

# NIL COLLECTIVES AND TITLE IX: A PROACTIVE CONSIDERATION OF TITLE IX'S APPLICATION TO DONOR-DRIVEN NIL COLLECTIVES

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## INTRODUCTION

June 23, 2022 marked the 50th anniversary of the passage of Title IX.<sup>1</sup> Over the past 50 years, Title IX has reduced gender inequities in education by ensuring institutional compliance in several areas, including athletics.<sup>2</sup> Before Title IX, only fifteen percent of all National Collegiate Athletic Association (NCAA) athletes were women.<sup>3</sup> Today, forty-four percent of those athletes are women.<sup>4</sup> Women athletes have earned significant success and notoriety in their high school, college, and professional athletic careers.<sup>5</sup>

While feminists celebrated Title IX, 2022 was also a year of change in college athletics.<sup>6</sup> On June 30, 2021, the NCAA ended its strict, longstanding amateurism principle and released an Interim Name, Image, and Likeness (NIL) Policy.<sup>7</sup> The Interim NIL Policy officially permitted student-athletes to monetize their publicity rights.<sup>8</sup> NIL compensation experienced rapid growth in 2022.<sup>9</sup> Many student-athletes received NIL compensation from brand deals and sponsorships.<sup>10</sup> A popular NIL platform, Opendorse, released a report in June 2022.<sup>11</sup> That report claimed approximately sixty-eight percent of transactions “facilitated or disclosed through Opendorse . . . were classified as ‘posting

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1. WOMEN'S SPORTS FOUND., 50 YEARS OF TITLE IX: WE'RE NOT DONE YET 1 (2002) [hereinafter 50 YEARS OF TITLE IX: WE'RE NOT DONE YET].

2. *Id.*

3. *50 Years of Title IX*, WOMEN'S SPORTS FOUND. (2022), [https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6\\_WSF-Title-IX-Infographic-2022.pdf](https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf) [https://perma.cc/CJ9V-C8R4].

4. *Id.*

5. 50 YEARS OF TITLE IX: WE'RE NOT DONE YET, *supra* note 1.

6. *See, e.g.*, Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives, and Chaos. Now What?*, SPORTS ILLUSTRATED (July 12, 2022), <https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year> [https://perma.cc/6KM6-8P5U].

7. 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> [https://perma.cc/6955-2DGS].

8. *Id.*

9. *See, e.g.*, Johnson, *supra* note 6.

10. *See, e.g., id.*

11. Andy Wittry, *First Year of NIL Data Shows Trends Favoring Social Media, Football, ON3NIL* (July 4, 2022), <https://www.on3.com/nil/news/nil-data-opendorse-inflcr-college-football-mens-womens-basketball-baseball/> [https://perma.cc/36VA-H9B3].

content.”<sup>12</sup> However, NIL compensation quickly expanded beyond social media content as groups of university boosters and alumni formed groups commonly referred to as “donor-driven collectives.”<sup>13</sup> These collectives funnel large sums of NIL compensation directly to student-athletes.<sup>14</sup>

Donor-driven collectives have made headlines over the past several months.<sup>15</sup> The Ohio State University head football coach told a group of Columbus business owners that he needed thirteen million dollars to keep the football roster intact.<sup>16</sup> The Oklahoma Sooner collective signed or offered a NIL deal to every member of the football roster.<sup>17</sup> NIL is new territory, but these donor-driven collectives wasted no time creating deals and opportunities for student-athletes.<sup>18</sup> Coaches, administrators, and other interested parties have scrutinized collective NIL compensation for serving as “inducements” and “pay-to-play” for student-athletes.<sup>19</sup> An important question raised by these NIL compensation agreements and donor-driven NIL collectives is whether they thwart gender equality under Title IX.<sup>20</sup>

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12. *Id.*

13. Pete Nakos, *What are NIL Collectives and How Do They Operate?*, ON3NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [https://perma.cc/EN8P-68GY].

14. See On3 Staff Report, *On3’s Top Most Ambitious NIL Collectives*, ON3NIL (Aug. 4, 2022), <https://www.on3.com/nil/news/on3s-top-20-most-ambitious-nil-collectives/> [https://perma.cc/H8AF-BD5R] (listing several collectives and large fundraising efforts).

15. See Amanda Christovich, *Report: Texas Tech NIL Collective Offers Every Football Player \$25K*, FRONT OFF. SPORTS (July 18, 2022, 5:42 PM), <https://frontofficesports.com/texas-tech-nil-collective-offers-25k-to-every-football-player/> [https://perma.cc/K6BD-FA3A].

16. Doug Lesmerises, *Ohio State Believes it Needs \$13 Million in NIL Money to Keep its Football Roster Together*, CLEVELAND.COM (June 2, 2022), [https://www.cleveland.com/osu/2022/06/ohio-state-believes-it-needs-13-million-in-nil-money-to-keep-its-football-roster-together-doug-lesmerises.html?utm\\_source=pocket\\_mylist](https://www.cleveland.com/osu/2022/06/ohio-state-believes-it-needs-13-million-in-nil-money-to-keep-its-football-roster-together-doug-lesmerises.html?utm_source=pocket_mylist) [https://perma.cc/CYX5-FW9R].

17. Jeremy Crabtree, *Oklahoma Men’s Basketball Signs Team-Wide NIL Deal with Crimson and Cream Collective*, ON3NIL (Oct. 18, 2022), <https://www.on3.com/nil/news/oklahoma-sooners-mens-basketball-team-signs-teamwide-nil-deal-with-crimson-and-cream-collective/> [https://perma.cc/HZ85-TZLD].

18. On3 Staff Report, *The On3 Guide to NIL Collectives Around the Nation*, ON3NIL (Aug. 25, 2022), <https://www.on3.com/nil/news/on3-guide-to-nil-collectives-around-the-nation/> [https://perma.cc/6BMT-3WRZ] (“Donor-led collectives are sweeping the nation, dramatically reshaping the NIL landscape.”).

19. Nakos, *supra* note 13; see also Dennis Dodd, *Inducement Concerns Fuel Fears for Coaches, Administrators amid \$8 Million Name, Image, and Likeness Deal*, CBS SPORTS (Mar. 21, 2022, 11:50 AM), <https://www.cbssports.com/college-football/news/inducement-concerns-fuel-fears-for-coaches-administrators-amid-8-million-name-image-and-likeness-deal/> [https://perma.cc/U87R-JYW5].

20. See Kristi Dosh, *Name, Image, and Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020, 1:22 PM), <https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/?sh=1633f0b87625>

Since the creation of the Interim NIL Policy, the NCAA has released two guidelines further defining NIL rules and regulations.<sup>21</sup> The entity charged with enforcing Title IX, the Department of Education’s Office for Civil Rights (OCR), has remained silent on Title IX’s application to NIL collectives.<sup>22</sup> While there has been no official guidance on Title IX’s application to NIL, some scholars have discussed potential Title IX issues with respect to NIL compensation.<sup>23</sup> Several scholars have argued that NIL grants women athletes the opportunity to “proactively manage their brands—and stop being forced to wait for athletic directors, who are mostly male—to recognize the value proposition their brands present.”<sup>24</sup> Other scholars have argued that NIL may create publicity implications.<sup>25</sup> For example, the quality and quantity of promotional material for men’s and women’s teams can influence the earning potential of the athletes’ NILs.<sup>26</sup> Many have urged that Title IX’s application to NIL is contingent on future national legislation.<sup>27</sup> However, there has been minimal discussion on Title IX’s application to donor-driven collectives.<sup>28</sup> Prompted by the 50<sup>th</sup> Anniversary of Title IX, this Note takes a proactive consideration of Title IX’s application to donor-driven NIL collective compensation. This Note suggests how the OCR, NCAA, and educational institutions can reinforce Title IX’s goals with respect to donor-driven collective NIL compensation.

This Note analyzes the application of Title IX to the recent developments in NIL compensation. It specifically focuses on the rapidly growing donor-driven collectives. Part I provides an overview of NIL, collectives, and Title IX. Part II discusses Title IX’s application to donor-driven collective NIL compensation. Part III reviews the potential issues with Title IX’s application to NIL. Part IV recommends solutions to correct the OCR’s current lack of guidance with respect to Title IX and NIL compensation.

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[<https://perma.cc/G3C9-GBB4>].

21. *See infra* Section I.E.

22. *See infra* Section II.

23. *See* Alicia Jessop & Joe Sabin, *The Sky is Not Falling: Why Name, Image, and Likeness Legislation Does Not Violate Title IX and Could Narrow the Publicity Gap Between Men’s Sport and Women’s Sport Athletes*, 31 J. LEGAL ASPECTS SPORT 253 (2021).

24. *Id.* at 282.

25. Dosh, *supra* note 20.

26. *Id.*

27. *Id.*

28. *See* Letter from Andrew Zimbalist, Ph.D., President, The Drake Group, to Dr. Miguel Cardona, Secretary of Education, et al., U.S. Dep’t of Educ. Off. for C.R., (Jan. 10, 2023), <https://www.thedrakegroup.org/wp-content/uploads/2023/01/FINAL-Drake-Letter-to-OCR-1-10-23-1.pdf> [<https://perma.cc/F77C-M7H9>].

## I. AN OVERVIEW OF NIL AND TITLE IX

### A. *Defining Name, Image, and Likeness*

In 1977, the Supreme Court recognized the right to publicity as a right granted under state law.<sup>29</sup> According to the Court, the First and Fourteenth Amendments did not allow a broadcast company to deprive an individual of his right to his own likeness.<sup>30</sup> Today, the right to publicity allows celebrities and professional athletes to license and monetize their name, image, and likeness (NIL) through sponsorships, brand deals, and other commercial opportunities.<sup>31</sup> Additionally, the right to publicity provides a mechanism for celebrities and professional athletes to protect their NILs from improper usage.<sup>32</sup> While celebrities and professional athletes have licensed, monetized, and protected their NILs over the past several years, the NCAA has prohibited student-athletes from commercializing their NILs under its rule of amateurism.<sup>33</sup>

### B. *Amateurism and the Restrictions on Student-Athlete Compensation*

The Inter-Collegiate Athletic Association, now the NCAA, was formed in 1906 to set and enforce rules for student-athletes.<sup>34</sup> One of the primary objectives of the NCAA was to uphold the principle of amateurism.<sup>35</sup> The 1906 Bylaws stated, “[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession.”<sup>36</sup> Students could remain amateurs only if the students did not receive compensation.<sup>37</sup>

For its first fifty years, the NCAA prohibited student-athletes from receiving

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29. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566 (1977).

