

# IF SHARING REVENUE IS THE GOAL, TITLE IX SHOULD NOT APPLY TO HOUSE NIL AGREEMENTS

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## *Abstract*

*The Supreme Court's decision in National Collegiate Athletic Association v. Alston marked a shift in the history of intercollegiate athletics, effectively ending the era of the unpaid amateur student-athlete. As Justice Kavanaugh stated in his concurrence, "The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. . . . But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing." This history appeared to drive the justification and structure of the House Settlement. In approving the settlement, Judge Wilken recognized the settlement will "enable NCAA schools to share their athletic revenues with Division I college student-athletes for the first time in the history of the NCAA." This goal is being accomplished by allowing Division I schools to enter into name, image, and likeness (NIL) agreements directly with their student-athletes up to a cap of \$20.5 million per year across all programs.*

*An unresolved question is whether the Title IX regulations governing athletic scholarships apply to these NIL agreements. Some argue that schools are required to distribute NIL funds to male and female student-athletes equitably based on their respective participation rates, similar to the rules governing athletic scholarships. However, NIL agreements are commercial and compensatory in nature and fundamentally different from scholarships. Moreover, the vast majority of intercollegiate athletic revenue is generated by football and men's and women's basketball. If Title IX were to apply to NIL agreements, the remedial purpose of sharing revenue to address the concerns identified by Judge Kavanaugh in Alston would be severely hampered. Instead, the revenue-generating athletes would again be precluded from receiving just compensation for the use of their NIL to generate billions of dollars. Such a result is not required by Title IX, nor should it be. Rather, schools and their student-athletes should be able to enter into NIL agreements that recognize the revenue-generation and market reality of each particular sport by sharing revenue with those student-athletes whose NIL are actually used to generate that revenue.*

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## TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>179</b>
<b>I. TITLE IX AND ITS REGULATIONS.....</b>	<b>180</b>
A. 34 C.F.R. § 106.37(c).....	180
B. 34 C.F.R. § 106.41(c).....	181
<b>II. COMMENTARY ON THE REGULATIONS .....</b>	<b>182</b>
A. 1979 POLICY INTERPRETATION.....	182
1. <i>Athletic Financial Assistance</i> .....	182
2. <i>Other Athletic Benefits and Opportunities</i> .....	183
a. Compensation of Coaches.....	184
b. Publicity.....	185
c. Recruitment.....	185
d. Provision of Support Services.....	186
3. <i>Authority Section</i> .....	187
B. ADDITIONAL GUIDANCE AND THE BIDEN ADMINISTRATION FACT SHEET .....	187
C. TRUMP ADMINISTRATION'S RESCISSION OF OCR'S FACT SHEET.....	190
<b>III. TITLE IX REGULATIONS GOVERNING ATHLETIC SCHOLARSHIPS AND BENEFITS SHOULD NOT APPLY TO NIL AGREEMENTS.....</b>	<b>190</b>
A. NIL AGREEMENTS ARE NOT "FINANCIAL ASSISTANCE" .....	191
B. NIL AGREEMENTS ARE NOT "SCHOLARSHIPS AND GRANTS-IN-AID" .....	193
1. <i>NIL Agreements Are Neither a Scholarship nor a Grant-in-Aid</i> .....	193
2. <i>There Is a Common Understanding that NIL Revenue Is Different from Scholarships and Grants-in-Aid</i> .....	195
C. NIL AGREEMENTS SHOULD NOT BE CONSIDERED A "BENEFIT" UNDER 34 C.F.R. § 106.41(c) . . . .	196
<b>IV. CONCLUSION.....</b>	<b>199</b>

## INTRODUCTION

For decades, the National Collegiate Athletic Association (NCAA) has restricted what compensation and benefits intercollegiate student-athletes are allowed to receive based on the model of the amateur student-athlete. However, in the past five years, the NCAA and intercollegiate athletics has experienced extraordinary challenges to historical norms, catalyzed by the Supreme Court's unanimous decision in *Alston v. NCAA*.<sup>1</sup> Following the Court's holding that certain of the NCAA's restrictions on educational benefits violate antitrust law, a host of changes have occurred in intercollegiate athletics. These changes have given rise to a myriad of legal questions across numerous areas of the law, including antitrust, labor, employment, and Title IX.

At the forefront of this new era are name, image, and likeness (NIL) agreements, which were first offered to student-athletes by third parties, including "collectives" founded by a schools' boosters, alumni, and supporters, that pooled donor money to create NIL opportunities for that schools' student-athletes. During the first few years of the post-*Alston* NIL era, third-party and collective NIL agreements, combined with the liberalization of transfer rules and the advent of the transfer portal, created an entirely new marketplace for athletic talent. Up to this point, the NCAA continued to prohibit NIL agreements or other compensation agreements directly between schools and student-athletes, beyond the traditional scholarship model, along with limited additional education-related payments (e.g., the \$5,980 annual *Alston* payments). This limitation did not last long.

On June 6, 2025, U.S. District Court Judge Claudia Wilken issued her order granting final approval of the settlement of multiple antitrust cases brought against the NCAA and the major conferences (known as the *House Settlement*, after the lead case).<sup>2</sup> Under the *House Settlement*, Division I schools are now allowed to enter into NIL agreements directly with their student-athletes, with the total amount of such NIL agreements not to exceed a \$20.5 million cap across a school's sports programs for the first year (2025–26), with the cap increasing thereafter based on the growth in athletic revenues for conference defendant member institutions. While the *House Settlement* and resulting NIL agreements have provided new economic opportunities for both student-athletes and institutions of higher education, they also have raised several legal concerns, many of which remain unresolved.

This article addresses the extent to which Title IX regulations apply to the NIL agreements between schools and student-athletes under the *House Settlement*. While Title IX regulations govern financial assistance and certain benefits and opportunities in college athletics,<sup>3</sup> Judge Wilken expressly declined to address the

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1 594 U.S. 69 (2021).

2 *In re College Athlete NIL Litigation*, Case No. 20-cv-03919 CW, 2025 WL 1675820 (N.D. Cal. June 6, 2025) (order granting final approval to settlement).

3 See 34 C.F.R. § 106.37(c) (2025); 34 C.F.R. § 106.41(c) (2025).

application of Title IX to the *House Settlement*.<sup>4</sup> This article addresses the matter in two parts. First, the article summarizes the law and regulations relevant to the application of Title IX to NIL agreements as well as guidance on these regulations. Second, the article argues that the Title IX regulations governing athletic scholarships do not apply to NIL agreements between schools and student-athletes.

