, fans, sponsors, and other representatives of athletics interests to act as a conduit to pay athletes for their NIL services.

Although these groups are not directly controlled by the institution, they are being created by fans, boosters, sponsors and other representatives of athletics interests and appear to be created at least in part as a reaction to coach or athletic director appeals for NIL support at regular booster club or high contributor athletic department events and other emphasis placed by the institution on the nexus between successful recruiting and NIL opportunities. Any third-party entity formed to assist athletes at one institution in the NIL arena will be presumed to have done so to induce athletes at that institution. For example, institutions typically kick off the football season with special events such as Zoom calls or weekly luncheons with the coach where contributors enjoy rubbing elbows with the athletic director and the coach and hearing them speak. What is new at these events is the athletic director or coach discussing how important NILs are to the success of the program. LSU’s football coach was blunt: “We’re paying players now: name, image, and likeness. So, if you guys wanna start paying our players, you can go ahead!”<sup>17</sup> Others, more well-versed in compliance issues, artfully deliver an *indirect* ask thanking attendees for supporting the institution’s athletes through NIL deals and pointing out that this is where the new recruiting war is being waged. Predictably, the schools able to show that their athletes get more NIL deals than their rivals can arrange, will get the best recruits. Attendees understand exactly what is being suggested. One way in which alumni, donors, sponsors, and season ticket holders are responding is to participate in a third-party collective and contribute to a fund that allows them to connect with and support the school’s athletes, believing this to be an important contribution to producing a winning program.

The quid pro quo for athlete NIL payments from the collective includes myriad tasks, including the athlete taping video segments with collective members, appearing in live video conferences and answering member queries, autographing gear or photos or similar exclusive

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**13.02.15.1 Duration of Status.** Once an individual, independent agency, corporate entity or other organization is identified as such a representative, the person, independent agency, corporate entity, or other organization retains that identity indefinitely.

<sup>16</sup> Id., p. 73. See 12.4.1 which specifies that employment outside the institution must be for work actually performed and at a rate commensurate with the going rate in that locality for similar services. It remains to be seen whether the NCAA or its members challenge the value of NIL deals on these two measures.

<sup>17</sup> Dellinger, R. (August 26, 2021) The First Thing to Understand About NIL Is That Nobody Fully Understands NIL. *SI.com*. Retrieve from: <https://www.si.com/college/2021/08/26/ncaa-recruiting-name-image-likeness-daily-cover>

athlete access/services. The Florida Gator Collective is an example of this model with over 700 members (fans, boosters, and supporters) and expects to grow to 10,000 members by the time the team plays arch rival Alabama later in the season.<sup>18</sup> Collectives, growing in numbers, act as agents for local businesses, handling the details of arranging for athlete appearances or production of video social media posts promoting the business, and then processing payments to the athletes.<sup>19</sup> These collectives differ from independent sport agents or agencies with multiple sports agents in that they only provide NIL deals to a single institution, responding to direct and indirect requests from the respective athletic department to make sure the NIL deals for prospects and current athletes enable them to win the recruiting wars and keep current athletes from transferring to other institutions that may boast of more lucrative NIL opportunities.

**Little or No Governance of the NIL Space:** There is no doubt that these new NIL compensation opportunities for college athletes will continue to be exploited by institutions seeking a recruiting advantage. It is not clear whether the NCAA will police this space within the framework of the current rules regarding improper inducements, extra benefits, or improper fan, booster, and sponsor prohibitions. Further, it is not clear whether the NCAA will enforce its current rules that permit outside employment by representatives of athletics interests only if such compensation does not exceed fair market value and athletes are being paid for work actually performed.

**Institutions Continuing to Ignore Title IX Gender Equity Obligations.** What is also clear is that institutions are not grasping their Title IX obligations in this space and, instead, are proceeding rapidly to try to secure a recruiting advantage through providing directly or indirectly NIL opportunities to their athletes, the vast majority of whom are male. Historically, these institutions have ignored Title IX's mandates regarding equal publicity, promotion, and recruiting of female athletes and now are continuing those practices by encouraging alumni to provide NIL deals primarily to male athletes in their programs.

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<sup>18</sup> Alderman, B. (September 2, 2021) New NIL Opportunity for UF Athletes Unveiled. *Swamp247.com*. Retrieve from: <https://247sports.com/college/florida/Article/Florida-Gators-football-new-NIL-opportunity-for-UF-athletes-unveiled--170032057/>

<sup>19</sup> Weaver, M. (September 10, 2021) Hoosiers Confident That Sanquinetti Can Get the Job Done. *247Sports.com*. Retrieve from: <https://247sports.com/college/indiana/Article/New-NIL-initiative-The-Hoosier-Hysterics-NIL-Collective-169529715/>

### **III. INSTITUTIONAL OBLIGATIONS: Institutions Must Equally Support Male and Female Athletes in Publicity, Promotion, and Recruiting<sup>20</sup> and the Provision of Assistance with Respect to NIL Opportunities**

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The current NIL marketplace value of male and female athletes reflects the historically under-resourced treatment of women's sports with regard to the institution's promotion, publicity, and recruiting efforts. Colleges and universities must assess whether they are providing an equal percentage of male and female athletes (not teams) with equal publicity and promotion benefits and making equal recruiting efforts. If inequities are identified, the institution should immediately act to remedy these inequities.