30. *Id.* at 575.

31. See John T. Holden et al., *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports’ New Economic Frontier*, 57 GA. L. REV. 1, 13-16 (2022) (discussing modern right of publicity and right of publicity in sports).

32. Marc Edelman, *Closing the “Free Speech” Loophole: The Case for Protecting College Athletes’ Publicity Rights in Commercial Video Games*, 65 FLA L. REV. 553, 555 (2014) (“[C]ourts have generally disallowed the unlicensed, commercial use of celebrity likenesses.”).

33. *Id.* at 557 (citing NAT’L COLLEGIATE ATHLETIC ASS’N, 2011-2012 NCAA DIVISION I MANUAL (2011)).

34. *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> [<https://perma.cc/29T7-KLW3>] (last visited Feb. 2, 2023).

35. Robert Litan, *The NCAA’s “Amateurism” Rules: What’s in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), <https://www.milkenreview.org/articles/the-ncaas-amateurism-rules> [<https://perma.cc/S9YJ-CNSA>].

36. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2148 (2021) (citing Intercollegiate Athletic Ass’n of the United States Constitution By-Laws, Art. VII, § 3 (1906)).

37. *Id.*; Litan, *supra* note 35.

financial assistance of any kind under its amateurism principle.<sup>38</sup> In 1956, the NCAA allowed student-athletes to receive some “grant-in-aid,” but only for educational and incidental expenses.<sup>39</sup> Any other payment of compensation to student-athletes was a violation of the amateurism principle and could result in ineligibility.<sup>40</sup> While the NCAA received resistance to its amateurism principle, the NCAA claimed that the amateurism principle maximized fan interest<sup>41</sup> and that student-athletes were “students first, athletes second.”<sup>42</sup>

Over time, the NCAA developed more exceptions to amateurism.<sup>43</sup> Olympic athletes could receive compensation as long as all payments were for educational expenses.<sup>44</sup> Tennis players could receive professional prize money while still retaining their scholarships.<sup>45</sup> Other exceptions included competition awards valued at several hundred dollars for athletic performance, cash stipends, and unlimited meals and snacks.<sup>46</sup> While the NCAA changed its position on grant-in-aid and created some narrow exceptions to its restriction on compensation, it generally prohibited student-athletes from receiving compensation for the use of their NILs.<sup>47</sup>

### C. *The Downfall of the Amateurism Principle*

Although the amateurism principle was a foundational part of the NCAA, many interested parties have heavily criticized and challenged amateurism over the past several years.<sup>48</sup> In 2008, Ed O’Bannon discovered his likeness had been

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38. Litan, *supra* note 35.

39. *Id.*

40. *Amateurism*, NCAA, <https://www.ncaa.org/sports/2014/10/6/amateurism.aspx> [<https://perma.cc/DLH2-C7V2>] (last visited Feb. 2, 2023); *see also* Arianna Banks, *The Supreme Court Gets the Ball Rolling: NCAA v. Alston and Title IX*, 117 NW. U. L. REV. 549, 555 (2022) (“Eligibility relies on academic compliance and, critically, amateurism, the oft-debated ‘bedrock principle’ of college athletics.”).

41. *See* O’Bannon v. Nat’l Collegiate Athletic Ass’n, 802 F.3d 1049, 1058 (9th Cir. 2015) (“[A]mateurism is a key driver of college sports’ popularity with consumers and fans.”); *see also* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/PS65-CELX>] (discussing creation of term “student-athlete” as defense to workmen’s-compensation lawsuit in 1950s).

42. *Play Division I Sports*, NCAA, <https://www.ncaa.org/sports/2014/10/24/play-division-i-sports.aspx> [<https://perma.cc/V3TJ-TC4N>] (last visited Jan. 31, 2023).

43. Litan, *supra* note 35.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *See* Branch, *supra* note 41 (“But the real scandal is the very structure of college sports, wherein student-athletes generate billions of dollars for universities and private companies while earning nothing for themselves.”).

depicted in a college basketball video game without his consent and without compensation.<sup>49</sup> O'Bannon sued the NCAA, alleging that the NCAA's amateurism rules were an illegal restraint of trade under the Sherman Act.<sup>50</sup> The Ninth Circuit Court of Appeals upheld the district court's decision that the NCAA's ban on student-athlete compensation was a violation of federal antitrust law.<sup>51</sup> However, the Ninth Circuit stated that the NCAA cured the antitrust harm by allowing universities to offer their student-athletes compensation up to the full cost of attendance.<sup>52</sup>

In 2019, a class of current and former student-athletes brought an antitrust lawsuit against the NCAA, challenging the NCAA's restrictions on education-related benefits.<sup>53</sup> The district court struck down as unlawful the NCAA's rules limiting the education-related benefits that institutions could offer student-athletes.<sup>54</sup> After the Ninth Circuit affirmed, the Supreme Court granted certiorari and upheld the district court's findings.<sup>55</sup> Although *Alston* did not specifically discuss NIL, the decision signaled the end of NCAA restrictions on student-athlete benefits, including NIL compensation.<sup>56</sup>

Before *Alston*, several states, educational institutions, and advocates had opposed the NCAA's amateurism principle and restrictions on compensation.<sup>57</sup> In 2019, California passed the Fair Pay to Play Act.<sup>58</sup> The purpose of the Fair Pay to Play Act was to grant student-athletes the right to commercialize their NILs.<sup>59</sup> The bill's goal is stated in the preamble: to "ensure appropriate protections are in place to avoid the exploitation of student-athletes."<sup>60</sup> California State Senator Steven Bradford stated that the bill "addresses this civil rights issue of today, which is about fairness and equity. Our colleges should no longer treat student-athletes as chattel, but as the valued individuals they are."<sup>61</sup> The NCAA Board of

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49. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).

50. *Id.*

51. *Id.* at 1079.

52. *Id.*

53. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021).

54. *Id.* at 2146.

55. *Id.*

56. Tom Wright-Piersanti, *Change Comes to the N.C.A.A.*, N.Y. TIMES (June 22, 2021), <https://www.nytimes.com/2021/06/22/briefing/ncaa-scotus-ruling.html> [<https://perma.cc/FQ5R-L3FY>].

57. See Adam Harris, *The Experiment Podcast: The NCAA Sold Fans a Multibillion-Dollar Story. It May Finally Be Coming Apart*, ATLANTIC (July 29, 2021), <https://www.theatlantic.com/podcasts/archive/2021/07/ncaa-supreme-court-ruling-student-athlete-exploitation/619571/> [<https://perma.cc/UAF6-4X8S>].

58. Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act', NANCY SKINNER (Sept. 30, 2019), <https://sd09.senate.ca.gov> [<https://perma.cc/A9VJ-YT2J>].

59. Cal. Educ. Code § 67456 (2023).

60. Tan Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 15 (Feb. 1, 2021) (quoting S.B. 206 (Cal. 2019)).

61. Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act', *supra* note 58.

Governors sent a letter in opposition to the Governor of California.<sup>62</sup> The NCAA claimed the bill would “erase the critical distinction between college and professional athletics” and referred to the bill as “harmful” and “unconstitutional.”<sup>63</sup> Despite the NCAA’s opposition, the Governor signed the bill.<sup>64</sup> *Alston*, California’s Fair Pay to Play Act, and other similar state NIL laws ultimately led to the NCAA’s acceptance of NIL compensation.<sup>65</sup>

On June 30, 2021, the NCAA approved an Interim NIL Policy (the “Interim Policy”) which permitted student-athletes to receive NIL compensation.<sup>66</sup> The Interim Policy stated that student-athletes could engage in NIL activities that were “consistent with the law of the state where the school is located.”<sup>67</sup> If there was no NIL state law in the state where the college was located, student-athletes could engage in NIL activities if the activities did not violate the Interim Policy.<sup>68</sup> The Interim Policy also stated that students “should” report their NIL activities to their university and “could” engage with professional service providers in their NIL activities.<sup>69</sup>

#### *D. The Growth of Collectives and Boosters*

After the NCAA released the Interim Policy, the world of college athletics was transformed by the development of collectives.<sup>70</sup> Collectives (referred to by the NCAA as “NIL entities”) are business entities created for the purpose of funding and providing NIL compensation for college athletes.<sup>71</sup> Collectives have been categorized into three different forms: marketplace collectives, donor-driven collectives, and dual collectives.<sup>72</sup> Marketplace collectives serve as a meeting

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62. Letter from NCAA Board of Governors to Gavin Newsom, Governor, The State of California (Sept. 11, 2019), <https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx> [<https://perma.cc/G4NQ-2CAD>].

63. *Id.*

64. *Gov. Newsom Signs SB 206, the ‘Fair Pay to Play Act’*, *supra* note 58.

65. Tim Tucker, *NIL Timeline: How We Got Here and What’s Next*, ATLANTA J.-CONST. (May 5, 2023), <https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/> [<https://perma.cc/3PHL-2LJ3>]; Braly Keller, *NIL Incoming: Comparing State Laws and Proposed Legislation*, OPENDORSE (June 23, 2022), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/> [<https://perma.cc/UMC6-NLY8>].

66. Hosick, *supra* note 7.

67. *Id.*

68. *Id.*

69. *Id.*

70. Nakos, *supra* note 13.

71. *NCAA Takes Aim at Booster-Backed “Collectives” and Their NIL Deals*, DAVIS+GILBERT LLP (June 22, 2022), <https://www.dglaw.com/ncaa-takes-aim-at-booster-backed-collectives-and-their-nil-deals/> [<https://perma.cc/DR63-TLXA>].