## I. TITLE IX AND ITS REGULATIONS

Title IX of the Education Amendments of 1972 (Title IX) is a relatively brief statute that prohibits sex discrimination in federally funded educational institutions. The relevant prohibition states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” except in specified exceptional circumstances.<sup>5</sup> These exceptions include, among other things, admissions at institutions that traditionally admit only one sex, institutions with contrary religious tenets, military academies, fraternities and sororities, scholarships based on “beauty pageants,” and separate living facilities.<sup>6</sup> Furthermore, the law makes clear that the definition of “program or activity” is to be interpreted broadly and includes “all operations of ... a college, university, or other postsecondary institution, or a public system of higher education.”<sup>7</sup>

While the statute does not directly address intercollegiate athletics or sports, Title IX’s implementing regulations address athletic programs at institutions of higher education and related financial assistance. The requirements are set forth in two primary sections of the Department of Education’s implement regulations—34 C.F.R. § 106.37(c) and 34 C.F.R. § 106.41(c).<sup>8</sup>

### A. 34 C.F.R. § 106.37(c)

34 C.F.R. § 106.37 governs the provision of “financial assistance” to students and prohibits an institution from discriminating on the basis of sex by providing different amount or types of financial assistance, limiting eligibility for such assistance, or applying different criteria for such assistance.<sup>9</sup> The section specifically addresses athletic scholarships and states, “To the extent that a recipient awards athletic scholarships 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>10</sup> Notably,

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4 *In re College Athlete NIL Litigation*, 2025 WL 1675820, at \*38 (order granting final approval to settlement).

5 20 U.S.C. § 1681(a).

6 *Id.*; 20 U.S.C. § 1686.

7 20 U.S.C. § 1687.

8 34 C.F.R. § 106.34(b)(5) (2025).

9 34 C.F.R. § 106.37(a)(1) (2025).

10 *Id.* § 106.37(c).

this subsection expressly applies only to “athletic scholarships or grants-in-aid.”<sup>11</sup> Beyond the language of the regulation itself, there is little other regulatory guidance as to what qualifies as athletic scholarships or grants-in-aid.

When examining the application of the Title IX regulations to NIL agreements between schools and student-athletes pursuant to the *House* Settlement, the question is whether NIL agreement would be considered “athletic scholarships or grants-in-aid” subject to this regulation. If so, NIL agreements would need to be awarded “in proportion to the number students of each sex” participating in intercollegiate athletics.

**B. 34 C.F.R. § 106.41(c)**

Section 106.41 specifically addresses athletics and includes a general prohibition against discrimination, which states,

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.<sup>12</sup>

34 C.F.R. § 106.41 further identifies ten factors (“among other factors”) that are to be examined in determining whether a school provides “*equal athletic opportunity* for member of both sexes,” including (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes, (2) provision of equipment and supplies, (3) scheduling of games and practice, (4) travel and per diem allowance, (5) opportunity to receive coaching and academic tutoring, (6) assignment and compensation of coaches and tutors, (7) provision of locker rooms, practice and competitive facilities, (8) provision of medical and training facilities and services, (9) provision of housing and dining facilities and services, and (10) publicity.<sup>13</sup>

The regulation further states that an unequal expenditure between male and female teams will not in and of itself constitute noncompliance with 34 C.F.R. § 106.41, but the Department of Education “may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.”<sup>14</sup>

For purposes of the analysis of NIL agreements between schools and student-athletes pursuant to the *House* Settlement, the only factor that appears directly relevant is “publicity,” which is addressed in more detail below, along with guidance related to recruiting, compensation of coaches, and support services.

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11 *See id.*

12 34 C.F.R. § 106.41(a) (2025).

13 *Id.* § 106.41(c) (emphasis added).

14 *Id.*

## II. COMMENTARY ON THE REGULATIONS

### A. 1979 Policy Interpretation<sup>15</sup>

In 1979, the Department of Health, Education, and Welfare (HEW)—the precursor agency to the Department of Education—published a policy interpretation regarding Title IX and Intercollegiate Athletics (the “Policy Interpretation”),<sup>16</sup> which set out to explain the application of HEW’s initial Title IX regulations, adopted in 1975,<sup>17</sup> to intercollegiate athletics and provide institutions guidance regarding their compliance obligations. The Department of Education was created on October 17, 1979, and the Department of Education published modified Title IX regulations in 1980, including some revisions to the two primary regulations discussed above.<sup>18</sup> However, the Policy Interpretation remains a key document in understanding the application of current Title IX regulations on intercollegiate athletics and athletics programs at recipient institutions.

The Policy Interpretation focuses on compliance in three areas: (1) athletic financial assistance, (2) other program benefits and opportunities, and (3) meeting the interests and abilities of male and female students. For the purposes of this article, only the first two sections, as well as the authority section of the Policy Interpretation, will be addressed. The third compliance area governs whether a school is offering sufficient participation opportunities for male and female athletes and does not directly pertain to NIL agreements.

#### 1. Athletic Financial Assistance

34 C.F.R. § 106.37(c) and the original HEW regulation<sup>19</sup> require institutions to award “athletic scholarships or grants-in-aid” to members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics. Tracking the language of the regulation, the Policy Interpretation states that compliance will be determined by a financial comparison of whether proportionately equal amounts of financial assistance are provided between men’s and women’s programs.<sup>20</sup> If there are substantially equal amounts or the disparity can be explained by “legitimate, nondiscriminatory factors,” then the institution will be in compliance with Title IX.<sup>21</sup> The Policy Interpretation provides two examples of legitimate, nondiscriminatory factors, including (i) a difference in the cost of scholarships for in-state versus out-of-state students and (ii) reasonable decisions regarding awards appropriate for program development (e.g., spreading

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15 U.S. Dep’t of Health, Educ., and Welfare, Off. for Civ. Rights, A Policy Interpretation: Title IX and Intercollegiate Athletics (1979 Policy Interpretation), 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

16 HEW was the precursor to the Department of Education, which was formed in 1979 as a separate federal agency.

17 45 C.F.R. §§ 86.37(c), 86.41(c) (2025).

18 34 C.F.R. §§ 106.37(c), 106.41 (2025).

19 45 C.F.R. § 86.37(c).

20 1979 Policy Interpretation, 44 Fed. Reg. 71,415 (Dec. 11, 1979).

21 *Id.*

scholarships for a new program over multiple classes). While these factors are not likely to be relevant to NIL agreements, the Policy Interpretation does not suggest these factors are the exclusive “legitimate, nondiscriminatory factors” for assessing compliance.

Notably, the Policy Interpretation does not address the definition or scope of “athletics scholarships and financial aid” in detail. However, in a parenthetical, the Policy Interpretation qualifies financial assistance to be “scholarship aid.”<sup>22</sup> Further, while the Policy Interpretation states that financial assistance in “forms other than grants” is also required to be proportionately available, the examples of work-related aid and loans are distinguishable from NIL agreements, which are fundamentally different from work-related aid, such as federal work-study programs, or student loans.

Based on the express language of the regulations and the Policy Interpretation document, it does not appear that Title IX’s requirement of proportionate financial assistance applies to the NIL agreements between schools and student-athletes, which are not “athletic scholarships or grants in aid.” This should come as no surprise, since from the time of the adoption of the regulations until the *House Settlement*, such direct financial arrangements between schools and student-athletes were strictly forbidden by NCAA rules and would have been an affront to the notion of the amateur student-athlete that predominated collegiate athletes.

## 2. *Other Athletic Benefits and Opportunities*

34 C.F.R. § 106.41 requires universities to provide “equal athletic opportunities” for members of both sexes in their athletic programs. The regulation sets forth the ten factors cited above to assess compliance with this requirement. The Policy Interpretation states that these ten factors are not exclusive, and the Department may consider other factors.<sup>23</sup> In addition, an institution complies when the compared program components are “equivalent, that is, equal or equal in effect.”