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General education on brand-building, financial literacy, or information related to applicable athletic governance association rules or state/federal regulatory requirements must be equally provided to male and female athletes. Due to historical lack of resources applied to promotion and publicity provided to female athletes, education and information designed to build awareness of female athletes and remedy these inequities should also be provided.

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Male and female athletes must be treated equally if the institution is involved in any way in supporting NIL opportunities including: (a) introducing athletes to prospective third-party NIL sponsors, (b) contributing or receiving any consideration as part of an athlete NIL agreement, (c) enters into co-licensing or group licensing agreements that includes athletes, and (d) reviewing, analyzing, advising or discussing an athlete's NIL contract with a third party other than from strictly a regulatory perspective.

**Title IX's Requirement Not Being Met.** It is common knowledge that few athletic programs are complying with Title IX's mandate to provide equal participation opportunities, treatment, and benefits to females. Indeed, fifty years after the passage of Title IX, 90 percent of intercollegiate athletic programs are still discriminating on the basis of sex and female athletes

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<sup>12</sup> Title IX's athletics regulations require gender equity beyond publicity and promotion (e.g., accommodation of interests and abilities with regard to selection of sports, competition level and participation opportunities, scholarships, admissions, recruiting, and treatment and benefits in the areas of equipment and supplies, practice and competition apparel and uniforms, scheduling of games and practice times, modes of transportation, provision of meals and hotel accommodations, tutoring and academic support services, coaches, locker rooms, practice and competition facilities, medical and training facilities and services, awards and recognition, and administrative and support services.) 34 C.F.R. § 106. Retrieve from: <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S41>.

are being annually shortchanged by \$1 billion in athletics scholarship dollars, \$162.5 million in recruiting support, and 148,030 in sport participation opportunities.<sup>21</sup> Although Title IX permits an institution to treat some sports better than others, the institution must not engage in sex discrimination on a programmatic basis. In other words, football and men’s basketball may receive more favorable treatment as long as an equal percentage of female athletes (not sports) is similarly advantaged. Title IX does not compare the treatment of one sport to another. Rather, it compares the treatment of all male athletes to the treatment of all female athletes by that institution. If some male athletes are treated better than others, an equal proportion of female athletes must be equally treated better (e.g., if 100 male football players and 15 male basketball players receive more favorable promotional treatment and those 115 athletes represented 33 percent of all male athletes, then 33 percent of all female athletes among any number of women’s sports must receive equally favorable treatment.)<sup>22</sup>

**Publicity and Promotional Benefits Favoring Male Athletes.** Female athletes have been denied institutionally arranged promotional and publicity benefits provided to male athletes in revenue-producing sports. These benefits include regular television exposure, billboard advertising, press releases, extensive social media promotion supported by athletic department staffers and graphic specialists, and consistent appeals to alumni and local businesses to support these revenue-producing sports with the institution dangling incentives such as preferred seating, parking, and other special treatment. Further, recognizing that Title IX was in part intended to address sex role stereotyping that disadvantages females, institutions must promote female athletes as talented athletes, as opposed to sex objects, in the same manner as they promote their male athletes.

**Recruiting Efforts Favoring Male Athletes.** Most collegiate athletic programs are in violation of Title IX with regard to equally supporting the efforts by coaches and others to recruit male and female athletes as reflected by the \$162.5 million gap in direct recruiting expenditures on male versus female athletes at higher education institutions.<sup>23</sup> Now, because athletic departments realize that a dominant recruiting advantage exists when they can show prospective

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<sup>21</sup> Champion Women. (2020) Discrimination Against Women in College Sports Is Getting Worse. Retrieve from: <https://titleixschools.com/2020/06/23/gender-gap/>

<sup>22</sup> U.S. Department of Education Office for Civil Rights. A Policy Interpretation: Title IX and Intercollegiate Athletics (December 11, 1979) *Federal Register*, Vol. 44, No. 239, p.71414 (hereafter cited as “1979 Title IX Policy Interpretation”) Section VII. B. 2 “sets forth the means to assess an institution’s compliance with the equal opportunity requirements” of the Title IX Regulations (45CRF 88.37(c) and 88.4a(c)).