72. Nakos, *supra* note 13.

place for student-athletes and prospective businesses and sponsors.<sup>73</sup> Donor-driven collectives pool money together from boosters and other supporters to give to student-athletes.<sup>74</sup> Dual collectives combine marketplace and donor-driven qualities into one collective.<sup>75</sup> The most popular type of collective is the donor-driven collective.<sup>76</sup> Typically, donor-driven collectives are formed by “boosters” of a specific institution.<sup>77</sup>

A booster is defined by the NCAA as “an individual, independent agency, or corporate entity who is known by a member of the institution’s athletics administration to have participated in, or to be a member of, an agency or organization promoting the school’s intercollegiate athletics program.”<sup>78</sup> Before the era of NIL compensation, boosters contributed significant donations to institutions and their athletic programs.<sup>79</sup> The NCAA has guidelines for boosters, describing both permissible activities and impermissible activities.<sup>80</sup> Impermissible activities included contacting prospective student-athletes on or off campus or providing “extra benefits” for enrolled student-athletes.<sup>81</sup> Permissible activities included making “contributions to university programs and other gift-in-kind arrangements” and “attend[ing] university athletic events and show[ing] student-athletes you support their hard work and dedication to the university.”<sup>82</sup>

Most founders of the new donor-driven collectives are old friends of the intercollegiate athletic programs.<sup>83</sup> The first collective, the Gator Collective, was formed just a month after the NCAA adopted its Interim Policy.<sup>84</sup> On July 1, 2022, there were more than 120 collectives known or in the process of being formed, and this number continues to grow.<sup>85</sup> The rest of this Note focuses solely on donor-driven collectives, as this type of collective is the most popular and has

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73. *Id.*

74. *Id.* (“They basically wash the donor money, paying these players in an NCAA-compliant manner.”).

75. *Id.*

76. *Id.* (“Donor-driven collectives . . . [are] the most common setup.”).

77. *Id.* (“These collectives are pooling together booster and supporter funds and creating opportunities for athletes to give the money back to them.”).

78. *Id.*; see also *Role of Boosters*, NCAA, <https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx> [<https://perma.cc/P7T2-9959>] (last visited Jan. 31, 2023).

79. See Tyler Maxwell, *50 Impactful Athletic Boosters in College Athletics*, SILVER WAVES MEDIA (Oct. 27, 2021, 9:00 AM), [https://www.silverwavesmedia.com/news\\_article/show/1180447](https://www.silverwavesmedia.com/news_article/show/1180447) [<https://perma.cc/6JBT-HKCG>]; see also Charlotte Franklin, *Title IX Administers A Booster Shot: The Effect of Private Donations on Title IX*, 16 NW. J. L. & SOC. POL’Y 145, 146 (2021) (“[B]ooster clubs and private donors play a particularly significant role in supporting student programs.”).

80. *Role of Boosters*, *supra* note 78.

81. *Id.*

82. *Id.*

83. Nakos, *supra* note 13.

84. *Id.*

85. *Id.*



received the most criticism thus far.<sup>86</sup>

#### *E. Additional NCAA Guidance*

In May 2022, the Division I (DI) Board of Directors for the NCAA issued additional NIL guidance to its member institutions (the “May Guidelines”).<sup>87</sup> The May Guidelines recognize the prominence of collective and booster involvement in NIL compensation.<sup>88</sup> The May Guidelines state that collectives’ missions are to “promote and support a specific NCAA institution by making available NIL opportunities to prospective student-athletes (PSA) and student-athletes (SAs) of a particular institution.”<sup>89</sup> The May Guidelines also state that “NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to a NIL agreement as opposed to providing compensation or incentives for enrollment decisions . . . , athletic performance . . . , achievement . . . , or membership on a team.”<sup>90</sup> In the May Guidelines, the NCAA focused mostly on preventing booster and collective interaction with prospective student-athletes and did not provide much guidance for current student-athletes.<sup>91</sup>

In October 2022, the Division I Board of the NCAA approved “clarifications” for the Interim Policy (the “October Guidelines”).<sup>92</sup> Those clarifications focused on “how the current rules relate to Division I member schools’ involvement in NIL activities.”<sup>93</sup> The October Guidelines provide more specific information on what NIL activities are permissible and impermissible for institutions.<sup>94</sup>

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86. See, e.g., Jared Yaggie, *The New Wild West: An Update to the Existing NIL Environment in College Sports*, U. CIN. L. REV. BLOG (Oct. 4, 2022), <https://uclawreview.org/2022/10/04/an-update-to-the-existing-nil-environment/> [<https://perma.cc/BD92-BLLT>] (“The donor-driven collective model has drawn the most criticism and is likely to be the source for the first legal actions taken against the NIL industry[.]”).

87. Michelle Brutlag Hosick, *DI Board of Directors Issues Name, Image, and Likeness Guidance to Schools*, NCAA (May 9, 2022), <https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx>. [<https://perma.cc/9L7K-2RM2>].

88. NCAA, INTERIM NAME, IMAGE, AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT 1 (2022), <https://image.mail2.ncaa.com/lib/fe5715707d6d067e7c1c/m/7/38f59518-6731-4fde-983a-310d6468ef8f.pdf> [<https://perma.cc/8RLA-ZSWK>] [hereinafter MAY GUIDELINES].

89. *Id.*

90. *Id.* at 2.

91. *Id.* at 1-3.

92. Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022, 1:21 PM), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx> [<https://perma.cc/5K4Z-7VFB>].

93. *Id.*

94. NCAA, NCAA DIVISION I INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE’S NAME, IMAGE, AND LIKENESS ACTIVITIES 1 (2022), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL\\_InstitutionalInvolvementNILActivities.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf) [<https://perma.cc/8W74-M9NS>] [hereinafter OCTOBER

Permissible activities include providing information to student-athletes about opportunities, engaging with collectives, arranging spaces for collectives and students to meet, and promoting student-athletes' NIL activities.<sup>95</sup> Impermissible activities include communicating a student athlete's specific request for compensation, providing services to support the collective, or allowing student-athletes to promote their NIL activity while on call for required athletically related activities.<sup>96</sup>

#### *F. Title IX Discussion*

Title IX of the 1972 Education Amendments declares “[n]o person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”<sup>97</sup> Legislators explicitly included intercollegiate athletics in Title IX, requiring that “[a] recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.”<sup>98</sup> To prove a prima facie case under Title IX, the plaintiff must establish that: “(1) an educational program or activity is involved; (2) the defendant entity is a recipient of federal funds; and (3) discrimination occurred on the basis of sex in the provision or non-provision of the educational program or activities.”<sup>99</sup>

In 1979, a Policy Interpretation (the “1979 Policy Interpretation”) specified three areas of Title IX compliance: (1) athletic financial assistance; (2) athletic benefits and opportunities; and (3) student interest and abilities.<sup>100</sup> For athletic financial assistance, “to the extent that a recipient awards athletic scholarship or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.”<sup>101</sup>

For athletic benefits and opportunities, a list of ten nonexclusive factors determines whether equal opportunities exist.<sup>102</sup> Title IX requires that the

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#### GUIDELINES].

95. *Id.*

96. *Id.*

97. 20 U.S.C. § 1681(a).

98. 34 C.F.R. § 106.41 (2022).

99. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 et. seq. (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86) [hereinafter 1979 Policy Interpretation].

100. *Id.*

101. § 106.37(c).

102. *Id.* § 106.41(a) (“(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) [t]he provision of equipment and supplies; (3) [s]cheduling of games and practice time; (4) [t]ravel and per diem allowance (5) [o]pportunity to receive coaching and academic tutoring; (6) [a]ssignment and compensation of coaches and tutors; (7) provision of locker rooms, practice, and competitive facilities; (8) provision

provided benefits and opportunities are equivalent in terms of “kinds, quality, or availability,” but does not require equal expenditures on men’s and women’s benefits and opportunities.<sup>103</sup>

For student interests and abilities, a three-part test is applied.<sup>104</sup> The institution must satisfy at least one part of the test to comply with Title IX.<sup>105</sup>

*I. Previous Third-Party Funding by Boosters.*—Title IX applies to educational institutions that receive federal funding.<sup>106</sup> Institutions must ensure equitable financial assistance, equitable benefits and opportunities, and equally accommodate students’ interests and abilities pursuant to the 1979 Policy Interpretation.<sup>107</sup> However, Title IX and the 1979 Policy Interpretation do not address a crucial part of institutional athletic programs: third-party booster funding.<sup>108</sup> Both the courts and OCR have evaluated Title IX’s application to third-party funding in *Daniels v. School Board of Brevard City*, *Chalenor v. University of North Dakota*, and OCR Compliance Reviews.<sup>109</sup>

*a. Daniels v. School Board of Brevard County.*—In *Daniels*, members of a high school girls varsity team sued the School Board alleging a Title IX violation caused by disparities between the girls softball program and the boys baseball program.<sup>110</sup> The School Board argued that the School Board could not be “responsible if the fund-raising activities of one booster club are more successful than those of another.”<sup>111</sup> The court rejected this argument and stated that it was the “Defendant’s responsibility to ensure equal athletic opportunities, in

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of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) publicity.”).

103. 1979 Policy Interpretation, *supra* note 99, at 71,415 (“Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.” . . . “[A] finding of compliance may still be justified if the differences are the result of nondiscriminatory factors.”).

104. *Id.* at 71,418.

105. *Id.*

106. *Id.*

107. *Id.*

108. Letter from John E. Palomino, Regional Civil Rights Director, U.S. Dep’t of Educ., Off. for C.R., to Karen Gilyard, Esq., Atkinson, Andelsn, Loya, Ruud & Romo (Feb. 7, 1995), <https://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html> [<https://perma.cc/3W63-M9T7>] (“This letter will address the remaining unresolved issue: whether the obligation . . . applies to those services, benefits, and opportunities that are provided through the use of ‘outside’ financial assistance such as donations, fund-raising by coaches, and booster clubs.”).

109. *See id.*; *see also* *Daniels v. Sch. Bd. of Brevard Cnty.*, 985 F. Supp. 1458 (M.D. Fla. 1997); *see also* *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002); *see also* Compliance Resolution, Thomas J. Hibino, Regional Director, U.S. Dep’t of Educ., Off. for C.R., Region I, to Dr. Dorothy Galo, Superintendent, Hingham Public School District (Oct. 26, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01105003-a.html> [<https://perma.cc/BX4X-T465>] [hereinafter *Hingham Compliance Letter*].