However, even if there are differences in benefits and opportunities between men’s and women’s programs, an institution may still be in compliance so long as the differences are justified by legitimate, nondiscriminatory factors. For instance, the Policy Interpretation acknowledges that certain aspects of some sports, such as football, may cause components of men’s and women’s athletic programs to be unequal. These sports-specific aspects, such as the nature and replacement of equipment and rules of play, by their inherent nature, can create differences between men’s and women’s programs. However, so long as the sport-specific needs of women’s and men’s teams are all met equivalently, then these differences will not render an institution noncompliant with the equal opportunity requirement.<sup>24</sup>

Likewise, the Policy Interpretation addresses another difference that is especially relevant to NIL revenue-sharing agreements. The Policy Interpretation recognizes that the operation of a competitive event in a single-sex sport may create imbalances

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22 *Id.*

23 *Id.*

24 *Id.* at 71,416.

in the comparison of men's and women's programs. For many schools, this is often the case because sports like football and men's basketball draw in larger crowds, and thus the costs and support required for competitive events may be inequivalent as compared to other sports. The Policy Interpretation provides that in these instances, the differences would not violate Title IX so long as the level of support to men's and women's programs is based on sex-neutral criteria (i.e., projected attendance, staffing needs) and the institution does not limit the ability of women's athletic events to rise in appeal.<sup>25</sup> Thus, it is not always the case that discrepancies in resources allocated between men's and women's programs amount to noncompliance.

Although the Policy Interpretation addresses all ten factors listed in 34 C.F.R. § 106.41(c), the Policy Interpretation's discussion of four of the factors provides insight into the potential application of Title IX to NIL agreements: (1) compensation of coaches, (2) publicity, (3) recruitment, and (4) provision of support services.

**a. Compensation of Coaches.** Pursuant to 34 C.F.R. § 106.41(c), Title IX's equal opportunity requirement applies to the compensation of men's and women's coaches. The Policy Interpretation states, "[i]n general, a violation will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability."<sup>26</sup> Accordingly, Title IX's guarantee of equal opportunity for male and female athletes does not require that their coaches receive equal pay (although Title IX's application to employment and other employment discrimination statutes may require equal pay under certain circumstances). Furthermore, the Policy Interpretation recognizes that permissible, nondiscriminatory factors can affect the compensation of coaches, including "the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition," as well as an "outstanding record of achievement" that may justify an abnormally high salary.<sup>27</sup>

As with other components of college athletics, nondiscriminatory factors specific to an individual sport or program can create an unequal balance in the compensation of coaches.<sup>28</sup> Where these nondiscriminatory factors represent valid differences in skill, effort, responsibility, or working conditions, they may justify differences in compensation.<sup>29</sup>

These differences have also been recognized in litigation related to college coaches under applicable employment statutes. For example, Equal Pay Act cases that have addressed discrepancies in the compensation of coaches rarely result in

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25 *Id.*

26 *Id.*

27 1979 Policy Interpretation, 44 Fed. Reg. 71,416 (Dec. 11, 1979).

28 *Id.*

29 *Id.*

a finding that coaches of different teams are engaged in work “requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”<sup>30</sup>

Moreover, courts have recognized that “[u]nequal wages that reflect market conditions of supply and demand are not prohibited under the Equal Pay Act.”<sup>31</sup> As one court recognized, “market factor increases in salaries may be necessary to maintain a strong coaching staff, even if the pay increases happen to be in areas which are dominated by men.”<sup>32</sup>

**b. Publicity.** The Policy Interpretation highlights that recruitment must also be provided on an “equal opportunity” basis because recruitment practices often affect the overall provision of opportunities to male and female athletes.<sup>33</sup> Compliance will be determined based on whether coaches in men’s and women’s programs are provided substantially equal opportunities to recruit; whether financial and other resources for recruitment are equivalently adequate to meet the needs of each men’s and women’s athletic program; and whether differences in benefits, opportunities, and treatment afforded to prospective student-athletes of each sex have a disproportionately limiting effect on the recruitment of students of either sex.<sup>34</sup>

To the extent that NIL agreements are considered recruitment resources, the Policy Interpretation does not suggest simple differences in amounts spent on such agreements between men’s and women’s programs constitutes a violation of the regulation. Rather, assuming NIL agreements do constitute recruitment resources, the disparity must be such that recruitment needs of each program cannot be met in an equivalent manner.

**c. Recruitment.** 34 C.F.R. § 106.41 also extends the equal opportunity requirement to the provision of publicity for men’s and women’s athletic programs. To assess compliance, the Policy Interpretation identifies factors such as the equivalence for men and women in the availability of information personnel, access to “other publicity resources,” and quantity and quality of publications and promotion of

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30 See *Deli v. Univ. of Minn.*, 863 F. Supp. 958 (D. Minn. 1994) (holding that the job of gymnastics coach was not substantially equal to job of men’s basketball coach); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994) (holding that plaintiff did not prove that job of women’s basketball coach was substantially equal to that of men’s basketball coach); *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 800–02 (S.D. Ohio 1998) (holding that women’s field hockey coach not equivalent position to men’s ice hockey coach).

31 *Weaver*, 71 F. Supp. 2d at 801 (citing *Stanley*, 13 F.3d at 1322); see also *Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 480 (8th Cir. 1984) (allowing market forces to justify disparity in faculty awards across disciplines); *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. State of Mich.*, 886 F.2d 766, 769 (6th Cir. 1989) (employer may follow the market rate, and that the failure to rectify traditional wage disparities that exist in the marketplace between predominantly male and predominantly female jobs is not actionable); *Stanley*, 13 F.3d at 1322 (“Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.”).

32 *Weaver*, 71 F. Supp. 2d at 802.

33 1979 Policy Interpretation, 44 Fed. Reg. 71,417 (Dec. 11, 1979).

34 *Id.*

men's and women's programs.<sup>35</sup> The Policy Interpretation does not provide further guidance regarding publicity.

Information personnel and quantity and quality of publications and promotions are not directly tied to NIL agreements, and the more general "other publicity resources" was never intended to apply to NIL agreements, which were not contemplated at the time. However, "other publicity resources" could be used to describe NIL agreements, if the purpose of NIL agreements is to use the student-athletes' NIL rights to promote a particular program. While the *House Settlement* recognizes that NIL agreements between schools and student-athletes may also include institutional brand promotion, the settlement does not require that NIL agreements between schools and their student-athletes be primarily for "publicity" purposes. Unlike NIL agreements with collectives, NIL agreements between schools and their student-athletes are not subject to the requirement that the agreement have a "valid business purpose related to promotion or endorsement of goods or services" at rates comparable to those paid to nonstudent-athletes.<sup>36</sup> Rather, the *House Settlement* has recognized that student-athletes' NIL rights have monetary value to their respective schools, conferences, and the NCAA, as reflected by the \$2.7 billion damages award in the *House Settlement*. The *House* injunctive relief settlement simply authorizes schools to now pay their student-athletes for the value of those NIL rights, thereby creating a market for such rights. While an NIL agreement between a school and a student-athlete results in compensation going to the student-athlete in exchange for a license to use the student-athlete's NIL rights, it does not necessarily result in any specific publicity or promotion of a particular program by that student-athlete.

To the extent that NIL agreements are considered a form of publicity, 34 C.F.R. § 106.41(c) makes it clear that a simple difference in expenditure "will not constitute noncompliance," but rather the question is whether the school has failed to provide the necessary funds to provide *equality of opportunity* for each sex.