<sup>23</sup> The Champion Women web site permits the user to examine recruiting expenditure gaps between men’s and women’s sports by institution based on 2018-19 data (the last full year of normal athletic program operations prior to the Covid19 pandemic) submitted by the 2072 higher education institutions with athletics programs required to annually report such data to the U.S. Department of Education per the requirements of the federal Equity in Athletics Disclosure Act. Champion Women. (March, 2021) Is Your School Treating Female Athletes Fairly? *TitleIXSchools.com*. Retrieve from: <https://titleixschools.com/2020/06/23/eada-data/>

athletes that their currently enrolled athletes are receiving greater compensation and NIL exposure opportunities than at other institutions, institutions are engaged in numerous efforts to amplify these NIL benefits. Athletic departments are informally contributing consideration to or formally executing co-licensing and group licensing agreements with their athletes, allowing athletes to use institutional marks and institutional property even without licensing or other revenues flowing to the institution, and are directly encouraging individuals and group representatives of athletics interests to provide direct NIL support to their athletes for the specific purpose of advancing the institution's recruiting success.

As previously mentioned, Opendorse's data from the first several months of NIL activity reflect a continuation of male dominance in this space. The inequities created by favoring male athletes with regard to direct institutional support of publicity and promotion will be aggravated by institutions continuing to provide greater assistance to male athletes with regard to NIL opportunities.

**Marketplace Determination of Value Not Affecting Institutional Obligation to Treat Males and Females Equally.** It is important to understand a distinction between the institution's obligation to equally treat male and female athletes equally with regard to publicity, promotion, and recruiting and to ensure that all revenues being used by the athletic programs are used to benefit male and female athletes equally, on the one hand, and the *valuation* of the institution's sport program media rights or individual athlete's NIL in the open marketplace either from a donor or a corporate sponsor, on the other hand, the latter of which may not be under the direct control of the institution. For example, if the institution accepts a restricted donation from a supporter who indicates the donation is to be spent on a new football locker room and not for any other purpose, the institution may accept the donation. However, the benefit it provides (e.g., more favorable treatment of 100 male football players with a higher quality locker room) must be matched by funds the institution derives from other external or internal sources to provide females with equally favorable treatment. If the institution cannot afford to provide such equal treatment to female athletes, it must either delay use of the donation until it does obtain such resources, convince the donor to alter the terms so that the funds are shared by male and female athletes, or must decline the donation.

Or consider another example. Assume the institution enters into an agreement to have a third party videocast a live men's basketball game for which the institution receives a media rights fee. Unlike the donor restricted gift described above, such third-party media rights agreements do not dictate to the institution how such revenues must be used. But Title IX requires that the institution use *all* revenues (e.g., donations, gate receipts, sponsorships, media rights revenues, etc.) in a manner that does not discriminate on the basis of sex in the provision

of benefits and treatment (scholarships, uniforms, etc.) to *all* male and female athletes. Or, as previously explained, if the institution chooses to provide more favorable benefits to a more limited number of male athletes, the same percentage of female athletes must be treated more favorably as well.

**Institutions’ Obligation to Provide Equal Exposure Despite Unequal Equal Rights Fees.**

In addition to use of revenues generated by third-party media agreements, there is another Title IX element that must be considered by the institution: television exposure that represents “promotion and publicity” of the institution’s athletes.<sup>24</sup> This is a Title IX equitable treatment obligation that most institutions have ignored. If, for example, the men’s basketball team with 14 players represents 10 percent of all male athletes and is the only television exposure provided to male or female athletes, the institution now has to provide equivalent exposure to 10 percent of all female athletes. The institution is *not* obligated to provide television exposure at the same *media rights fee rate* as it receives for its male basketball players, but assuming it is seeking to maximize the rights fees obtained for any of its properties, it is obligated *not* to undervalue its female athlete property (as the NCAA has done with its Women’s Final Four basketball championship<sup>25</sup>) and to make the same effort to obtain female athlete exposure. The value of the rights fees is dictated by the marketplace rather than artificially controlled by the institution. The institution’s Title IX obligation is to demonstrably seek equal television exposure (promotion/publicity) for the same percentage of female athletes at fair market value, even if it means in some cases that there is no rights fee for videocasting the women’s games.<sup>26</sup>

**Institutions’ Obligation to Seek to Equalize Exposure at Fair Market Value.** Most institutions have put little or no effort into developing women’s sports as revenue-producing properties or selling them as properties having value. In doing so, they undermine the potential for women’s sports to generate additional revenue for the institutions and undermine the value of such exposure to the female athletes seeking to monetize their individual NIL brands in the open market. In order to comply with Title IX in this television exposure example, the institution has a number of options, all of which should be carefully explored to determine which deal provides the best combination of exposure and fair market value:

- Negotiate the televising of a women’s game as part of its third-party men’s game agreement.