110. *Daniels*, 985 F. Supp. at 1459.

111. *Id.* at 1462.

accordance with Title IX. This funding system is one to which the Defendant has acquiesced; Defendant is responsible for the consequences of that approach.”<sup>112</sup> The court found that the School Board was accountable for the School Board’s failure to fix the fund-raising disparities between the teams.<sup>113</sup>

*b. Chalenor v. University of North Dakota.*—In *Chalenor*, a group of male student wrestlers sued the University of North Dakota, alleging that the elimination of the university wrestling program violated Title IX.<sup>114</sup> The United States District Court granted the university’s summary judgment motion, and the student wrestlers appealed to the Eighth Circuit.<sup>115</sup> The student wrestlers argued that the elimination of the men’s wrestling team was sex discrimination forbidden by Title IX.<sup>116</sup> The university claimed that continuing the men’s wrestling program would result in men student-athletes receiving a disproportionately large share of the athletic budget compared to women student-athletes.<sup>117</sup> As a result, continuing to fund the men’s wrestling team would have discriminated against women.<sup>118</sup> The student wrestlers countered, arguing that the university could have used private donor funding for the wrestling program instead of canceling the entire program to comply with Title IX.<sup>119</sup>

The Eighth Circuit rejected the student wrestlers’ argument and stated that once an institution receives monetary donations, the donations become “public money, subject to Title IX’s legal obligations in their disbursement.”<sup>120</sup> According to the court, “the District Court correctly concluded: A school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guise of ‘outside funding.’”<sup>121</sup> Under *Chalenor*, an institutional athletic program cannot avoid its Title IX requirements by using private donor funding.<sup>122</sup>

*c. Office for Civil Rights Compliance Reviews.*—Outside the courts, OCR considered Title IX’s application to third-party donations and funding for institutional athletics programs.<sup>123</sup> A 1995 letter from the Regional Civil Rights Director of the Office for Civil Rights (the “Letter”) directly addressed Title IX’s obligation to ensure equivalent services, benefits, and opportunities are provided to men and women.<sup>124</sup> This obligation applies to the use of “‘outside’ financial

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112. *Id.*

113. *Id.*

114. *Chalenor*, 291 F.3d at 1043.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1048.

121. *Id.*

122. *Id.*

123. See Letter from John E. Palomino, *supra* note 108.

124. *Id.*

assistance such as donations, fund-raising by coaches, and booster clubs.”<sup>125</sup>

OCR issued the Letter as part of a final determination of a complaint against the Jurupa Unified School District (“Jurupa Unified”).<sup>126</sup> The complaint alleged, among other things, that Jurupa Unified failed to provide equivalent services, benefits and opportunities in the interscholastic athletics programs at Rubidoux High School.<sup>127</sup> OCR found that Jurupa Unified failed to provide equivalent benefits and services to girl and boy athletes in violation of Title IX.<sup>128</sup> In response, Jurupa Unified argued that it had “no obligation or authority to monitor athletic income or expenditures from private sources . . . that it is not responsible for private activities and, further, that [Jurupa Unified’s] oversight in this area would inhibit private fundraising initiatives.”<sup>129</sup> OCR found that “[Jurupa Unified’s] position as to its obligations is not acceptable under Title IX.”<sup>130</sup> Instead, Jurupa Unified had the responsibility under Title IX to ensure that both programs receive equivalent services, benefits, and opportunities, regardless of their source.<sup>131</sup> OCR explained that “[i]f all benefits are not considered in examining interscholastic athletics, the purpose and effect of the Title IX requirements could be routinely undermined by the provision of unequal benefits through private financial assistance.”<sup>132</sup> While the Letter acknowledged that this policy may discourage private financial assistance and fundraising efforts, OCR could not “diminish the protection of Title IX by exempting benefits, treatment, services, or opportunities provided to athletes through the use of private funds.”<sup>133</sup>

OCR restated Title IX’s application to third-party funding in other compliance reviews.<sup>134</sup> In 2010, OCR investigated Hingham Public School District’s (“Hingham”) provision of equal opportunity to participate in interscholastic athletics for male and female athletes.<sup>135</sup> Upon completion of the investigation, OCR sent a Compliance Resolution to Hingham’s Superintendent.<sup>136</sup> The Compliance Resolution stated:

OCR considers benefits and services provided through the use of private funds, including booster club funding, in combination with all other benefits and services. Where booster clubs provide benefits or services that assist only teams of one sex, the district must ensure that teams of the other sex receive equivalent benefits and services. If booster clubs

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See, e.g.,* Hingham Compliance Letter, *supra* note 109.

135. *Id.*

136. *Id.*

provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.<sup>137</sup>

2. *Conflicts Between Institutions and Boosters.*—“[T]he OCR and federal courts have consistently ruled that the origins of the money that created the inequities does not serve as a defense for the district and does not mitigate the obligation to remedy those inequities.”<sup>138</sup> Title IX’s application to third-party funding is not a new concept.<sup>139</sup> The institution is responsible for ensuring adequate support of both men’s and women’s sports, regardless of where the funding originates.<sup>140</sup>

As a result of Title IX requirements, many booster clubs and institutions have experienced conflict over third-party funding and resources earmarked for a specific team.<sup>141</sup> Upon receiving booster funding, the institution is responsible for determining whether the funding causes disparate athletic opportunities and experiences among men and women.<sup>142</sup> If inequalities exist, institutions can choose to allocate more funds to the less-supported sex, seek to control the booster budget, or reject the booster club donations.<sup>143</sup> Sometimes, boosters resist working with the institution as the boosters want to assert complete control over the donations.<sup>144</sup> These boosters may attempt to skirt athletic directors and administrators, and instead, work directly with the athletics teams.<sup>145</sup> However, an athletic team’s acceptance of a donation means “the school itself is also accepting that donation, regardless of whether the athletic department or institution is involved in the process.”<sup>146</sup>

To maintain control of third-party donations and remain compliant with Title IX, the institution must self-regulate and manage its boosters.<sup>147</sup> Many institutions

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137. *Id.*

138. Lee Green, *Title IX Compliance - Part II: The Eleven Areas of Other Athletic Benefits*, NAT’L FED’N OF STATE HIGH SCHOOL ASSN’S (Mar. 14, 2022), <https://www.nfhs.org/articles/title-ix-compliance-part-ii-the-eleven-areas-of-other-athletics-benefits/> [<https://perma.cc/49EC-QH2G>].

139. *See id.*

140. Peter S. Finley, *Title IX and Booster Club Management: Expert’s Suggestions for Managing Challenging Scenarios*, 16 *ESSAYS EDUC.* 3-4 (2006).

141. *See id.* (“When it was suggested the district should have oversight for expenditures, the booster president responded ‘We’re not anxious to give away control of our club to the district. No way.’”).

142. *Id.*

143. *Id.*

144. Franklin, *supra* note 79, at 155.

145. *Id.*

146. *Id.* (internal citations omitted).

147. *Id.*; *see also* Finley, *supra* note 140 (“[W]hen a football team won a state title, it was lavished in gifts at an extravagant banquet through booster donations. When the girls’ cross country team won the state title the athletic director had to draw money from the general budget to provide

have resources on their websites to assist in booster compliance.<sup>148</sup> Additionally, the NCAA has a set of rules that help protect institutions from the unilateral acts of boosters.<sup>149</sup> A violation of the rules may “jeopardize a student-athlete’s eligibility for intercollegiate competition, jeopardize a school membership status with the NCAA or cause a booster to lose access to all booster benefits.”<sup>150</sup> The NCAA booster rules and institutional resources help assert control over boosters by setting clear boundaries for prospective boosters and their donations.<sup>151</sup>

### *G. New Third-Party Payments by NIL Collectives*

NIL compensation opened a new door for boosters. In the past, NCAA regulations and institutions required boosters to refrain from communicating with both prospective and current student-athletes.<sup>152</sup> Now, instead of providing funding to an institution’s athletic program, the boosters can either individually, or through a collective, provide NIL compensation directly to the student-athletes.<sup>153</sup> In the May Guidelines, the NCAA clarified that boosters are still prohibited from engaging in recruiting activities for prospective athletes.<sup>154</sup> However, boosters and collectives are able to work directly with current student-athletes to provide NIL compensation as long as the NIL is not “contingent on initial or continuing enrollment at a particular institution” and the NIL is based on “an independent, case by case analysis of the value that each athlete brings to a NIL agreement as opposed to providing compensation or incentives for enrollment decisions . . . , athletic performance . . . , achievement . . . [,] or membership on a team.”<sup>155</sup>

Boosters and collectives have taken advantage of this opportunity, giving large sums of NIL compensation to student-athletes.<sup>156</sup> The University of Texas-Austin boosters pledged to “blindly give” \$50,000 to each offensive lineman for future charity work through the Texas Collective, Horns with Heart.<sup>157</sup> Southern Methodist University’s (SMU) collective, the Boulevard Collective, is paying every SMU football and men’s basketball player \$36,000 for the 2022-23

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an equitable experience.”).

148. See, e.g., *Booster FAQ*, UNIV. OF GA. ATHLETIC ASS’N COMPLIANCE DEPART. (2020), <https://compliance.sports.uga.edu/boosters-alumni-fans/booster-faq/> [<https://perma.cc/792Z-2ATB>].

149. See *Role of Boosters*, *supra* note 78.

150. *Id.*

151. See *id.*; see also Franklin, *supra* note 79, at 155.

152. See *Role of Boosters*, *supra* note 78.

153. Nakos, *supra* note 13.

154. MAY GUIDELINES, *supra* note 88.

155. *Id.*

156. On3 Staff Report, *supra* note 14.

157. Darren Rovell, *New Texas Booster Fund Highlights Major Flaws in NIL System*, ACTION NETWORK (Dec. 8, 2021), <https://www.actionnetwork.com/ncaaf/new-texas-booster-fund-highlights-major-flaws-in-nil-system> [<https://perma.cc/D6NH-EDMC>].

season.<sup>158</sup> Miami billionaire, John Ruiz, has spent about seven million dollars on NIL deals, with the majority of deals going to Miami Hurricanes football players.<sup>159</sup> Although some women student-athletes are receiving NIL compensation, the majority of donor-driven collective NIL compensation benefits men student-athletes—specifically men’s basketball and football student-athletes.<sup>160</sup> The rest of this Note focuses on Title IX’s application to donor-driven collective NIL compensation. This analysis will help determine the proper recourse for women student-athletes experiencing financial inequities based on sex in donor-driven collective NIL compensation.