**d. Provision of Support Services.** Like recruitment and publicity, the provision of support services can also affect whether a school provides equal opportunities in athletics between both sexes.<sup>37</sup> According to the Policy Interpretation, compliance will be assessed by examining the amount of administrative support provided to men's and women's programs. Notably, the Policy Interpretation discusses support services with a focus on "administrative and clerical" support and makes no mention of financial support.<sup>38</sup>

Accordingly, it would not appear that NIL agreements would qualify as "support services" under 34 C.F.R. § 106.41(c).

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35 *Id.*

36 2025–2026 NCAA DIVISION 1 MANUAL, Bylaw 22.1.3. <https://ncaapublications.com/products/2025-2026-ncaa-division-i-manual>

37 1979 Policy Interpretation, 44 Fed. Reg. 71,417 (Dec. 11, 1979).

38 *Id.*

### 3. *Authority Section*

Finally, the authority section of the Policy Interpretation addresses some of the facts and comments from institutions that factored into HEW's interpretation of Title IX. Notably, the Policy Interpretation addresses commentary that revenue-producing sports, such as football, should be exempt from the equal opportunity requirements of Title IX.<sup>39</sup> In its discussion, HEW explicitly rejected this commentary and stated Title IX applies to any revenue-producing activity; therefore, football and other similar sports were not exempted.<sup>40</sup> However, the Policy Interpretation does provide that the unique circumstances of football, such as the unique size and costs of such programs, were taken into account.<sup>41</sup> Further, the Policy Interpretation emphasizes there are characteristics common to most revenue-producing sports that could result in legitimate nondiscriminatory differences in expenditures.<sup>42</sup> For example, the high costs spent on managing events attended by large numbers of people for these "revenue-producing" sports would be an acceptable, nondiscriminatory reason for differences between men's and women's programs.<sup>43</sup>

### B. *Additional Guidance and the Biden Administration Fact Sheet*

From 1979 until 2025, the Department of Education did not issue guidance providing direct insight into whether NIL agreements between schools and student-athletes would be covered by Title IX. This is not surprising, as those years were defined by the amateur student-athlete model until 2021 when the *Alston* court declined to find the amateurism model constituted a defense to antitrust liability (and Justice Kavanaugh further rejected the model in his concurrence).<sup>44</sup> While the Department of Education has issued guidance over the years regarding Title IX and athletics, virtually all of the guidance has addressed the Policy Interpretation's "three-part test" used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics to "effectively accommodate the interests and abilities of members of both sexes" under 34 C.F.R. § 106.41(c)(1).<sup>45</sup> The Department has also provided additional

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39 *Id.* at 71,421.

40 *Id.*

41 *Id.* at 71,419.

42 *Id.* at 71,421.

43 *Id.*

44 *See Alston*, 594 U.S. at 101-02 (rejecting the NCAA's argument that the "amateurism" of college athletics is a fundamental product feature rendering college athletics rendering it immune from antitrust scrutiny); *Id.* at 110 (Kavanaugh, J., concurring) ("The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate billions of dollars in revenues for colleges every year. ... [T]he NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.").

45 *See, e.g.*, 1979 Policy Interpretation, 44 Fed. Reg. 71,418 (Dec. 11, 1979) (establishing three-part test); Dept. of Educ. Off. of Civ. Rts., Dear Colleague Letter and Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996); Dept. of Educ. Off. of Civ. Rts.,

guidance regarding compliance with the “substantially proportionate” requirement for athletics scholarships under 34 C.F.R. § 106.37(c),<sup>46</sup> but this guidance did not provide insight into whether NIL agreements would be subjected to 34 C.F.R. § 106.37(c).

However, in January 2025 during the final days of the Biden administration, and while the *House Settlement* was pending final approval, the Department of Education Office of Civil Rights (OCR) released a fact sheet discussing the implications of Title IX and NIL activities.<sup>47</sup> The fact sheet addresses equal opportunity requirements under Title IX in the context of NIL-related compensation and activities. Drawing heavily on the 1979 Policy Interpretation, the OCR reached two conclusions relevant to NIL.

First, OCR concluded the Title IX requirement of equivalent benefits, opportunities, and treatment under 34 C.F.R. § 106.41(c) applies to publicity and support services that may impact the student-athlete’s ability to secure NIL opportunities.<sup>48</sup> The fact sheet stated that schools have the obligation to provide equivalent publicity in the context of NIL activities. However, as with other components of Title IX, the fact that publicity is not equivalent between men and women does not inherently mean that the school is not in compliance, so long as the difference is a result of nondiscriminatory factors. For example, if a school’s athletic department were to assist athletes in obtaining and negotiating NIL agreements, then such support would need to comply with Title IX. Moreover, OCR did *not* conclude that NIL agreements, themselves, are a form of publicity or support services subject to the equivalency requirement of 34 C.F.R. § 106.41(c).

Second, OCR did conclude compensation from a school for use of a student-athlete’s NIL qualifies as financial assistance subject to the proportionality requirement of 34 C.F.R. § 106.37(c).<sup>49</sup> The fact sheet states, “Compensation provided by a school for the use of a student-athlete’s NIL constitutes athletic financial assistance under Title IX because athletic financial assistance includes any financial assistance and other aid provided by the school to a student-athlete that is connected to a student’s athletic participation; it is not limited to scholarships or grants.”<sup>50</sup>

Contrary to the expressly language of the rule, OCR concluded 34 C.F.R. § 106.37(c) applies to far more than “athletics scholarship and grants-in-aid,”

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Dear Colleague Letter and Guidance on Determining which Athletic Activities Can Be Counted for Purposes of Title IX Compliance (Sept. 17, 2008); Dept. of Educ. Off. of Civ. Rts., Dear Colleague Letter and Guidance on Accommodating Students’ Athletic Interests and Abilities: Standards for Part Three of the “Three-Part Test” (Apr. 20, 2010); Dept. of Educ. Off. of Civ. Rts., Support Equal Opportunity in School Athletic Programs, A Resource for Students and Families (Feb. 2023).

46 *See, e.g.*, Dept. of Educ. Off. of Civ. Rts., Dear Colleague Letter: Bowling Green State University (1998).

47 U.S. Dep’t of Educ. Off. of Civ. Rts., Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities (Jan. 16, 2025) (rescinded).

48 *Id.* at 5–7.

49 *Id.* 7–8.

50 *Id.* 7.

including “any financial assistance and other aid provided by the school to a student-athlete that is connected to a student’s athletic participation.” OCR went on to claim that section 106.37(c) therefore includes “other types of compensation and financial assistance permitted to be provided by schools following a federal court injunction” (citing *Alston*) and “compensation from schools for use of a student-athlete’s NIL” (presumably referring to the *House Settlement*).<sup>51</sup> OCR concluded, “When a school provides athletic financial assistance in forms other than scholarships or grants, including compensation for the use of a student-athlete’s NIL, such assistance also must be made proportionately available to male and female athletes.”<sup>52</sup> In support of this position, OCR cited three sources.<sup>53</sup>

First, OCR cited the Policy Interpretation’s statement that financial assistance covered by 34 C.F.R. § 106.37(c) could include work-related aid and loans. As stated above, work-related financial aid and loans to cover the cost of education are not equivalent to NIL agreements, which are unrelated to the cost of education and are not intended to cover the cost of education.