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<sup>24</sup> Title IX Regulations at CRF 86.41(c)(10)

<sup>25</sup> Kaplan Hecker & Fink LLP. (August 2, 2021) NCAA External Gender Equity Review -- Phase I: Basketball Championships. Retrieve from: <https://ncaagenderequityreview.com/>

<sup>26</sup> It should be noted that any developing sport may not have immediate market value, in which case exposure (airing the event) may represent *marketing* value toward the end of developing *media rights value*.

- Seek another distributor for its live women’s basketball game (or a similar percent of female athletes such as a volleyball match). For example, UConn women’s basketball aired a full slate of games for many years on Connecticut Public Television (CPTV)<sup>27</sup> before advancing to stations with wider reach and media rights fees.
- Produce (comparable production quality), promote (advertise), and distribute (comparable reach) the game itself either by purchasing television time, live streaming on the internet, or any combination of these possibilities.

Thus, the key concept is that if there is any institutional involvement in the marketplace with a third party that results in publicity and exposure of male athletes – whether it generates money for the institution or the athlete or not – the Title IX obligation is to demonstrably match the *promotion and publicity effort* to obtain the same benefit for an equal proportion of female athletes.

**Equal Effort to Advance NIL Exposure and Compensation.** Similarly, if institutions are involved in any way other than a regulatory function and assists athletes in obtaining NIL exposure and compensation in the marketplace through formally entering into co-licensing or group licensing or informally allowing use of its trademarks, facilities, or other assets for an athlete NIL deal that may not provide direct compensation or benefits to the institution, the institution must make the same effort for its male and female athletes. We have identified one notable example of an institution seeking to benefit its male and female athletes equally by assisting athletes in the NIL space. In August 2021, BYU announced with great fanfare an “enhanced multi-year agreement to support the Cougar football program, while also pioneering separate innovative NIL agreements” with Built Brands, LLC, an existing athletic program sponsor.<sup>28</sup>

*‘I’m super grateful to Nick Greer and Built Brands for providing a mechanism for hard-earned compensation for our student-athletes and for making it possible for all of our football players to be able to compete without having as much of a strain*

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<sup>27</sup> Consider the exposure of UConn women’s basketball produced by UConn giving its Connecticut PBS station the right to videocast games for no rights fee. The public became aware of the quality of the national champion quality UConn programs, which in turn drove ticket sales and donations to UConn athletics and made many UConn female athletes like Rebecca Lobo, Diana Taurasi, Maya Moore, and Breanna Stewart household names with high value in the open market. *Current*. (May 14, 2012) UConn’s ratings-rich lady hoopsters desert CPTV. Retrieve from: [https://current.org/tag/cptv/?wallit\\_nosession=1](https://current.org/tag/cptv/?wallit_nosession=1)

<sup>28</sup> BYU Athletic Department. (August 12, 2021; updated August 25, 2021) BYU Football Touts Groundbreaking NIL Agreements with Built Brands. *BYUCougars.com*. Retrieve from: <https://byucougars.com/story/football/1297331/byu-football-touts-groundbreaking-nil-agreements-built-brands>

*on their finances,’ said BYU director of athletics Tom Holmoe. ‘With the changes in the NIL space, we have embraced the role of advocates as our student-athletes involve themselves in quality opportunities to use NIL to help earn additional income.’*

All 123 individual members of the football team, including 36 walk-on players were signed.<sup>29</sup> It was also reported<sup>30</sup> that scholarship athletes could earn up to \$1,000 while those not on scholarship should earn up to the cost of tuition (\$6,120 to \$12,300).<sup>31</sup> The deal requires BYU football players to wear decals with the company’s logo on their practice helmets, make at least one appearance at a company event, and walk-on players will provide additional social media and experiential promotions. A separate enhancement of BYU’s existing agreement with Built Brands will provide additional benefits to the football program with “much of this funding [going] towards fueling the football team over the next several years. Built has agreed to place two Built fueling areas in the two football locker rooms – one in the Student-Athlete Building and one in LaVell Edwards Stadium.”<sup>32</sup>

One month later, BYU announced a similar agreement it negotiated with SmartyStreets, another Utah company, to benefit all female athletes.<sup>33</sup>

*“Under the agreement with SmartyStreets, each female student-athlete will be compensated up to \$6,000 for sharing about SmartyStreets on their social media accounts and participating in various company events and activities. With more than 300 female athletes at BYU, the total compensation could surpass \$2 million. In addition to the NIL agreements with student-athletes, SmartyStreets is also donating facility and equipment upgrades to BYU female athletes.”*

The bottom line is that the institution must treat male and female athletes (or an equal proportion of male and female athletes) equally if the institution assists its athletes in any way with regard to their activities in the NIL space. Examples of such assistance include:

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<sup>29</sup> Ibid.