## II. APPLYING TITLE IX TO COLLECTIVE NIL COMPENSATION

While the NCAA has released guidance on NIL compensation, the NCAA has not elaborated on the potential Title IX implications of NIL compensation.<sup>161</sup> In the October Guidelines, the NCAA stated that “institutions should consult legal counsel regarding other issues that may stem from institutional involvement in NIL activities, such as the potential for contractual nonperformance, Title IX and employment related matters.”<sup>162</sup> In April 2023, NCAA president Charlie Baker supported national NIL legislation and stated that “[t]he Office [for] Civil Rights would say right now that if a collective is affiliated . . . with a college or university then they need to be spending as much money on women’s sports as they spend on men’s sports and as much money on women athletes as they spend on men athletes.”<sup>163</sup> However, the NCAA is not in charge of enforcing Title IX.<sup>164</sup>

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158. Ross Dellenger, *The Other Side of the NIL Collective*, *College Sports’ Fast-Rising Game Changer*, SPORTS ILLUSTRATED (Aug. 10, 2022), <https://www.si.com/college/2022/08/10/nil-collectives-boosters-football-tennessee-daily-cover> [<https://perma.cc/93KB-R79N>].

159. *Id.*

160. Amanda Christovich, *NIL Collectives Are Slacking on Supporting Women’s Sports*, FRONT OFF. SPORTS (Jan. 10, 2023, 12:29 PM), <https://frontofficesports.com/collectives-womens-sports/> [<https://perma.cc/RQX9-RPCP>]; see also Julie Sommer, *Women’s College Sports Are Breaking Records. Do NIL Collectives Care?*, SPORTICO (May 24, 2023, 8:30 AM), <https://www.sportico.com/leagues/college-sports/2023/womens-college-nil-collectives-1234723732/> [<https://perma.cc/YXN5-CS9H>] (“77% of all NIL funding went to male athletes . . . [F]ewer than 35% of all collectives provide any resources to women athletes.”).

161. Letter from Andrew Zimbalist, *supra* note 28 (“[T]here was no guidance as to how the schools might satisfy Title IX[.]”).

162. OCTOBER GUIDELINES, *supra* note 94.

163. Eric Prisbell, *NCAA President Warns NIL Could Lead to Title IX Implications for School-Affiliated Collectives*, ON3NIL (Apr. 26, 2023), <https://www.on3.com/nil/news/ncaa-president-warns-nil-could-lead-to-title-ix-implications-for-school-affiliated-collectives/> [<https://perma.cc/DG42-B948>].

164. *Title IX Frequently Asked Questions*, NCAA, <https://www.ncaa.org/sports/2014/1/27/title-ix-frequently-asked-questions.aspx#enforce> [<https://perma.cc/944S-MJG6>] (last visited Feb. 2, 2023).



Rather, OCR is responsible for ensuring institutions comply with Title IX.<sup>165</sup> OCR's website states that "OCR vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from the Department comply with the law."<sup>166</sup> Additionally, the website states that "OCR provides information and guidance to schools, universities and other educational institutions and agencies to assist them in voluntarily complying with the law."<sup>167</sup> Currently, OCR has not released any information or guidance on Title IX's application to NIL compensation.<sup>168</sup>

The following subsections discuss that Title IX should apply to donor-driven collective NIL compensation for two reasons: (1) NIL compensation should be categorized as an athletic benefit and opportunity under 34 CFR § 106.41(c) and the 1979 Policy Interpretation, and (2) Title IX applies to third-party funding under current law and legal precedent.

#### *A. NIL Compensation Is an Athletic Benefit under Title IX*

Under Title IX, there are three areas of athletic compliance: (1) student interest and abilities; (2) athletic benefits and opportunities; and (3) financial assistance.<sup>169</sup> Of the three areas, athletic benefits and opportunities fits best with donor-driven collective NIL compensation.<sup>170</sup> Student interest and ability addresses access to athletic participation.<sup>171</sup> To receive NIL compensation, the student-athlete must participate on an athletic team already.<sup>172</sup>

Financial assistance provides that "the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates."<sup>173</sup> Institutions satisfy Title IX's financial assistance if "schools award roughly equivalent amounts, or if a disparity can be explained by legitimate nondiscriminatory factors."<sup>174</sup> The NCAA defines scholarships as "funds provided in exchange for 'athletics ability, participation, or achievement' to assist in paying educational costs."<sup>175</sup> Under the NCAA's current definition,

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165. 1979 Policy Interpretation, *supra* note 99, at 71,418; *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html#](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html#) [<https://perma.cc/UX2N-BMS7>].

166. *Title IX and Sex Discrimination*, *supra* note 165.

167. *Id.*

168. See Letter from Andrew Zimbalist, *supra* note 28 ("We seek only that OCR promulgate clear guidance as to what does, or does not, implicate Title IX concerns in the new NIL space.").

169. 34 C.F.R. § 106.41 (2020).

170. See Boston, *supra* note 60, at 23-24 (explaining how NIL compensation differs from athletic scholarships and student participation).

171. *Id.* at 24-25.

172. *Id.*

173. *Id.* (quoting 1979 Policy Interpretation, *supra* note 99).

174. *Id.* at 23 (citing 1979 Policy Interpretation, *supra* note 99).

175. *Id.* at 27 (quoting NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION 1 MANUAL §

NIL compensation avoids “pay-for-play” and thus NIL compensation does not fit within financial assistance.<sup>176</sup>

The athletic benefits and opportunities portion of Title IX lists ten factors to help evaluate compliance.<sup>177</sup> Additionally, compliance with athletic benefits and opportunities under Title IX is not limited to the listed ten factors.<sup>178</sup> Rather, the Title IX Athletics Regulation states that “[i]n determining whether equal opportunities are available the Director will consider, among other factors” and then lists the ten factors.<sup>179</sup> If an athletic benefit does not fit perfectly into the ten listed factors in the Title IX Athletics Regulation, the list “may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.”<sup>180</sup>

NIL compensation is not currently on the list of ten factors discussed in the Title IX Athletic Regulation or the 1979 Policy Interpretation, as NIL compensation is new to intercollegiate athletics.<sup>181</sup> However, a comparison of NIL compensation to some of the currently listed benefits suggests that NIL compensation qualifies as an athletic benefit and opportunity.<sup>182</sup> One factor, “assignment and compensation of coaches and tutors,” is very similar to NIL compensation.<sup>183</sup> Both NIL compensation and coach and tutor compensation are “monetary payments that ultimately inure to the benefit of the student-athletes.”<sup>184</sup> Arguably, NIL compensation confers a more substantial benefit on student-athletes than the benefit conferred by coach and tutor compensation. In NIL compensation, student-athletes are directly receiving the compensation.<sup>185</sup> In compensation of coaches and tutors, student-athletes indirectly receive the benefit of academic and athletic instruction through the institution’s compensation of tutors and coaches.<sup>186</sup> If coach compensation and tutor compensation are considered athletic benefits to student-athletes, NIL compensation should be considered a benefit to student-athletes as well.<sup>187</sup> Therefore, NIL compensation is an athletic benefit and opportunity under Title IX.

### *B. Title IX Applies to Third-Party Donations*

Title IX applies to educational institutions that receive federal funding.<sup>188</sup> NIL

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15.02.5.1 (2019)).

176. *Id.*; see also OCTOBER GUIDELINES, *supra* note 94.

177. 34 C.F.R. § 106.41 (2020); see also *supra* text accompanying note 100.

178. § 106.41.

179. *Id.*

180. 1979 Policy Interpretation, *supra* note 99.

181. See § 106.41; see also 1979 Policy Interpretation, *supra* note 99.

182. See Boston, *supra* note 60, at 26.

183. See § 106.41; see also Boston, *supra* note 60, at 26.

184. Boston, *supra* note 60, at 26.

185. *Id.*; see *supra* Section I.G.

186. Boston, *supra* note 60, at 26.

187. *Id.*

188. 20 U.S.C. § 1681.

compensation is the payment to student-athletes from third parties for the student-athletes NIL.<sup>189</sup> Therefore, one might logically think that Title IX does not govern NIL compensation. Many academics have supported this proposition.<sup>190</sup> However, a deeper look at Title IX case law and OCR interpretations refutes this non-application of Title IX.<sup>191</sup> The OCR and federal courts have held that Title IX applies to third-party funding.<sup>192</sup> Institutions are accountable for their failure to correct the discrepancies in third-party funding.<sup>193</sup> While Title IX cannot control the third party, Title IX applies against the institution whose student-athletes are receiving compensation from third parties.<sup>194</sup> NIL compensation is just a new form of third-party funding. Institutions may not escape liability by blaming donor-driven collectives.

*C. Acknowledging the Differences Between Third-Party Funding and Donor-Driven Collective NIL Compensation*

Although NIL compensation has the qualities of an athletic benefit and opportunity under Title IX and Title IX has previously addressed third-party funding, three factors distinguish third-party funding and current donor-driven collective NIL compensation. Those three include: (1) the recipient of the NIL compensation, (2) the lack of institutional involvement in NIL compensation, and (3) the quid-pro-quo structure of NIL compensation.<sup>195</sup> These three differences receive discussion in the following subsections.

*1. The Recipient.*—One of the main differences between prior third-party donations and NIL compensation is the recipient of the money. In third-party

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189. See *supra* Section I.A.

190. See, e.g., Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. SPORTS & ENT. L. 175, 198 (2021) (“[T]hird parties would not trigger Title IX scrutiny because they are not educational institutions.”).