Second, OCR cited a letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights in the Department of Education under the second Obama administration, addressing whether an NCAA rule regarding cost-of-attendance scholarship awards would be used to circumvent Title IX. The letter states, without citing any authority, “[a]thletic financial assistance includes any financial assistance expenditures through the institution’s athletics program and any other aid that is connected to a student’s athletic participation.”<sup>54</sup> However, the letter then goes to conclude that cost-of-attendance scholarship awards are subject to 34 C.F.R. § 106.37(c). This final conclusion is not surprising, since the regulation covers “athletic scholarships.” However, the letter was written in the era of the amateur student-athlete and prior to NIL agreements. Accordingly, the letter does not support the fact sheet position that NIL agreements constitute a form of “athletic scholarships and grants-in-aid” under 34 C.F.R. § 106.37(c).

Third, OCR cited to schools’ reporting obligations under the Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092(e), and its implementing regulation, 34 C.F.R. § 668.47. Under the EADA regulations, “athletically related student aid” is defined as “any scholarship, grant, or other form of financial assistance, offered by an institution, the terms of which require the recipient to participate in a program of intercollegiate athletics at the institution.”<sup>55</sup> The EADA’s definition is broader than the use “athletics scholarships and grants-in-aid” found in 34 C.F.R. § 106.37(c). Moreover, the very document that the January 2025 Fact Sheet relies upon, the User’s Guide for the Equity in Athletic Disclosure Act, expressly states that the data schools report in the EADA portal “may not be the same as data used for determining compliance with other Federal or state laws, including Title IX of

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51 *Id.* Notably, OCR did not expressly refer to the *House Settlement* in the Fact Sheet.

52 *Id.* 8. OCR also clarified that it does not consider third-party NIL agreements subject to 34 C.F.R. § 106.37(c).

53 *Id.* 7 n.26.

54 Letter from Catherine E. Lhamon to Marcia D. Greenberger and Deborah Slaner Larkin (Nov. 15, 2015), at 2.

55 34 C.F.R. § 668.41(a) (2025).

the Education Amendments of 1972.”<sup>56</sup> Again, the fact sheet’s reliance on EADA definitions to establish compliance standards for Title IX is misplaced.

### *C. Trump Administration’s Rescission of OCR’s Fact Sheet*

On February 15, 2025, the OCR under the Trump administration rescinded the January 2025 Fact Sheet on NIL activities.<sup>57</sup> In its press release, OCR stated that the fact sheet created under the Biden administration lacked credible legal justification as “Title IX says nothing about how revenue-generating athletics programs should allocate compensation among student athletes.”

## III. TITLE IX REGULATIONS GOVERNING ATHLETIC SCHOLARSHIPS AND BENEFITS SHOULD NOT APPLY TO NIL AGREEMENTS

With the order granting final approval of the *House* Settlement, institutions of higher education may for the first time directly compensate their student-athletes through NIL agreements. Under the injunctive relief portion of the *House* Settlement, the amount of funds that a school may spend on NIL agreements with student-athletes is capped based on twenty-two percent of the “Averaged Shared Revenue” generated by the conference defendants’ member institutions based on eight specific categories of revenue. Under the terms of the settlement, each institution is allowed to provide up to a total of \$20.5 million in NIL agreements to student-athletes per year, beginning in 2025–26, with that amount increasing approximately four percent per year.

Notably, various objectors to the *House* Settlement agreement (SA) challenged its fairness to female class members on the grounds that the settlement violates Title IX in two ways: “because the SA’s damages allocations favor male class members over female class members in violation of Title IX, and because the SA does not contain any provisions that require that benefits and compensation provided to class members pursuant to the Injunctive Relief Settlement be made in compliance with Title IX.”<sup>58</sup>

As for the first argument, the court recognized that the “the objectors have cited no authority that Title IX applies to damages awards distributions or that damages distributions made by a claims administrator are subject to Title IX.”<sup>59</sup> In other words, the objectors failed to cite any law that would indicate that compensation to student-athletes for the historical use of their NIL rights by the NCAA, conference defendants, and member institutions was subject to Title IX. Moreover, the court

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56 U.S. Dep’t of Educ., Off. of Postsecondary Educ., *User’s Guide for the Equity in Athletic Disclosure Act Web-Based Data Collection*, at 3 (Sept. 2023).

57 Press Release, U.S. Dep’t of Educ. Off. for Civ. Rts., U.S. Department of Education Rescinds Biden 11th Hour Guidance on NIL Compensation (Feb. 15, 2025), <https://www.ed.gov/about/news/press-release/us-department-of-education-rescinds-biden-11th-hour-guidance-nil-compensation>.

58 *In re College Athlete NIL Litigation*, 2025 WL 1675820, at \*38 (N.D. Cal. June 6, 2025) (order granting final approval to settlement).

59 *Id.*

noted that the damages model allocates more funds to class members who played Division I football and men's basketball on the basis that schools and conferences received far more revenues from those sports than from other sports during the class period.<sup>60</sup> Notably, the *House* Settlement is currently subject to an appeal on the basis that the damages distribution methodology violates Title IX, among other bases.<sup>61</sup>

As to the second argument regarding injunctive relief, the court stated,

There is nothing in the SA that would prevent or prohibit schools from distributing benefits and compensation pursuant to the Injunctive Relief Settlement in a manner that complies with Title IX. Further, the SA does not require class members to release claims arising out of Title IX in connection with the implementation of the Injunctive Relief Settlement. Thus, to the extent that schools violate Title IX when providing benefits and compensation to student-athletes pursuant to the Injunctive Settlement Agreement, class members will have the right to file lawsuits arising out of those violations.<sup>62</sup>

As a result, student-athletes have the ability to challenge a school's methodology for distributing the \$20.5 million in NIL funds under Title IX through litigation.

In the event such litigation proceeds, there are likely two main arguments advanced in the debate of whether the Title IX regulations apply to NIL agreements and revenue sharing between institutions and student-athletes. In the first argument, proponents would likely contend that Title IX applies to NIL agreements as "athletic scholarships" under 34 C.F.R. § 106.37(c).<sup>63</sup> In the alternative, proponents may argue that Title IX applies to NIL agreement revenue sharing because NIL constitutes a "benefit" under 34 C.F.R. § 106.41.<sup>64</sup> While both arguments cite to the Title IX regulations, the arguments take the language of the regulations beyond their reasonable scope. Further, the arguments do not account for the commercial nature of NIL compensation or the purpose of the *House* Settlement.

#### *A. NIL Agreements Are Not "Financial Assistance"*

Individuals that advocate for Title IX's application to NIL revenue sharing argue Title IX applies because NIL compensation provided by institutions qualifies as financial assistance under 34 C.F.R. § 106.37(c).<sup>65</sup> Not only does this argument ignore the actual language of the regulation, but such interpretation is contrary to the common understanding of what constitutes financial assistance subject to Title IX.

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60 *Id.* n.16.

61 *House, et al., v. Nat'l Coll. Athletic Ass'n, et al.*, Nos. 25-7461, 25-7467, 25-7469, 25-7824, and 25-7869, Ninth Circuit Court of Appeals. On February 4, 2026, the Ninth Circuit consolidated the pending appeals, and opening briefs by the appellants are due March 9, 2026.