<sup>30</sup> Russo, R.. (August 13, 2021) Competitive Advantage? BYU’s NIL Deal Could Test Limits. *APNews.com* Retrieve from: <https://apnews.com/article/sports-college-football-business-brigham-young-cougars-football-4ac6e186e0aa10b221af59a299f40077>

<sup>31</sup> The payments to walk-on football players raised the question of BYU using arranged NIL deals to exceed NCAA scholarship limits.

<sup>32</sup> BYU Athletic Department. (August 12, 2021; updated August 25, 2021)

<sup>33</sup> McCombs, R. (September 21, 2021) SmartyStreets Inks NIL Deal with BYU Female Athletes. *VanquishtheFoe.com*. Retrieve from: <https://www.vanquishthefoe.com/2021/9/21/22686263/byu-inks-nil-deal-with-smartystreets-for-female-athletes-2-million-dollars>

- providing general education on brand building education, financial literacy, or information related to applicable athletic governance association rules or state/federal regulatory requirements);
- introducing athletes to prospective third-party NIL sponsors;
- contributing any consideration (e.g., institutional trademarks, use of institutional facilities, etc.) to an athlete NIL agreement;
- entering into co-licensing or group licensing agreements that includes athletes; or
- assisting athletes in the review, analysis, or evaluation of an athlete’s NIL contract with a third party (other than from strictly a regulatory perspective).

**IV. CONFERENCES, NATIONAL SPORT GOVERNING ASSOCIATIONS AND THIRD-PARTY COMMERCIAL BUSINESSES OPERATING ON BEHALF OF INSTITUTIONS SHOULD BE HELD SUBJECT TO TITLE IX**

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**Conferences, national governing organizations, and their treatment of the institutions’ athletes at conference and national championship post-season or other events must not result in sex discrimination under Title IX.**

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**Similarly, businesses such as conference- or institution-owned television networks must be subject to Title IX and not discriminate on the basis of sex in the provision of publicity and exposure to male and female athletes.**

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**If conferences, national governing organizations, or third parties owned by conferences or national governing organizations or operating on behalf of institutions contribute any consideration (e.g., use of trademarks, etc.) to athlete NIL agreements or enter into co-licensing or group licensing agreements that include athletes from member institutions, they must treat male and female athletes equally pursuant to Title IX, just as institutions are obligated to treat athletes equally under Title IX.**

**No Escape of Title IX Obligations Through the Formation of Third Parties.** Institutions should not be allowed to escape Title IX responsibility by combining with other institutions to create a jointly owned property like a conference or national governing organization or television network that provides inequitable publicity and promotional benefits to male and female

athletes. These entities have been created and “controlled” by institutional representatives and the entity has “controlling authority” over the institutions. The employees of member institutions serve on governing boards and vote on rules and regulations. Although the controlling authority theory has not been tested against the NCAA or collegiate conferences to date, courts have held that it applies to state high school athletic associations, supporting the conclusion that conferences and the NCAA cannot escape Title IX obligations.<sup>34</sup> There is no logical reason for it to apply in the intercollegiate space to prevent institutions from doing indirectly what they could not do directly. They would in essence be creating a subterfuge.

Consider the recent NCAA Final Four debacle in which male athletes received more favorable television exposure, access to much higher quality and size strength and conditioning areas, higher standard COVID-19 testing, superior meals, “swag bags” and better hotel accommodations among other inequities. No individual institution should escape Title IX liability with such inequitable treatment; nor too should a collection of institutions avoid Title IX’s equitable treatment requirements.

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<sup>34</sup> There is a compelling legal argument that Title IX applies to intercollegiate conferences and national governing organizations, including the NCAA. The only Supreme Court case to address the issue is *NCAA v. Smith*, 525 U.S. 459 (1999). There the Supreme Court held that membership dues from educational institutions were not a sufficient basis upon which to hold the NCAA subject to Title IX. However, the Court indicated that a different theory—the controlling authority theory—might be a sufficient basis upon which to hold that Title IX applies to the NCAA. The Court explained that the controlling authority theory--“when a recipient of federal funds cedes controlling authority over a federally funded program to another entity, the controlling authority is covered by Title IX regardless of whether it is itself a recipient”--was not asserted in the lower courts in the case and therefore would not be addressed by it. But the Court admonished that “entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.” *Id.* at 468. Litigation at the high school level has been more fertile. For example, in *Communities for Equity v. Michigan High School Athletic Ass’n.*, 80 F. Supp. 2d 729 (W.D. Mich. 2000), the court explained: “any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.... [B]ecause the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds... and because holding otherwise would be nothing more than empty formalism, the court concluded that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.” *Id.* at 930. The court also explained that significant to its decision was the symbiosis of decisionmakers between the educational institutions and the athletic association. *Id.* at 739-40. Further support for holding that conferences and the NCAA responsible should be subject to Title IX is *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n* 531 U.S. (2001), where the Court held that the state athletic association was a state actor by examining the entwinement up and down between the schools and the association in terms of decision making and participation of committee and board members. *CF, NCAA v. Tarkanian*, 488 U.S. 179 (1988) (involving only one state actor). Further support for holding the NCAA and conferences subject to Title IX is the most recent memorandum by the General Counsel of the NLRB. That memorandum states that in addition to holding certain college athletes to be employees of their respective schools, the athletes may also be employees of the conferences and the NCAA under a joint employer theory of liability. (Memorandum GC 21-08, dated September 29, 2021 at FN 34). Though applying to a different federal law, it demonstrates the entwinement of institutions/athletic departments, on the one hand, and conferences and national governing organizations, on the other hand.