191. See *supra* Section I.F.1.

192. See *supra* Section I.F.1.

193. See *supra* Section I.F.1.

194. See *supra* Section I.F.1.

195. See John Allgood, *Paying Student-Athletes Fundamentally Changes College Sports – and Maybe Not for the Best*, PHILA. INQUIRER (Oct. 5, 2019), <https://www.inquirer.com/opinion/commentary/ncaa-california-ruling-student-athletes-endorsement-paid-20191005.html> [<https://perma.cc/5FYW-RDFM>] (“This is not a Title IX issue as the compensation is not coming from universities themselves[.]”); see also Nick Bromberg, *SEC Commissioner ‘Concerned’ Women’s Sports Could Lose Funding If Prominent Male Athletes Generate Significant Endorsements*, YAHOO SPORTS (July 1, 2020), <https://www.yahoo.com/now/sec-commissioner-concerned-womens-sports-could-lose-funding-if-prominent-male-athletes-generate-significant-endorsements-171623674.html> [<https://perma.cc/5U2A-52B4>] (“[I]f colleges get involved, which I don’t think anybody on this panel supports, then we’d have a Title IX problem—a direct Title IX problem.”).

funding, student-athletes did not receive money directly.<sup>196</sup> Instead, the third-party donations went to the institution's athletic program to be distributed to the athletic teams.<sup>197</sup> In contrast, NIL compensation directly benefits the student-athletes and not the institution's athletic department or athletic teams.<sup>198</sup>

Arguably, the only difference between NIL compensation and prior third-party funding is the direct nature of the benefit for the student-athlete.<sup>199</sup> While the prior third-party donations were indirectly benefiting the student-athlete by providing the athletic program and teams with the funding for equipment, facilities, etc., NIL compensation directly benefits the student-athlete by providing the student-athletes with monetary compensation.

2. *The Institution's Involvement.*—Another difference between NIL compensation and third-party funding is the extent of the institution's involvement. Since institutions are not directly allocating funds from the donor-driven collective to the student-athlete, some scholars argue that institutions are not involved in NIL compensation and therefore Title IX should not apply.<sup>200</sup>

Institutional involvement in donor-driven collectives has increased since the release of the NCAA October Guidelines.<sup>201</sup> The October Guidelines set out directly what is permissible with respect to institutional involvement in NIL compensation.<sup>202</sup> The permissible NIL activities for institutions include engaging collectives to inform student-athletes of opportunities, providing information to student-athletes about NIL collectives, facilitating meetings between donors and NIL collectives, and promoting student-athlete NIL activities.<sup>203</sup> The NCAA has clearly permitted institutional involvement in NIL compensation and institutions have “wasted little time throwing their support behind the groups that have become college sports’ key driving force in recruiting.”<sup>204</sup>

After the NCAA released the October Guidelines, Kansas State University's football coach and basketball coach appeared in an advertisement for the Wildcats

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196. See *supra* Section I.F.1.; see also Franklin, *supra* note 79, at 154 (discussing role of boosters and third-party funding).

197. See *supra* Section I.F.1.

198. See *supra* Section I.F.1.

199. See *supra* Section I.F.1.; see Boston, *supra* note 60.

200. See, e.g., Yasser & Fox, *supra* note 190, at 199 (“These third parties would not trigger Title IX scrutiny because they are not educational institutions. While NCAA’s Title IX concerns regarding ‘pay-to-play’ are legitimate and not a ‘red herring,’ the issue is moot regarding Third Party Payments.”).

201. See, e.g., Jeremy Crabtree, *Athletic Officials Realize Its Time to Support NIL Collectives or Get Left Behind*, ON3NIL (Nov. 14, 2022), <https://www.on3.com/nil/news/more-and-more-athletic-officials-throwing-support-behind-nil-collectives-tennessee-kansas-state-colorado-oregon-state-kentucky-wisconsin-oklahoma/> [<https://perma.cc/MCH7-YXUT>] (“When the NCAA clarified its interim NIL policy in late October, it opened the door for schools, athletic department officials and coaches to official endorse booster-run collectives.”).

202. OCTOBER GUIDELINES, *supra* note 94.

203. *Id.*

204. Crabtree, *supra* note 201.

NIL Collective.<sup>205</sup> The University of Wisconsin Athletic Director announced support for the Varsity Collective.<sup>206</sup> The UCLA Athletic Director posted a letter encouraging NIL opportunities and endorsed several different collectives.<sup>207</sup> The Ohio State Football coach stated that he needed thirteen million dollars to keep the football roster intact.<sup>208</sup> Athletic programs and coaches have become more open and vocal about supporting the donor-driven collectives connected to their institutions.<sup>209</sup> While these institutions may not be allocating the NIL compensation directly, many institutions are playing a key role in donor-driven collectives.<sup>210</sup>

Some institutions may try to avoid Title IX scrutiny by ignoring the donor-driven collectives and taking a hands-off approach.<sup>211</sup> However, the School Board tried that strategy in *Daniels* and failed.<sup>212</sup> The *Daniels* court held that the third-party donations were a funding system to which the School Board “acquiesced.”<sup>213</sup> Thus, the School Board was still “responsible for the consequences of that approach.”<sup>214</sup> The “hands-off approach” is just institutional toleration of discriminatory NIL compensation.<sup>215</sup>

3. *The Structure.*—For prior third-party donations, the boosters provided funding to the institution with the goal of helping the athletics programs and student-athletes succeed.<sup>216</sup> There was no quid-pro-quo. In contrast, NIL compensation affords someone the right to use the student-athletes NIL.<sup>217</sup> The

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205. *Id.*

206. *Id.*

207. Amanda Christovich, *Before Signing Day, ADs Asked Donors to Contribute to NIL Collectives*, FRONT OFF. SPORTS (Dec. 21, 2022), <https://frontofficesports.com/ads-asked-contribute-to-nil-collectives/> [<https://perma.cc/4A93-UEJY>].

208. Lesmerises, *supra* note 16.

209. Crabtree, *supra* note 201.

210. *Id.*

211. See Andy Wittry, *Iowa, Kentucky, Ohio State Show Tension Between Collectives, Schools*, ON3NIL (Jan. 18, 2023), <https://www.on3.com/nil/news/iowa-swarm-collective-nil-gary-barta-kirk-ferentz-brad-heinrichs-kentucky-ohio-state-the-foundation/> [<https://perma.cc/R8L6-QFLH>] (discussing University of Kentucky’s measured approach to NIL and collectives).

212. *Daniels v. Sch. Bd. of Brevard Cnty.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) (“The Defendant suggests that it cannot be held responsible if the fund-raising activities of one booster club are more successful than those of another.”); see also *supra* Section I.F.1.a.

213. *Daniels*, 985 F. Supp. at 1462.

214. *Id.*

215. See Hingham Compliance Letter, *supra* note 109 (“If booster clubs provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.”).

216. *Role of Boosters*, *supra* note 78; see also Franklin, *supra* note 79, at 154 (“[T]he role of boosters is to provide ‘student-athletes with a positive experience through their enthusiastic efforts,’ which include ‘contributions to university programs and other gift-in-kind arrangements.’”).

217. See *supra* Section I.A.

NCAA's May Guidelines state, "NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions, . . . athletic performance, . . . or membership on a team."<sup>218</sup> This provision ensures student-athletes are not engaging in "pay-to-play" or recruitment incentives.<sup>219</sup> However, many have expressed skepticism on whether institutions and donor-driven collectives are actually following these restrictions.<sup>220</sup>

Some donor-driven collectives provide NIL compensation in return for student-athlete charity work, appearances, autographs, etc.<sup>221</sup> Some donor-driven collectives have directed NIL compensation to student-athletes without suggesting or acknowledging any specific NIL activity in return.<sup>222</sup> Many coaches and NCAA leaders claim that NIL is just "pay-for-play" and "improper inducements" in disguise.<sup>223</sup> Ole Miss Coach Lane Kiffin stated "NIL has a lot to do with where players go. To not think that is crazy. There are schools with no shot to recruit certain players . . . They're going to go where they get paid most. You've legalized paying players."<sup>224</sup>

Several donor-driven collectives have expressly stated the collective's misguided missions and goals. They indicate the collective's intent to support the athletics teams and institution.<sup>225</sup> Founder of the Hoosier Hysterics NIL Collective stated in an interview that "[w]e want current players and recruits to know that if you come to Indiana, and stay at Indiana, the fanbase has your back."<sup>226</sup> This mission bears no relationship to NIL. The Home of the Brave's website states that the collective is "created by a group of fans, alumni, and business leaders dedicated to the success of the Bradley University Men's Basketball program and passionate about supporting our student-athletes and the Greater Peoria area."<sup>227</sup> Again, this mission has nothing to do with NIL.

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218. MAY GUIDELINES, *supra* note 88, at 2.

219. *Id.* at 1.

220. See Jeremy Crabtree, *NCAA's Attempt to Nix Pay-For-Play NIL Deals Not A 'Significant Step Forward'*, ON3NIL (May 10, 2022), <https://www.on3.com/nil/news/ncaas-attempt-to-nix-pay-for-play-nil-deals-not-a-significant-step-forward/> [<https://perma.cc/8MWR-7VRT>].

221. *Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS (Oct. 4, 2023), <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> [<https://perma.cc/K4JM-R5WF>] (see descriptions of "How it Works" in list of NIL Collectives by School).

222. *Id.*

223. Crabtree, *supra* note 220.

224. *Id.*

225. Dellenger, *supra* note 158 ("Donor-led collectives are pushing the sport toward a more professionalized model, blurring the lines between endorsement contracts and employment deals.").

226. Jeff Rabjans, *New NIL Initiative The Hoosier Hysterics NIL Collective*, 247SPORTS (Aug. 23, 2021, 12:30 PM), <https://247sports.com/college/indiana/Article/New-NIL-initiative-The-Hoosier-Hysterics-NIL-Collective-169529715/> [<https://perma.cc/8FYZ-FBJK>].

227. HOME OF THE BRAVE, <https://hotbrave.com/> [<https://perma.cc/ZDB9-D9BK>] (last visited

Clemson's Dear Old Collective provides options on its website to "contribute to football" or "contribute to women's sports" by selecting a monthly or yearly subscription model.<sup>228</sup> These collectives ignore NIL.

It appears that several donor-driven collectives are not interested in receiving any return value or benefit from the student-athlete.<sup>229</sup> Instead, these donor-driven collectives are financially supporting entire athletics teams and institutions through the guise of supporting individual athletes.<sup>230</sup> NIL compensation may appear different from third-party booster funding because of NIL's theoretical quid-pro-quo structure. But in practice, donor-driven collective NIL compensation is just discriminatory third-party booster funding with a new name.