62 *Id.* (internal citations omitted).

63 See Erin Buzuvis, *Title IX and Athlete Compensation in the Postamateurism Era*, 93 *FORDHAM L. REV.* 1579, 1594 (2025).

64 See *id.* at 1579, 1591–93.

65 34 C.F.R. § 106.37(c) (2024).

Notably, Title IX includes a general prohibition regarding discrimination in financial assistance, which has not been the focus of commentators. 34 C.F.R. § 106.37(a)(1) states a recipient shall not, “[o]n the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate.” This provision follows the “on the basis of sex” language found in the Title IX statute. Furthermore, the Supreme Court has recognized that this language prohibits “intentional sex discrimination.”<sup>66</sup> In 2001, the Supreme Court held in *Alexandre v. Sandoval* that there is no private right of action to enforce disparate-impact regulations under Title VI the Civil Rights Act, upon which Title IX is based.<sup>67</sup> While the Department of Education’s regulations may impose enforcement liability for disparate impact in certain specified circumstances, no federal appellate court has held that Title IX recognizes a private right of action to enforce disparate impact regulations under Title IX post-*Sandoval*.<sup>68</sup>

Accordingly, if schools make decisions regarding allocation of NIL funds based on legitimate, nondiscriminatory reasons other than sex, such decisions should be defensible in a private Title IX action.<sup>69</sup> For example, if a school distributed its \$20.5 million in NIL funds to each program based on the proportionate amount of revenues generated by each program in the eight categories of revenue used to calculate the average shared revenue in the *House* Settlement, such a methodology may be defensible, as the methodology reflects both the stated revenue-sharing purpose of the *House* Settlement and the settlement’s methodology for calculating what revenue should be shared with student-athletes. While a given school’s football and men’s basketball teams may generate the largest portion of revenue by program, the school’s women’s basketball team and other programs (e.g., women’s volleyball) may generate significantly more revenue than many male programs (e.g., golf, tennis), and those higher-revenue women’s programs would therefore receive a greater share of the NIL agreement funds than the lower-revenue men’s programs.

Of course, if a school decided to offer NIL agreements only to male student-athletes without any legitimate, nondiscriminatory reason, such a decision would not be able to take advantage of the defense described above. Moreover, some commentators have argued “that a sports’ ability to generate revenue does not justify unequal treatment” under any circumstances.<sup>70</sup> Whether distribution of NIL

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66 *Jackson v. Birmingham Bd. of Educ.*, 55 U.S. 167, 173 (2005) (recognizing prohibition of discrimination “on the basis of sex” gives rise to a private right of action for “intentional sex discrimination”).

67 532 U.S. 275, 280–81 (2001) (holding no private right of action to enforce disparate impact claims under Title VI).

68 *See, e.g., Poloceno v. Dallas Indep. Sch. Dist.*, 826 F. App’x 359, 363 (5th Cir. 2020) (“A plaintiff’s Title IX claim must be based on intentional discrimination, not disparate impact.”) (relying on *Sandoval*).

69 *See Stucky v. Dept. of Educ.*, 283 F. App’x 503, 506 (9th Cir. 2008) (affirming summary judgment of Title IX claim where defendant offered “legitimate, non-discriminatory reason for plaintiff’s disparate treatment”).

70 Erin Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon*, 41 J. COLL. & UNIV. L. 297, 326 (2015) (citing cases); Buzuvis, *supra* note 64, at 1595 n.116.

funds based on revenue generation will be defensible is likely to be determined by the courts in future litigation.

### ***B. NIL Agreements Are Not “Scholarships and Grants-in-Aid”***

As discussed above, 34 C.F.R. § 106.37(c) applies to the provision of athletic scholarships and grants-in-aid in athletics, which must be allocated “in proportion to the number of students of each sex” that participate in athletics.<sup>71</sup> Therefore, the regulation expressly applies *only* to funds provided as athletic scholarships or grants-in-aid. Because NIL revenue is neither of the two, the regulation does not apply.

#### *1. NIL Agreements Are Neither a Scholarship nor a Grant-in-Aid*

It is not enough to say that because NIL agreements are financial in nature and are administered by an institution, they necessarily qualify as financial assistance to a student-athlete to be covered by 34 C.F.R. § 106.37(c). Rather, for the regulation to apply, NIL agreements must be categorized as an athletic scholarship or a grant-in-aid.<sup>72</sup> However, NIL agreements between a school and its student-athletes are inherently different from athletic scholarships and grants-in-aid, making such a classification unreasonable.

The first quality of an NIL agreement that distinguishes it is the fact that an NIL agreement is compensatory in nature.<sup>73</sup> While the regulation does not provide a definition for what constitutes an athletic scholarship or grant-in-aid, the NCAA provides a definition of what constitutes financial aid in its bylaws: “... funds provided to student-athletes from various sources to pay or assist in paying their **cost of education** at the institution.”<sup>74</sup>

The NCAA Bylaws set forth permissible financial aid that includes Athletically Related Financial Aid and Institutional Financial Aid,<sup>75</sup> as well as other permissible external financial aid.<sup>76</sup> All these forms of financial aid are common in the fact that they are funds that must be provided to cover the cost of education. To date, athletic scholarships and financial aid granted by schools has been provided with the intent that such funds cover educational expenses,<sup>77</sup> including Alston payments.<sup>78</sup> This is

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71 See also 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, 25 (2021) (stating athletic scholarships amount to pay-for-play, which is prohibited for NIL compensation, and describing how NIL compensation may only be provided for intellectual property rights) (stating the regulations do not define athletic scholarships).

72 See 34 C.F.R. § 106.37(c) (2025).

73 Tan Boston, *The NIL Glass Ceiling*, 57 U. RICH. L. REV. 1107, 1119 (2023).

74 2025–2026 NCAA DIVISION I MANUAL, Bylaw 15.02.4.

75 *Id.*

76 *Id.*, Bylaw 15.01.1 (includes financial aid from a person upon whom the student athlete is naturally or legally dependent, “financial aid awarded solely on bases having no relationship to athletics ability,” or “financial aid from an established and continuing scholarship program”).

77 Paula Lavigne & Dan Murphy, *Title IX Will Apply to College Athlete Revenue Share, Feds Say*, ESPN (July 16, 2024, 10:58 AM), [https://www.espn.com/college-sports/story/\\_/id/40567726/title-ix-college-athlete-revenue-share-nil](https://www.espn.com/college-sports/story/_/id/40567726/title-ix-college-athlete-revenue-share-nil).

78 *Alston*, 594 U.S. at 74 (“the court struck down NCAA rules limiting the education-related benefits

where financial aid and NIL agreements differ. The compensation a student-athlete receives through an NIL agreement is wholly unrelated to covering the costs of student-athlete's educational expenses.<sup>79</sup> Rather, an NIL agreement is commercial in nature, and its compensatory scheme is based on payment for the schools' use of the student-athlete's NIL rights, not money provided to cover the costs of the student-athlete's education. NIL revenue sharing is a commercial transaction, not a scholarship and, thus, is not covered by 34 C.F.R. § 106.37(c).