**Equity Obligations of Commercial Businesses Created by Institutions.** Similarly, if the institution, conference, or national governing organization *creates* an entity to expand the publicity, promotion, and exposure of its athletes and to monetize its programs or properties in the commercial marketplace, such as the Pac12 Network, the Longhorn Network, or the CFP (College Football Playoff) Administration LLC, those entities should have a gender equity obligation under Title IX equal to the institution. They must seek equal publicity, promotion and fair market value for men’s and women’s properties. The funds generated by such ventures must flow back to the entities and be used to provide equal opportunities, scholarships, treatment, and benefits.

**V. INSTITUTIONS MUST REQUIRE THIRD-PARTY REPRESENTATIVES OF ATHLETICS INTERESTS, ORGANIZED TO SUPPORT, OR WHO IN FACT SUPPORT THE RECRUITING SUCCESS OF THEIR RESPECTIVE INSTITUTIONS BY PROVIDING NIL COMPENSATION OR OTHER BENEFITS, TO TREAT MALES AND FEMALE ATHLETES EQUALLY**

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**Institutions must not assist third parties or otherwise indirectly violate Title IX or its spirit whether through knowing inaction, encouragement, or other active inequitable involvement in areas that will negatively impact women’s NIL opportunities.**

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**Institutions must educate all athletics employees and fans, boosters, sponsors or other representatives of athletics interests involved in providing compensation or benefits to prospective or current athletes about any obligations created by state or federal laws or athletics governance entities including the institution’s Title IX obligations. Specifically with regard to NIL or other compensation or benefits, such education must include that compensation cannot be inducements to attend (recruiting) or remain at the institution and that services rendered in return for compensation must be actually performed and at rates commensurate with fair market value, in order to protect their eligibility for athletic competition.**

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**Institutions must require third parties composed of boosters, fans, sponsors, or other representatives of institutional interests to treat female and male athletes equally. There should be a presumption that any third party formed to operate to serve a single institution’s**

athletes in any way related to NIL deals must comply with Title IX and, if they do not, that the institution will be held to violate Title IX. More specifically, permitting institutions having knowledge of or having employees directly or indirectly encouraging the operation of third-party entities organized by alumni or fans, boosters, sponsors, or other representatives of athletics interests for the purpose of providing direct NIL or other support limited to prospective or current athletes at a specific institution in a manner that discriminates on the basis of sex, effectively permits the institution to violate the letter and spirit of Title IX, which requires equal recruiting treatment, and benefits. Accordingly, institutions must educate and require such third parties not to engage in sex discrimination. If the entity does not respond appropriately, the institution should be expected to completely sever ties (i.e., not provide benefits associated with the athletic program or institution such as attendance at athletic or other special athletic department events, etc.). Failure to remove institutional assistance (benefits) to members/contributors to the NIL entity organization enables the institution to avoid its equal recruiting treatment mandate and should result in a presumption that the institution knowingly violated its Title IX obligations. A similar requirement applies to the involvement by conferences and national governing organizations with third parties.

**Institutions’ Obligations Not To Assist Third Parties That Engage in Sex Discrimination in the Employment or NIL Compensation of Their Students.** Institutions must not assist third parties or otherwise indirectly violate Title IX or its spirit whether through knowing inaction, encouragement, or other active inequitable involvement in areas that will negatively impact women’s NIL opportunities. The Office for Civil Rights has admonished schools in such contexts. In 2017, when a group was considering the formation of a men’s collegiate basketball league for HBCUs, the OCR responded:

*[A] recipient institution may violate Title IX when it assists an outside organization that engages in sex discrimination. As part of its broad prohibition on sex discrimination, the Title IX regulations prohibit recipients from aiding or perpetuating discrimination by providing significant assistance to any outside organization that discriminates on the basis of sex in providing any aid, benefit or service to students or employees. 34 C.F.R. § 106.31(b)(6). Similarly, a recipient that assists an outside organization in making employment available to any of its students must “**assure itself that such employment is made available without discrimination on the basis of sex**” and “**not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.**” 34 C.F.R. § 106.38(a) (emphasis added).*

It is clear that OCR would find that an institution violates Title IX if the outside entity provides it with a recruiting, compensation, or other treatment benefit and, in doing so, discriminates against its prospective or current students on the basis of sex.