#### *D. Title IX Should Apply to Donor-Driven Collective NIL Compensation*

34 C.F.R. § 106.41 states that "a recipient which operates or sponsors interscholastic, intercollegiate, club or intermural athletics shall provide equal athletic opportunity for members of both sexes."<sup>231</sup> Title IX case law indicates that an institution cannot escape liability for the differences in benefits provided to its student-athletes "through the guise of 'outside funding.'"<sup>232</sup> Thus, institutions may be held accountable for disparities created by third parties.

While NIL compensation may not go directly towards an institutional athletic team's equipment, supplies, facilities, etc., the NIL compensation is still providing a direct benefit to student-athletes.<sup>233</sup> There may be some differences between third-party funding and donor-driven collective NIL compensation, but these differences are insignificant. Minor changes in the recipient, institutional involvement, or structure of the funding do not impact Title IX's application to an athletic benefit under the 1979 Policy Interpretation. Under current law, Title IX applies to donor-driven collective NIL compensation. If donor-driven collective NIL compensation creates inequities in the benefits and opportunities enjoyed by men and women, institutions must remedy the inequities or face Title IX sanctions for their failure to do so.

### III. ISSUES IN THE APPLICATION OF TITLE IX TO DONOR-DRIVEN COLLECTIVES

Despite Title IX's application to donor-driven collective NIL compensation, OCR has not enforced Title IX with respect to NIL compensation.<sup>234</sup> The reason for OCR's lack of action is unknown. However, there are some practical issues accompanying Title IX's application to donor-driven collective NIL

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Feb. 3, 2023).

228. *Doing NIL the Clemson Way!*, DEAR OLD CLEMSON (2022), <https://www.dearoldclemson.com/> [<https://perma.cc/J99L-BKT3>].

229. *See* Nakos, *supra* note 13; *see also supra* text accompanying notes 226-28.

230. *See* Christovich, *supra* note 207; *see also* Christovich, *supra* note 15.

231. 34 C.F.R. § 106.41 (2022).

232. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1048 (8th Cir. 2002).

233. *See supra* Section II.C.1.

234. *See* Letter from Andrew Zimbalist, *supra* note 28.

compensation. This section discusses potential problems with Title IX's application to NIL compensation as an athletic benefit.

*A. Current Pressure on Institutions to Participate in NIL Compensation*

OCR has provided no information or guidance on Title IX's application to NIL compensation.<sup>235</sup> Some institutions are cautious toward donor-driven collectives and NIL compensation due to potential compliance concerns.<sup>236</sup> However, “[w]hen schools decline to work closely with collectives, uproar occurs.”<sup>237</sup> For example, former West Virginia University Athletic Director Shane Lyons discussed his conflict with the West Virginia collective, Country Roads Trust.<sup>238</sup> The ratio of men and women athletes participating in the Country Roads Trust is almost two to one.<sup>239</sup> Lyons resisted involvement with the collective because of Title IX implications.<sup>240</sup> Lyons stated that he was “not going to cross the line in order to jeopardize the integrity of the department.”<sup>241</sup> While some institutions attempt to avoid donor-driven collectives, “such . . . abstinence is more theoretical than actual, as most schools are generally wading, if not swimming, in NIL waters in hopes (and fears) of keeping their athletic programs competitive in the NIL environment.”<sup>242</sup> Although some athletic departments express concern for Title IX, the departments receive external pressure from fans, collectives, and the NIL market to participate in NIL activities.<sup>243</sup>

*B. What Can Institutions Do to Comply with Title IX?*

Academic institutions lack compliance mechanisms to control donor-driven NIL compensation. Before NIL, when third-party funding created an imbalance between men's and women's athletic benefits, institutions responded by either (1)

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235. *Id.*

236. See Brad McElhinny, *As Former AD Lyons Underscored, Colleges Face Balancing Act on NIL and Title IX*, METRONNEWS (Jan. 15, 2023, 7:41 AM), <https://wvmetronews.com/2023/01/15/as-former-ad-lyons-underscored-colleges-face-balancing-act-on-nil-and-title-ix/> [<https://perma.cc/DV9C-W8QM>]; see also Marisa Ingemi, *NIL Collectives Leave Women's Sports Behind, and No One Knows How to Fix It*, S.F. CHRON. (Mar. 6, 2023), <https://www.sfchronicle.com/sports/college/article/nil-collective-women-ncaa-17782408.php> [<https://perma.cc/YM8G-HFNZ>].

237. Alex Kirshner, *'Everything's on Fire': NIL Collectives Are the Latest Patchwork Solution for College Athlete Pay*, GLOB. SPORT MATTERS (Jan. 17, 2023), <https://globalsportmatters.com/business/2023/01/17/nil-collectives-latest-patchwork-solution-college-athlete-pay/> [<https://perma.cc/GL7P-BCGX>].

238. McElhinny, *supra* note 236.

239. *Id.*

240. *Id.*

241. *Id.*

242. Jonathan L. Israel & Nicole M. Marschean, *Giving Title IX Its Props in the NIL Era of College Sports*, FOLEY & LARDNER LLP (Jan. 27, 2023), <https://www.foley.com/en/insights/publications/2023/01/giving-title-ix-props-nil-era-college-sports> [<https://perma.cc/RSH3-56J2>].

243. McElhinny, *supra* note 236.



rejecting the donation (2) working a compromise with the third-party booster or (3) using the institution's funds to balance out the donation.<sup>244</sup> For example, if a booster offered five million dollars earmarked for the men's basketball team, the institution could take the time to investigate the donation's impact on men and women student-athletes and choose one of the three solutions.<sup>245</sup> The institution had some leverage to negotiate and control the booster's actions.<sup>246</sup>

Currently, the institutions can attempt to educate donor-driven collectives about Title IX and encourage them to provide equal NIL compensation for all student-athletes.<sup>247</sup> However, the collective may refuse to allocate the NIL compensation in a Title IX-compliant manner.<sup>248</sup> Institutions may not compensate student-athletes directly under the current prohibition on "pay-for-play."<sup>249</sup> Moreover, institutions cannot invalidate the agreements between donor-driven collectives and student-athletes.<sup>250</sup> Thus, the institution's only recourse is to offer alternative benefits and opportunities for the underfunded athletes, typically women. Institutions with limited resources may struggle to balance NIL compensation from well-funded donors.

#### IV. RESOLVING THE CONFLICT BETWEEN COLLECTIVE NIL COMPENSATION AND TITLE IX

Currently, donor-driven collectives and student-athletes are enjoying the free market of NIL compensation.<sup>251</sup> Student-athletes are marketing themselves through social media, participating in brand deals, and making appearances at events.<sup>252</sup> Some of these activities recognize NIL's true intent: allowing athletes to commercialize their right to publicity and receive compensation for their NIL.<sup>253</sup> However, donor-driven collectives have transformed NIL compensation

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244. Franklin, *supra* note 79, at 158-59; *see also* Finley, *supra* note 140.

245. *See supra* Section 1.F.2.

246. *Id.*

247. *See* Ingemi, *supra* note 236 ("Its news release announcement of the collective partnership includes endorsement from men's basketball coach Herb Sendek along with women's soccer coach Jerry Smith, giving equitable treatment to it publicly.").

248. *See* Bruce Schoenfeld, *Student Athlete Mogul?*, N.Y. TIMES MAG. (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/magazine/ncaa-nba-student-athlete.html> [<https://perma.cc/QJ8S-DJS2>] ("[S]he worries that donations that previously helped fund the field hockey team will end up going to collectives. 'If donors want to give their money to that big star quarterback, they're going to[.]'").

249. OCTOBER GUIDELINES, *supra* note 94, at 1.

250. *See* Ingemi, *supra* note 236 (discussing Stanford's approach to collectives).

251. *See* Dan Whateley & Colin Salao, *How College Athletes Are Getting Paid from Brand Sponsorships as NIL Marketing Takes Off*, BUS. INSIDER (Dec. 19, 2022, 10:58 AM), <https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12> [<https://perma.cc/4K5P-BX6F>].

252. *Id.*

253. *See supra* Section I.C.

into improper disguises for pay-for-play, inducements, and third-party booster funding.<sup>254</sup>

In the current NIL landscape, donor-driven collectives are disproportionately benefiting football and men's basketball athletes and largely ignoring women's athletics.<sup>255</sup> Collectives account for about fifty percent of total NIL compensation.<sup>256</sup> However, only thirty-four percent of collectives have offered compensation to women student-athletes.<sup>257</sup>

The NCAA informed institutions of the "permissible" and "impermissible" NIL activities and set boundaries for boosters and collectives.<sup>258</sup> The NCAA indicated that Title IX may apply to some NIL compensation.<sup>259</sup> The responsibility of Title IX enforcement falls on the OCR.<sup>260</sup> Without OCR guidance on NIL compensation, student-athletes have limited knowledge of Title IX's application to NIL compensation.

Although OCR has not issued any guidance on NIL compensation, institutions know or should know about Title IX and its application to third-party donations.<sup>261</sup> Institutions must not use OCR's failure to enforce Title IX as a scapegoat.<sup>262</sup> Institutions and athletic departments have fifty years of Title IX experience.<sup>263</sup> This Note will not tolerate institutional failure to acknowledge Title IX's application to NIL compensation. Instead, institutions should demand OCR action and guidance.

By failing to take a position on donor-driven collectives, OCR encourages the current willful blindness to sex discrimination in intercollegiate athletics. The following subsections address recommendations to solidify Title IX's application to donor-driven NIL compensation and ensure equity in men's and women's sports.

#### *A. OCR Must Provide Guidance and Enforce Title IX*

OCR must hold institutions and donor-driven collectives accountable for their current shortcomings. "The federal government has never brought a single enforcement action against a school for violating Title IX. Most coaches, parents,

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254. Crabtree, *supra* note 220.

255. Letter from Andrew Zimbalist, *supra* note 28.

256. Christovich, *supra* note 160.

257. *Id.*

258. *See supra* Section I.E.

259. *Id.*; Prisbell, *supra* note 163.