The second quality of NIL compensation that distinguishes it from athletic scholarships and grants-in-aid is the lack of any limit on how much money may be provided to a student-athlete in an NIL agreement or any connection to educational expenses.<sup>80</sup> While the *House Settlement* does place an initial overall limit of \$20.5 million per year that an institution may share amongst its student-athletes, there is no limit as to how much an institution may give an individual athlete.<sup>81</sup> Indeed, a school could theoretically spend its entire \$20.5 million cap on an NIL agreement with a single student-athlete. In contrast, the amount of financial assistance a student-athlete may receive is limited to the maximum cost of attendance that normally is incurred by students.<sup>82</sup> Cost of attendance is comprised of the cost of tuition and fees, living expenses, books and supplies, transportation, and other expenses related to attendance at an institution.<sup>83</sup> Thus, whereas financial aid is limited to the maximum cost of education-related expenses, NIL agreements are only limited by the \$20.5 million cap.<sup>84</sup> And as commonly seen, student-athletes across the country are entering into NIL agreements that pay them amounts that far exceed the maximum for financial aid.

Finally, the nature of the consideration inherent to an NIL agreement distinguishes it from athletic scholarships and grants-in-aid.<sup>85</sup> As defined in the NCAA bylaws, Athletically Related Financial Aid is "awarded on any basis that is related to athletics ability, participation, or achievement."<sup>86</sup> An athletic scholarship is intended to cover the student-athlete's educational expenses, based on the cost of an education at the particular school, in exchange for their participation on the team. On the other hand, an NIL agreement recognizes that the school is paying for the right to use the student-athlete's rights to their NIL in exchange for sharing a portion of the revenue generated by the student-athlete's participation in intercollegiate athletics. NCAA Bylaw 22.02.1 defines Name, Image, and Likeness

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schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships").

79 Andrew J. Haile, *Equity Implications of Paying College Athletes: A Title IX Analysis*, 64 B.C. L. REV. 1449, 1471 (2023).

80 Boston, *supra* note 74.

81 *Id.*

82 2025–2026 NCAA DIVISION I MANUAL, Bylaw 15.01.5.

83 *Id.*, Bylaw 15.02.2.

84 Boston *supra* note 74.

85 *Id.* at 25.

86 2025-2026 NCAA DIVISION I MANUAL, Bylaw 15.02.4.1.

Compensation as “compensation for the use of the individual’s name, image and likeness, which may be secured or compensated based, in whole or in part, on athletics skill or reputation. Name, image and likeness activities **may not be used to compensate a student-athlete for athletics participation or achievement.**”<sup>87</sup> Thus, while athletic scholarship may be used as an after-the-fact reward for participation and achievement (such as awarding a walk-on a scholarship after a successful season), NIL compensation is prohibited from being used to reward performance.<sup>88</sup> In short, compensation from an NIL agreement is fundamentally different from an athletic scholarship or a grant-in-aid.

2. *There Is a Common Understanding that NIL Revenue Is Different from Scholarships and Grants-in-Aid*

Furthermore, the language of various NIL legislation around the country further supports the conclusion that NIL compensation is separate and apart from financial assistance for educational purposes. Legislation allowing NIL compensation frequently includes language that defines NIL compensation as distinct from scholarships and other forms of financial aid tied to athletic participation.<sup>89</sup> For instance, in the Mississippi legislation permitting NIL compensation to student-athletes, the law explicitly states that NIL compensation “shall not mean any grant, scholarship ... tuition assistance or other form of financial aid provided to a student for pursuing a post-secondary education.”<sup>90</sup> Nebraska’s Student-Athlete Name, Image, or Likeness Rights Act defines “athletic grant-in-aid” as money given “for tuition, fees, room, board, and textbooks as consideration for participation ... and does not include compensation for the use of the student-athlete’s name, image, or likeness rights. ...”<sup>91</sup> Likewise, Oklahoma law distinguishes NIL compensation from “athletic grant-in-aid” and states it shall not include compensation for the use of a student’s NIL.<sup>92</sup> Such legislative efforts provide further support for the notion that NIL revenue sharing does not qualify as financial assistance as understood in the regulation.

Additionally, recent legislative action at the federal level further suggests that the perspective of NIL compensation as something separate from financial assistance is not limited to the states. On July 10, 2025, H.R. 4312, known as the SCORE Act, was proposed in the House of Representatives.<sup>93</sup> The proposed bill explicitly states that NIL compensation governed by the Act does not include

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87 *Id.*, Bylaw 22.01.1 (emphasis added).

88 *Id.*; Boston, *supra* note 74.

89 *See, e.g.*, TEX. EDUC. CODE ANN. § 51.9246(d) (2025) (stating that scholarship, grant, or similar financial assistance awarded to a student athlete by an institution is not NIL compensation covered by the law); CAL. EDUC. CODE § 67456(d) (2024) (stating a scholarship is not NIL compensation).

90 MISS. CODE ANN. § 37-97-103 (2025).

91 NEB. REV. STAT. § 48-3602 (2024).

92 OKLA. STAT. § 70-820.22(1) (2024).

93 SCORE Act, H.R. 4312, 119th Cong. (2025) (as introduced in the House, July 10, 2025).

grants-in-aid, which includes athletic scholarships.<sup>94</sup> Thus, while not yet law, the SCORE Act further bolsters the notion that NIL compensation is commonly understood to be different than financial assistance.

**C. NIL Agreements Should Not Be Considered a “Benefit” Under 34 C.F.R. § 106.41(c)**

Under 34 C.F.R. § 106.41, an institution must provide equal benefits, treatment, and opportunities for members of both sexes in athletics. Individuals that argue for application of Title IX regulations to NIL revenue sharing argue that 34 C.F.R. § 106.41 applies both directly and indirectly. The indirect argument is premised on the regulation’s nonexhaustive list of benefits and proposes that NIL revenue sharing is sufficiently similar to the listed items such that it is covered.<sup>95</sup> Under the direct argument, proponents claim the NIL compensation provided by schools is encompassed within a few of the factors enumerated in the list and, thus, is directly addressed by the regulation.<sup>96</sup> Regardless, both arguments are unavailing because NIL compensation is distinct from the factors enumerated in 34 C.F.R. § 106.41(c).

As an initial matter, 34 C.F.R. § 106.41(c) focuses on “equal athletic opportunity” for both sexes, and it does not mandate equal funding or resources, regardless of context. Not surprisingly, 34 C.F.R. § 106.41 does not address monetary compensation for student-athletes. Again, the Title IX regulations were drafted in the era of the unpaid, amateur student-athlete when NIL agreements and other forms of compensation were not even contemplated. Thus, it should come as no surprise that the language of the Title IX regulations does not apply to NIL agreements between schools and their student-athletes.

In the regulation’s silence, the canon of interpretation, *noscitur a sociis*, serves as a guiding principle. Under the canon, it would only be reasonable to state that NIL compensation provided by institutions falls under an “other factor,” if it is substantially similar to the factors enumerated.<sup>97</sup> While proponents contend that NIL agreements are sufficiently similar to the benefits listed, such arguments ignore the distinguishing characteristics of NIL compensation that prevent it from reasonably falling within the contemplated scope of the regulation. NIL agreements compensate the student-athlete for the schools’ commercial use of the student-athlete’s NIL rights by sharing athletics revenue with the student-athlete via a commercial transaction. In contrast, the benefits enumerated in 34 C.F.R. § 106.41(c) are all commonly attached to education and intercollegiate athletics *opportunities* and are wholly unrelated to the commercial use of NIL rights by the school.