**Institutions' Obligations to Protect the Eligibility of Male and Female Athletes and Ensure that Entities Under Their Control Adhere to Those Same Title IX Obligations.** Institutions have an obligation to equally protect the eligibility of college athletes, not only through the education of athletes, but also through the education of its fans, boosters, sponsors, and other representatives of athletics interests with regard to adherence to recruiting rules, including the offer of inducements. That education should include clear direction to any entity it controls that they must adhere to Title IX gender equity requirements. The NCAA specifically holds the institution responsible for controlling the actions of its representatives of athletics interest:

#### **6.4 Responsibilities for Actions of Outside Entities**

**6.4.1 Independent Agencies or Organizations.** *An institution's "responsibility" for the conduct of its intercollegiate athletics program shall include responsibility for the acts of an independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization when a member of the institution's executive or athletics administration, or an athletics department staff member, has knowledge that such agency, corporate entity, or other organization is promoting the institution's intercollegiate athletics program.*

**6.4.2 Representatives of Athletics Interests.** *An institution's "responsibility" for the conduct of its intercollegiate athletics program shall include responsibility for the acts of individuals, a corporate entity (e.g., apparel or equipment manufacturer), or other organization when a member of the institution's executive or athletics administration or an athletics department staff member has knowledge or should have knowledge that such an individual, corporate entity, or other organization:*

- (a) Has participated in or is a member of an agency or organization as described in Constitution 6.4.1;*
- (b) Has made financial contributions to the athletics department or to an athletics booster organization of that institution;*
- (c) Has been requested by the athletics department staff to assist in the recruitment of prospective student-athletes or is assisting in the recruitment of prospective student-athletes;*
- (d) Has assisted or is assisting in providing benefits to enrolled student-athletes; or*
- (e) Is otherwise involved in promoting the institution's athletics program.*

**Nature and Origins of NIL Collectives.** NIL collectives are replicas of booster clubs that have been created for the specific purpose of connecting athletes and fans, boosters, or sponsors with athletes for the monetization of NILs. The collective pools money and then enters into NIL deals with the athletes. The money goes from the collective to the athletes. Normally, booster clubs donate restricted and unrestricted funds or gifts-in-kind to the institution and the institution has the responsibility to expend these funds in a manner that provides equal participation, scholarships, and treatment and benefits. The NIL collective differs in that these entities exist to provide direct compensation to college athletes in the form of NIL agreements that pay athletes for services rendered. We contend that Title IX equity obligations presumptively apply to the institution if the entity exists only to benefit athletes at a single institution, effectively acting on behalf of the institution, at least in part, to advance its recruiting interests. These collectives differ from the typical sports agent or groups of sports agents that usually offer services to any athlete from any institution with the money going from the business to the athlete.

Significantly, in many of these collectives, it is evident that coaches and administrators of the institution have communicated clearly to members of the collective that NIL compensation is a critical ingredient in recruiting success that the institution cannot control but the collective can. For example, the Hoosier Hysterics NIL Collective pools money from representatives of athletics interests and then creates NIL deals for Indiana University athletes in which the athlete or athletes in turn promote Hoosier Hysterics through social media posts, appearances, etc. Eric Pankowski, co-founder, clearly comments on the collective's primary purposes:

- *The primary goal is to make Indiana University the leader in NIL opportunities for its student-athletes. We want current players and recruits to know that if you come to Indiana, and stay at Indiana, the fanbase has your back. Not just when it comes to showing up for games and cheering our tails off, but financially, you will do very well at Indiana.*
- *The Hoosier Hysterics NIL Collective allows fans to have a direct impact on the future success of our programs! If IU's fans, boosters and supportive businesses band together and pool our resources, NIL will become a major factor in prospective student-athletes deciding to come to IU. That is direct impact. It is totally in our control.*
- *Simply put, if current players know there is real opportunity to do well financially in NIL opportunities at IU, they will be less likely to leave early or transfer. And if recruits across the nation know that Indiana is a place where the fanbase as a*

*whole supports them financially with NIL opportunities once they get to IU, then we will win recruitments that we otherwise may have lost.*<sup>35</sup>

Another example is the announcement of alumni and prominent University of Oregon donors to form Division Street Inc. a “sport venture that will assist Oregon student-athletes in monetizing their NIL”<sup>36</sup> with the CEO of the new entity pledging sport and gender inclusivity:

*Our team has spent decades building the brands of the world’s best athletes, and we will use that experience to elevate NIL opportunities by bringing in leading expertise across brand, marketing, sponsorship, digital and creative to support all Oregon student-athlete, inclusive of every sport and across gender.*<sup>37</sup>

Thus, institutions have an obligation to make certain that third party entities such as NIL collectives or the Oregon Division Street, treat its male and female athletes equally. Indeed, there should be a presumption that any third party formed to operate to serve a single institution’s athletes in any way related to NIL deals must not engage in sex discrimination with regard to its students’ employment or NIL compensation. If they do engage in sex discrimination, then the institution will be held to violate Title IX. Accordingly, institutions *must* educate and require such third parties not to engage in sex discrimination.