260. 1979 Policy Interpretation, *supra* note 99; *see also* Letter from Andrew Zimbalist, *supra* note 28 (Although NCAA does not enforce Title IX, NCAA failure to enforce rules permits sex discrimination. OCR should consider NCAA obligation to regulate sex discrimination).

261. Letter from Andrew Zimbalist, *supra* note 28 ("The 'Wild West' scene we see today, involving compensation for athletes' names, images, and likenesses, has simply provided the schools an opportunity to feign ignorance or confusion as to the implications for women athletes.").

262. *Id.*

263. 50 YEARS OF TITLE IX: WE'RE NOT DONE YET, *supra* note 1.

and students don't know their rights. So lawsuits are not filed unless schools do something egregious enough to get girls and women angry . . . . Then females sue—and they win.”<sup>264</sup> OCR has been unreliable in the proactive and consistent enforcement of athletic Title IX violations.<sup>265</sup> Since OCR acts only when individuals demand action, this Note directly demands that OCR take action to remedy these violations.

OCR must pay attention to significant disparities in donor-driven NIL compensation by closely following donor-driven collectives and institutions. An example of an ongoing Title IX violation is Butler University. Butler University Vice President and Director of Athletics, Barry Collier, specifically endorsed and promoted Butler's donor-driven collective, “All Good Dawgs.”<sup>266</sup> All Good Dawgs states on its website that “[a]ll unrestricted donations will be utilized to support Men's Basketball Student Athletes. Donors may restrict funds to be used to support specific sports and/or specific Student Athletes.”<sup>267</sup> In this case, an educational program or activity is clearly involved, as Butler student-athletes are receiving NIL compensation from All Good Dawgs, and Butler University has expressly supported All Good Dawgs.<sup>268</sup> Additionally, Butler University is a recipient of federal funding.<sup>269</sup> Although the specific monetary amount of All Good Dawg's funding is not publicly accessible, the donor-driven collective appears to discriminate on the basis of sex by allocating all “unrestricted donations” to the men's basketball team.<sup>270</sup> OCR must recognize the Title IX violations in donor-driven collectives such as Butler's All Good Dawgs and hold the institutions accountable.

### *B. Social Pressure on OCR, Institutions, and Donor-Driven Collectives*

Until OCR acknowledges the current discrimination by donor-driven collectives, this Note encourages feminist advocacy groups to support women

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264. Arthur H. Bryant, *Title IX at 40: Most Schools Still Aren't in Compliance*, CHRISTIAN SCI. MONITOR (June 27, 2012), <https://www.csmonitor.com/Commentary/Opinion/2012/0627/Title-IX-at-40-Most-schools-still-aren-t-in-compliance> [<https://perma.cc/5NF6-7M59>].

265. *Id.*; see also *What is Title IX?*, WOMEN'S SPORT FOUND. (Sept. 10, 2019), <https://www.womenssportsfoundation.org/advocacy/what-is-title-ix/#:~:> [<https://perma.cc/6FHC-LE5W>] (“Despite the fact that most estimates are that 80 to 90 percent of all educational institutions are not in compliance with Title IX as it applies to athletics, such withdrawal of federal moneys has never been initiated.”).

266. John Dedman, *AD's Corner by Barry Collier*, BUTLER SPORTS (Nov. 23, 2022, 1:33 PM), <https://butlersports.com/news/2022/11/23/general-ads-corner-by-barry-collier.aspx> [<https://perma.cc/KC4A-AX3D>].

267. *Frequently Asked Questions*, ALL GOOD DAWGS, <https://www.allgooddawgs.org/faqs> [<https://perma.cc/KLS6-EZYU>] (last visited Feb. 2, 2022).

268. *Id.*; Dedman, *supra* note 266.

269. *External Grants*, BUTLER UNIVERSITY, <https://www.butler.edu/academics/sponsored-programs/external-grants/> [<https://perma.cc/8Q9G-N9T7>] (last visited Mar. 11, 2023).

270. ALL GOOD DAWGS, *supra* note 267.

athletics and publicize the blatant discrimination by donor-driven collectives. In 2021, a member of the University of Oregon women's basketball team posted a TikTok comparing the resources at the men's and women's basketball tournaments.<sup>271</sup> While the men's tournament had a fully stocked weight room, the women's tournament had a small rack of dumbbells and a couple of yoga mats.<sup>272</sup> More women athletes shared photos and videos of food, swag bags, and other athletic resources, creating a "firestorm of attention to the discrepancies."<sup>273</sup> In response to the public pressure, the NCAA apologized and attempted to correct the discrepancies between the student-athletes.<sup>274</sup> The chair of the NCAA Committee on Women's Athletics wrote a letter to the NCAA President discussing how the situation "undermined the NCAA's authority as a proponent and guarantor of Title IX protections."<sup>275</sup> Additionally, a group of 36 House Democrats requested a review of "all other championship competitions to ensure that they adhere to the gender equity principles of Title IX."<sup>276</sup> The next day, the NCAA retained a law firm to conduct an external gender equity review.<sup>277</sup>

Even after fifty years of Title IX, organizations such as the NCAA require social pressure before providing equitable resources to women student-athletes.<sup>278</sup> While the resource disparities were disheartening, this situation serves as an example of the power of social media.<sup>279</sup> A single TikTok created a significant discussion on the unequal treatment of student-athletes.<sup>280</sup> This Note encourages feminist advocacy groups to take a similar approach. These groups should use social media to promote the disparities in donor-driven collective NIL compensation. OCR, institutions, and donor-driven collectives may respond to the social pressure and enforce Title IX with respect to donor-driven NIL compensation.

### *C. Supporting Women Athletes Through Advocacy*

Feminists must also support women student-athletes through advocacy beyond social media. The Drake Group Inc. is an organization created "to end the academic corruption in college sport."<sup>281</sup> The Drake Group is outspoken on Title

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271. Maggie Mertens, *The Title IX Loophole that Hurts NCAA Women's Teams*, ATLANTIC (Apr. 1, 2021), <https://www.theatlantic.com/culture/archive/2021/04/march-madness-could-spark-title-ix-reckoning/618483/> [<https://perma.cc/8T4P-6MTN>].

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See id.*

279. *See id.*

280. *Id.*

281. *History*, THE DRAKE GROUP, INC., <https://www.thedrakegroup.org/about/history> [<https://perma.cc/PYV4-WV3Z>] (last visited Oct. 2, 2023).

IX's application to NIL compensation and published a Position Statement on NIL and Title IX in October 2021.<sup>282</sup> In January 2023, the Drake Group sent a letter to OCR inquiring about Title IX's application to NIL compensation, specifically focusing on collectives.<sup>283</sup> The letter expressed concern for the current state of NIL compensation and requested that "OCR promulgate clear guidance as to what does, or does not, implicate Title IX concerns in the new NIL space."<sup>284</sup> The Drake Group is one of the few groups acknowledging and advocating for the same concerns addressed in this Note. Feminists should support the Drake Group's activism and write additional letters to OCR and other federal officials demanding action against donor-driven collective discrimination.

#### *D. Fair Play for Women Act*

The government's lack of action may change with the recent introduction of the "Fair Play for Women Act" on December 20, 2022.<sup>285</sup> This bill acknowledges the current disparities in collegiate athletics and states that the "magnitude of current gaps in intercollegiate participation . . . is likely undercounted."<sup>286</sup> This bill aims at ensuring gender equity in institutional athletics by providing OCR with more mechanisms to enforce Title IX compliance.<sup>287</sup> The mechanisms include increasing reporting on Title IX compliance, authorizing OCR to levy fines on non-compliant institutions, giving students a private right of action for all Title IX claims and lawsuits, and increasing Title IX training for student-athletes, athletic departments, and other interested parties.<sup>288</sup>

This bill will incentivize institutions to comply with and enforce Title IX, as the new reporting requirements will increase public access to relevant Title IX information. OCR will be better equipped to hold institutions accountable for their Title IX violations. However, the Fair Play for Women Act must pass first. This Note advocates for the passage of this bill and encourages other interested parties to rally support behind this crucial piece of legislation.

#### CONCLUSION

In his *Alston* dissent, Justice Kavanaugh posed the question: "How would any

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282. THE DRAKE GROUP, INC., POSITION STATEMENT 1 (2021), <https://www.thedrakegroup.org/wp-content/uploads/2021/10/10-12-21-Position-Statement-Title-IX-and-NILs-1.pdf> [<https://perma.cc/BDM6-5E6P>].

283. Amanda Christovich, *Advocacy Group Asks DOE to Fix Gender Inequities in NIL*, FRONT OFF. SPORTS (Jan. 17, 2023), <https://frontofficesports.com/drake-group-nil/> [<https://perma.cc/SRT7-5EUN>]; see also Letter from Andrew Zimbalist, *supra* note 28.

284. Letter from Andrew Zimbalist, *supra* note 28, at 2.

285. *Murphy, Adams Introduce Legislation to Promote Gender Equity in Sports*, CHRIS MURPHY (Dec. 20, 2022), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-adams-introduce-legislation-to-promote-gender-equity-in-sports> [<https://perma.cc/FM53-7NNH>].

286. Fair Play for Women Act, S. 5307, 117th Cong. (2022).

287. *Murphy, Adams Introduce Legislation to Promote Gender Equity in Sports*, *supra* note 285.

288. *Id.*

compensation regime comply with Title IX?<sup>289</sup> The NIL era of intercollegiate athletics is two years old, yet OCR has failed to address Title IX. OCR's failure has allowed institutions to remain willfully blind to sex discrimination by donor-driven collectives and boosters. This Note argues that donor-driven collective NIL compensation should be subject to Title IX.

OCR must release updated information on Title IX and its application to NIL compensation. OCR must create an approach to hold institutions accountable but also recognize the limits of an institution's control over donor-driven collectives. Until OCR acts, feminists must use social pressure and other forms of advocacy to publicize and criticize the inequities facilitated by donor-driven collectives, institutions, and male student-athletes. Under the current interpretation of Title IX, Title IX should apply to donor-driven compensation. Institutions, student-athletes, donor-driven collectives, and boosters must abide by Title IX. Title IX is not a mere recommendation. Title IX is the law.

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289. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J. concurring).