While NIL agreements arguably could be considered a form of “publicity,” the withdrawn 2025 Fact Sheet did not even make such an argument. The fact that a

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<sup>94</sup> *Id.*

<sup>95</sup> *See* Buzuvis, *supra* note 64.

<sup>96</sup> *See* Buzuvis, *supra* note 64, at 1594.

<sup>97</sup> *See* *Yates v. United States*, 574 U.S. 528, 549 (2015) (Alito, J., concurring in the judgment) (stating that the *noscitur a sociis* canon instructs that when a statute contains a list, each word in that list presumptively has a “similar” meaning).

school pays a student-athlete a certain amount to license that student-athlete's NIL rights does not equate to a publicity expenditure, and it does not necessarily result in any publicity or promotion of a particular program or the institution. Indeed, there are no requirements that schools link NIL agreements and related payments to any promotion or publicity efforts by the student-athlete on behalf of the school (which is in direct contrast to the requirements for third-party NIL).<sup>98</sup>

However, in one recent Title IX case governing pre-*House* claims, female student-athletes alleged the university engaged in unequal publicity of men's versus women's sports that resulted in alleged harm to women through unequal third-party NIL opportunities, and the court found such allegations relevant to the female student-athlete's claim that "male student-athletes get better treatment and benefits, opportunities, and income through" the university's NIL marketplace.<sup>99</sup> Thus, if courts consider direct NIL agreements between schools and student-athletes as a form of publicity, female student-athletes could argue the disparity between direct NIL agreements results in harm to female student-athletes in the form of decreased third-party NIL opportunities.

To the extent that NIL agreements are argued to be recruitment resources under 34 C.F.R. § 106.41(c), the Policy Interpretation indicates the disparity must be such that recruitment needs of each program cannot be met in an equivalent manner. However, the result of this analysis will depend on the NIL market and recruitment environment for each sport. For example, if School X decided to spend its entire \$20.5 million cap on NIL agreements for football and men's basketball only, while the other schools in its conference, spent on average \$500,000 on NIL agreements for women's basketball, it could be argued that School X's recruitment resources toward women's basketball cannot meet the needs of the program in an equivalent manner, since School X would presumably be unable to recruit women's basketball players at a level to be competitive with peer conference institutions without the available NIL funds.<sup>100</sup> But even in this scenario, there will also be plenty of men's teams that could be impacted as well. For example, School X's men's baseball, tennis, golf, and track and field teams would also be without any NIL funds, suggesting that limiting NIL funds to one or two sports does not necessarily result in intentional discrimination "on the basis of sex." Moreover, as the regulation makes clear, "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates

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98 2025–2026 NCAA DIVISION I MANUAL, Bylaws 22.1.3 (requiring associated third-party NIL agreements "are for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to similarly situated individuals with comparable name, image and likeness value who are not prospective student-athletes or student-athletes of the institution").

99 *Schroeder v. Univ. of Or.*, No. 6:23-CV-01556-MC, 2025 WL 1019760, \*12 (D. Or. Apr. 4, 2025).

100 *See also* Dept. of Educ. Off. of Civ. Rts., Support Equal Opportunity in School Athletic Programs, A Resource for Students and Families (Feb. 2023) (citing the following as an example that could raise Title IX concerns: "A university provides funds for its coaches to recruit athletes for its men's football and basketball teams because it considers those teams to be 'flagship sports'" It provides no funds for coaches to recruit women athletes. As a result, the school has difficulty attracting women to participate in its athletic program.").

or sponsors separate teams will not constitute noncompliance with this section.”<sup>101</sup>

To the extent a court considers NIL agreements to be recruiting resources under 34 C.F.R. § 106.41(c), courts should treat such expenditures similar to coaching expenditures and salaries to identify whether legitimate, nondiscriminatory factors justify differences in NIL agreement amounts offered to recruits. When examining coaches' salaries, courts often concluded that higher marketability and revenue generation distinguished coaching positions of revenue-generating sports from nonrevenue generating sports because higher revenue generation came with more pressure and responsibility.<sup>102</sup> For instance, in *Bartges v. University of North Carolina at Charlotte*, the court held that the role of the men's assistant basketball coach and the women's assistant basketball coach were not substantially equal work.<sup>103</sup> In its conclusion, the court stated that the marketability and revenue generation of the men's basketball team made the team of greater financial and promotional importance to the university.<sup>104</sup> As a result, the men's assistant basketball coach not only had more responsibility to promote the team and engage in public relations but also the role carried a greater pressure to produce winning teams. The court concluded that, while similarly engaged in the role of coaching, the men's assistant basketball coach and the women's assistant basketball coach were not engaged in equal work.<sup>105</sup> These same type of differences can apply to student-athletes across programs to justify differences in NIL agreements between football and women's tennis, for example, or for that matter, men's basketball and men's tennis. Moreover, the market value for the men's basketball player's NIL rights is likely (but not necessarily) much higher than a player on the men's or women's tennis team. For comparison purposes, sex-based distinctions in employment are expressly authorized by the Title IX regulations when sex is a bona fide occupational qualification and essential to the successful operation of the employment function concerned.<sup>106</sup>

As NIL practices play out across intercollegiate athletics, markets will be created, and schools will likely use their NIL dollars to participate in those markets based on the individual priorities of that particular institution. Whether such decisions may give rise to Title IX claims based on recruitment resources remains to be seen. However, so long as the resources provided to men's and women's programs are equivalently adequate to meet the needs of those programs in light of the applicable recruiting market and demands of that sport, then such allocation of resources should not run afoul of Title IX's rules regarding recruitment.

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101 34 C.F.R. §106.41(c) (2025).

102 *See Deli*, 863 F. Supp. 958; *Stanley*, 13 F.3d 1313; *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791 (E.D. Va. 1980).

103 908 F. Supp. 1312 (W.D.N.C. 1995).

104 *Id.* at 1323.

105 *Id.* The court made similar conclusions with respect to the head baseball coach as compared to the head softball coach. *Id.*

106 34 C.F.R. § 106.61 (2025).

#### IV. CONCLUSION

In conclusion, the Title IX regulations governing athletic scholarships and the benefits of participation should not apply to NIL revenue sharing because NIL compensation is neither financial assistance nor a benefit, treatment, or opportunity of athletics, as those terms are used in the Title IX regulations. Rather, NIL agreements are a commercial transaction between the student-athlete and the school to compensate the student-athlete for the schools' licensing and potential use of the student-athlete's NIL rights. Because of the compensatory and commercial nature of NIL agreements, combined with the intent of the *House* Settlement to share athletic revenue with those student-athletes who generate it, NIL agreements should fall outside the scope of these specific Title IX regulations. Since student-athletes will almost certainly be required to prove intentional discrimination to assert a Title IX claim in a post-*Sandoval* world, schools should ensure that their methodology for distribution of their NIL agreement is based on legitimate, nondiscriminatory reasons and factors, such as the proportionate share of revenue generated by particular programs (for example). However, schools should monitor legal developments in this area (such as the appellate challenge to the *House* damages model under Title IX) and continue to develop and modify their approach to NIL agreements to meet the economic realities of the new era of intercollegiate athletics while also providing equivalent athletic opportunities for all student, regardless of sex, in compliance with Title IX.