If the entity does not respond appropriately, the institution should be expected to completely sever ties (i.e., not provide benefits associated with the athletic program or institution such as attendance at athletic or other special athletic department events, etc.). Failure to remove institutional assistance (benefits) to members/contributors to the NIL entity organization enabling the institution to avoid its recruiting equal treatment mandate should result in a presumption that the institution knowingly violated its Title IX obligations. A similar requirement applies to the involvement by conferences and national governing institutions with third parties.

The fact that a collective restricts the use of its funds to benefit prospective or current athletes and the purpose of such employment is to obtain a recruiting advantage may place the institution both in the crosshairs of violating NCAA inducement rules and violating its Title IX obligation to treat male and female athletes equally with regard to recruiting. As noted earlier,

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<sup>35</sup> Rabjohns, J. (August 23, 2021) New NIL Initiative: The Hoosier Hysterics NIL Collective. *247sports.com*. Retrieve from: <https://247sports.com/college/indiana/Article/New-NIL-initiative-The-Hoosier-Hysterics-NIL-Collective-169529715/>

<sup>36</sup> Dosh, K. (September 30, 2021) Phil Knight and Former Nike Execs Launch Oregon-Focused NIL Company. *Forbes.com*. Retrieve from: <https://www.forbes.com/sites/kristidosh/2021/09/30/phil-knight-and-former-nike-execs-launch-oregon-focused-nil-company/?sh=4f2c1c538927>. It appears that Division Street Inc. will seek to realize gender equity based on its hiring of Sabrina Ionescu to serve as Chief Athlete Officer and her comment that gender diversity will be part of her focus. *Id.*

<sup>37</sup> *Ibid.*

although the institution cannot control the specific *value* of NIL agreement athlete services, it can control the education of its representatives of athletics interests and cut them off when there is evidence of improper inducement, pay for play, or sex discrimination, e.g., unequal efforts to obtain NIL deals for men and women. Thus, the institution should be vigilant that the representatives of athletics interest offer employment compensation that is for work actually performed, at rates commensurate with fair market value, and not include any requirement to attend a specific institution (inducements). Third parties and their members of the NIL collectives or similarly situated entities should be required to meet these requirements and not condition any agreement on athlete attendance at a specific institution.

## **VI. Conclusion: Institutions, Conferences, National Governance Organizations, and the Entities They Establish, Control, Assist, or Provide with Benefits Must Fulfill Title IX Obligations**

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Putting aside the question whether any of the above-described practices violate state laws or the NCAA's prohibition of improper inducements, pay for play, or extra benefits to prospective and current athletes, universities must not only focus on their own Title IX compliance obligations to provide male and female athletes with equal participation opportunities, athletics scholarship support, and equal treatment and benefits (including promotion, publicity, and recruiting). They must also require the third parties they establish, control, assist, or benefit from -- conferences, national governing organizations, businesses, booster clubs and NIL collectives -- to do likewise. With specific regard to the support of college athletes' NIL agreements, institutions and these third parties must provide equal opportunities for male and female athletes to obtain NIL agreements (recognizing that the value of such agreements will be subject to the marketplace).

As NIL income becomes more important to athletes, we will see more female athletes willing to challenge unequal institutional promotion and publicity practices and co-licensing and group licensing deals by filing Title IX complaints with their schools or the Office for Civil Rights or bringing Title IX lawsuits. Complicating this scenario may be the difficulty female athletes will have to access documents and testimony or otherwise easily prove the inequities because no central repository exists for such deals and their terms and much of the school involvement will be indirect and not written. Rules requiring the disclosure of NIL deals to a central depository of all substantial NIL deals and all contracts regarding such deals would mitigate this difficulty. Moreover, institutions must help empower and promote female athletes by encouraging them to promote themselves as talented athletes, as opposed to sex objects.

Public universities in particular have an obligation to educate for the greater good, which includes taking gender, race, economic, and all forms of discrimination into account in their decisionmaking. The Drake Group urges all collegiate athletic programs to think deeply about ways to make this new arena — the monetization of NILs — a game changer with regard to gender equity.